



# 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

1939

1ST JANUARY TO 31ST DECEMBER

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THE  
INDIAN LAW REPORTS  
(MADRAS SERIES)

APPELLATE CIVIL—FULL BENCH.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice Mockett  
and Mr. Justice Abdur Rahman.*

IN RE AN ADVOCATE.\*

1938,  
September 12.

*Legal Practitioner—Memorandum of appeal—Filing on the  
last day of limitation with deficient court-fee—Propriety  
of such practice.*

*Held by the Full Bench :—*The filing of a memorandum of appeal on the last day of limitation with the full knowledge that it was under-stamped and in the hope that the Court would be persuaded to accept the deficiency later is not in accordance with the high traditions of the profession of Advocates. An Advocate should refuse to file an appeal unless the full amount of the court-fee is first paid.

NOTICE issued under section 12 (3) of the Indian Bar Councils Act to an Advocate, Madras, calling upon him to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court.

*Advocate-General (Sir A. Krishnaswami Ayyar)* for the Crown.—The complainant paid a sum of Rs. 175 to the respondent Advocate for filing an appeal in the High Court against the decree in Original Suit No. 11 of 1929 on the file of the Court of the Subordinate Judge of Cuddalore. According to him the arrangement was that the full court-fee should be paid out of the money given to the respondent and that the fee due to the respondent would be fixed and paid later on. The case of the respondent is that out of the money given to

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\* *In re An Advocate.*

AN ADVOCATE, him, Rs. 100 was to be kept towards his fees, Rs. 50 to be spent on court-fee and the balance to be utilized for other expenses. The complainant promised to send the balance of court-fee required for the appeal afterwards. So the respondent filed the appeal with a deficient court-fee as per the instructions of his client.

[THE CHIEF JUSTICE:—The Advocate knowingly under-stamped the appeal and presented it to the Court. This is most improper.]

The respondent wrote several letters later on to the complainant to furnish him with the necessary funds, but no money was sent to him. Exhibit I evidences that fact. The Bar Council Tribunal accepted the version of the respondent, relying on the evidence of Mr. V. S. Ramanujachari, an Advocate practising at Cuddalore, and held that the charges against the respondent were not made out.

*V. V. Srinivasa Ayyangar* (with him, *S. Panchapagesa Sastri*) for respondent.—The respondent filed the appeal with a deficient court-fee.

[THE CHIEF JUSTICE.—Did your client know about it? If he knew, do you say that such conduct is proper?]

He knew about it but he acted under the instructions of his client. He had no intention to defraud the Court thereby, but intended to pay the full court-fee later when the complainant furnished him with the necessary funds.

*T. S. Venkatesa Ayyar* for the Bar Council.

### JUDGMENT.

LEACH C.J.

LEACH C.J.—The respondent who is an Advocate of this Court was charged with professional misconduct on a complaint by one Palaniswami Chetty, who is now dead. There were three separate charges. The first charge was that the respondent was engaged in or about July 1934 by the complainant to file an appeal in this Court and was put in sufficient funds for filing it, but that he presented the memorandum of appeal with a court-fee stamp of only Rs. 50 whereas it should have been stamped with a court-fee of Rs. 142. The second charge was that having filed the appeal

with a deficient court-fee the respondent made the complainant believe that the full court-fee had been paid. The third charge was that when the memorandum of appeal was returned by this Court for re-presentation with the proper court-fee the respondent did not re-present it in time, as he ought to have done. The Bar Council Tribunal heard the evidence on behalf of the complainant and the respondent and has presented a report in which it accepts the respondent's version of the arrangement between him and the complainant, and finds that there has been no professional misconduct.

The complainant's case is this. On or about 26th July 1934 he saw the respondent with a view to filing an appeal from a decision of the Subordinate Judge of Cuddalore, and on 30th July, the respondent having accepted his instructions, he paid to the respondent a sum of Rs. 175 on account of costs of the appeal. It is common ground that the stamp and the process fees required Rs. 169-9-0. The complainant says that the arrangement was that the court-fee was to be paid out of the Rs. 175. The respondent's case is that out of the Rs. 175, Rs. 100 was to be kept by him on account of his fees, Rs. 50 to be spent on court-fee stamps and the balance utilized for other expenses. He says that as the complainant was not in a position to pay all that was required for court-fees and his fees it was arranged that the respondent should file the appeal, stamped to the extent of Rs. 50 only, and the complainant should pay the balance when the Court discovered the deficiency in the court-fee.

In this Court a memorandum of appeal is received by what is known as the Receiving Section. The officials in this department merely enter in a register the date of filing. The memorandum is then passed

AN ADVOCATE,  
*In re.*  
LEACH C.J.

on to another department where the stamping is checked. If it is discovered that there is a deficiency in the stamping the matter is placed before the Deputy Registrar, who causes the memorandum to be returned to the Advocate who filed it. The arrangement in this case was that the memorandum should be filed with a stamp of less than the proper value and that, when the deficiency was discovered, the complainant should put the respondent in further funds so that the deficiency in the stamping could be rectified. This scheme depended for its success on the Court not discovering the true position. The memorandum of appeal was not returned to the respondent until 26th September 1934, that is nearly two months after it had been filed.

Subraya Chetti gave evidence in support of the allegation that the Rs. 175 was paid to the respondent for the purpose of filing the appeal and that the arrangement was that he should pay the court-fee out of this money. This evidence was not accepted and in rejecting it the Tribunal relied on the evidence of Mr. V. S. Ramanujachari, an Advocate practising at Cuddalore. According to Mr. Ramanujachari the complainant told him after his interview with the respondent that only some portion of the court-fee had been paid and some portion of the Advocate's fee. On hearing this he informed the complainant that there would be difficulty in obtaining an extension of time and advised the complainant to send the balance as soon as possible. The respondent states that when the complainant failed to send the money to make up the deficiency in the court-fee he wrote to him several times but the complainant took no notice of the letters. The complainant denies that he received any letter but it is quite clear that the respondent wrote

to him. Exhibit 1 is a post card which the respondent wrote to the complainant on 15th November 1934 and in it he referred to the fact that he had written to him on 21st October 1934 and on 31st October 1934 asking him to meet him at Tirupapuliyur on 2nd November 1934 to attend to the matter of re-presenting the appeal in Court. This post card, as the endorsement by the postal authorities shows, was refused by the complainant.

We see no reason to take a different view of the evidence of Mr. Ramanujachari, especially as the respondent's case is strongly supported by Exhibit I. We agree with the Tribunal that the charges against the respondent have not been substantiated and that the arrangement between him and the complainant was as stated by the respondent. At the same time it is obvious from the respondent's own evidence that the filing of the memorandum of appeal on the last day of limitation knowing full well that it was under-stamped and hoping that the Court would be persuaded to accept the deficiency later is certainly not in accordance with the high traditions of the profession to which he belongs. If the real facts did become known to the Court it is obvious that the Court would not allow the deficiency to be paid. Another Advocate who had been approached to file the appeal on terms similar to the arrangement accepted by the respondent refused to file it and the respondent also should have refused to file it unless the full amount of the court-fee was first paid. We are not now considering whether this action of the respondent amounts to professional misconduct. That question is not before us. But this Court will not tolerate practices of this nature.

Before I conclude, I will refer to another matter, and that is the delay which has taken place in the

AN ADVOCATE,  
*In re.*  
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presentation of the report. The order constituting the Tribunal was passed on 25th April 1936. The report was presented on 27th July 1938. Including the complainant and the respondent the total number of witnesses examined was seven and the examinations were not of a lengthy nature. The complainant was examined on 10th December 1936, Subraya Chetty on 5th February 1937 and another witness called by the complainant on 23rd February 1937. There was no further examination till 19th August 1937 when Mr. Ramanujachari was examined, and the last witness was not examined until 6th April of this year. There is no explanation of the delay. The Court trusts that in future these matters will be dealt with much more speedily. In fairness to the respondent a charge of this nature should not be hanging over his head for more than two years, as has been the case here. I hope that these remarks will have the effect they are intended to have.

MOCKETT J. MOCKETT J.—I agree. I only wish to add a word with regard to one matter. My Lord the CHIEF JUSTICE has pointed out the undesirability of practitioners lending themselves to the practice of deliberately filing appeals under-stamped. I wish to emphasize one evil which must inevitably arise out of that practice and it is this. On the facts in this case there was no reason whatever why the appeal should not have been filed in time and with the correct court-fee. The result probably would have been that the Advocate would have been asked to draft an affidavit setting out wholly false grounds known to him to be untrue for not putting the proper stamp fee, and experience unfortunately shows that statements are included in his class of affidavits which have no basis whatever. If the proper practice is followed, as I have no doubt

it is, by many members of the Bar (one Advocate AN ADVOCATE, clearly would have nothing to do with the arrangement In re. in this case) this danger of the Bar being asked deliberately to draft false affidavits will not arise.

ABDUR RAHMAN J.—I agree.

V.V.C.

### APPELLATE CIVIL—FULL BENCH.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice Madhavan Nair and Mr. Justice Varadachariar.*

PATELKHANA VENKATARAMASWAMI AND ANOTHER  
(DEFENDANTS 3 AND 4), APPELLANTS,

1938,  
April 1.

v.

THE IMPERIAL BANK OF INDIA AT RAJAHMUNDRY  
AND THREE OTHERS (PLAINTIFF AND DEFENDANTS 1, 2  
AND 5), RESPONDENTS.\*

*Hindu law—Antecedent debt—Father—Money advanced to, in pursuance of an agreement to execute a mortgage if and when called upon—Agreement genuine and not a device to evade law—Subsequently mortgage called for and same executed by father—If agreement and mortgage part of the same transaction—Original debt, “antecedant debt”, if.*

If money is advanced to the father in a joint Hindu family in pursuance of an agreement merely to execute a mortgage if and when called upon, the fact that subsequently a mortgage is called for and executed will not make the debt and the mortgage part of the same transaction within the meaning of *Armugham Chetty v. Muthu Koundan*(1), but the debt will constitute an “antecedent debt” within the meaning of Hindu law. The agreement must be a genuine agreement and not a device to evade the law.

Case-law reviewed and discussed.

\* Appeal No. 251 of 1933.  
(1) (1919) I.L.R. 42 Mad. 711 (F.B.).

VENKATA-  
RAMASWAMI  
v.  
IMPERIAL  
BANK OF  
INDIA.

APPEAL against the decree of the Court of the Subordinate Judge of Rajahmundry in Original Suit No. 18 of 1932.

The appeal came on for hearing before VARADACHARIAR and PANDRANG ROW JJ., when their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH:—

VARADACHARIAR J.—This appeal arises out of a suit to enforce specific performance of an agreement entered into by defendants 1 and 2 to execute a mortgage in favour of the plaintiff bank to secure repayment of moneys advanced to them in pursuance of that agreement. Moneys were advanced on more than one occasion and some time in December 1930 the plaintiffs say that they asked for the execution of the security in pursuance of the agreement. The bank had obtained a simple money decree against defendants 1 to 4 for the amount due.

Defendants 1 and 2 are father and son and defendants 3 and 4 are the minor sons of the second defendant. All the four defendants are members of an undivided family. The fifth defendant is the Official Receiver in the insolvency of the first and second defendants. Defendants 1 and 2 seem to have carried on a joint business and they purported to borrow money from the plaintiff bank in connection with that business, but the question has not been raised or decided whether that was an "ancestral" business in respect of which defendants 1 and 2 can create a mortgage so as to bind the shares of defendants 3 and 4 in the family property. Defendants 3 and 4 contend that, according to the test laid down in the Privy Council decisions, the suit debts are not "antecedent debts" in relation to the mortgage, because they were lent on the strength of the agreement to create a mortgage and that therefore any mortgage executed by defendants 1 and 2 on foot of such agreement cannot bind their shares in the family property.

If these defendants had not been impleaded in this suit, specific performance might have been decreed in the usual course as against the parties to the agreement, leaving the question of the binding character of the mortgage to be agitated in appropriate proceedings. But as they have been impleaded in this suit and the question has been raised and dealt with

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in the Court below, we do not think it proper to ignore that contention. The learned Subordinate Judge was of opinion that the mortgage now to be executed by defendants 1 and 2 must be deemed to be one in respect of an "antecedent debt", because the debts had already been advanced. The appellants' learned Counsel relies on the decision of a Division Bench of this Court in *Rajayya v. Satyanarayanamurthy*(1) in support of his contention that, where money has been advanced on the strength of an agreement to create a security on the family property, the fact that the mortgage comes to be executed only after the advance has been made will not make the mortgage valid as one created to secure repayment of an "antecedent debt". This is a direct authority on the point; but we have felt some difficulty in reconciling it with the principle of the Full Bench decision in *Armugham Chetty v. Muthu Koundan*(2) which was approved by the Judicial Committee in *Brij Narain v. Mangal Prasad*(3). If money which had been advanced on a mortgage of joint family property can be regarded as an "antecedent debt" validating a later mortgage securing repayment of the same sum, it is not easy to see why money which has been advanced on the strength of an agreement to execute a mortgage should be regarded as standing on a different footing. The principle of the decision in *Armugham Chetty v. Muthu Koundan*(2) has also been applied by the Privy Council in *Lal Bahadur v. Ambika Prasad*(4). But for the judgment in *Rajayya v. Satyanarayanamurthy*(1), we should have been prepared to concur in the decision of the lower Court. In view however of that decision, we refer to the decision of a Full Bench the question "whether money advanced to the father in a joint Hindu family in pursuance of an agreement to create a mortgage as and when required by the lender will constitute an antecedent debt so as to make the mortgage (when it comes to be executed) binding even on the shares of the sons of the borrower."

ON THE REFERENCE—

*M. S. Ramachandra Rao* for appellants.—Moneys were being advanced by the Imperial Bank of India to the appellants' father in pursuance of an agreement by him to execute

(1) 1934 M.W.N. 812. 2) (1919) I.L.R. 42 Mad. 711 (F.B.)  
(3) (1923) I.L.R. 46 All. 95 (P.C.). (4) (1925) I.L.R. 47 All. 795 (P.C.).

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a mortgage for the same when called upon to do so. Subsequently the Imperial Bank of India called upon the appellants' father to execute a mortgage. The moneys that were advanced under such circumstances under the agreement could not be an "antecedent debt" in connexion with the mortgage. *Rajayya v. Satyanarayanamurthy*(1) is on all fours with the present case. This case is stated to be contrary to the decision in *Armugham Chetty v. Muthu Koundan*(2) which is approved in *Brij Narain v. Mangal Prasad*(3).

[VARADACHARIAR J.—Should the debt be an "antecedent debt" with respect to the mortgage or with respect to the agreement?]

The question as to what is an "antecedent debt" came up for decision before the Privy Council in *Sahu Ram Chandra v. Bhup Singh*(4). The relevant passage appears at pages 447 and 449. There is an article in the journal portion of 35 Madras Law Journal by the then Editor, Mr. Varadachariar as he then was, which I adopt as my argument. The illustration given in the article fits in with the present case. There is nothing in *Armugham Chetty v. Muthu Koundan*(2) or in *Brij Narain v. Mangal Prasad*(3) which militates against that view. The present question is discussed in Mulla's Hindu Law at pages 355 and 360. In *Armugham Chetty v. Muthu Koundan*(2) the point is discussed at page 719.

[VARADACHARIAR J.—In *Armugham Chetty v. Muthu Koundan*(2) there were two mortgages one after the other. In the present case there was an agreement which was to be followed by a mortgage if and when called for.]

In that case when the first mortgage was executed the second mortgage was not in contemplation, but in the present case when the agreement was executed the mortgage was in contemplation. It is the presence of the agreement which brings the present case within the rule laid down in *Sahu Ram Chandra v. Bhup Singh*(4). This distinction is pointed out in *Ram Rekha Singh v. Ganga Prasad Mukaraddhwaj*(5), which was decided after *Brij Narain v. Mangal Prasad*(3). In the latter case the test laid down is that when the first mortgage was executed the second one should not have been in

(1) 1934 M.W.N. 812.

(2) (1919) I.L.R. 42 Mad 711 (F.B.).

(3) (1923) I.L.R. 46 All. 95 (P.C.). (4) (1973) I.L.R. 39 All. 437 (P.C.).

(5) (1926) I.L.R. 49 All. 123 (F.B.).

contemplation. It is the original understanding that makes the second transaction part of the first.

O. T. G. Nambiar for first respondent.—The history of "antecedent debt" has to be looked into if it is to be properly understood. It is based on the theory of pious obligation of sons to discharge the debts of their father which are neither immoral nor illegal. It was first considered in *Suraj Bansi Koer's case*(1). After the decision in that case the controversy was as to whether a debt contemporaneous with a mortgage could be an "antecedent debt". In *Sahu Ram Chandra v. Bhup Singh*(2) the Privy Council set at rest that controversy. It is in that connexion the Privy Council used the term "dissociation in fact". *Rajayya v. Satyanarayanamurthy*(3) ignored this aspect. In the present case under the terms of the agreement until a demand is made on the constituent to execute a mortgage there is only a probability of a mortgage coming into existence. No specific amount has been fixed upon. The transaction was not meant to be a device to evade the law.

Other respondents were unrepresented.

M. S. Ramachandra Rao replied.

*Cur. adv. vult.*

## OPINION.

LEACH C.J.—The suit which has given rise to this reference was instituted in the Court of the Subordinate Judge of Rajahmundry by the Imperial Bank of India, the first respondent. The bank sued to enforce specific performance of an agreement entered into by the second and third respondents with the bank to secure repayment of moneys advanced to them. The second respondent is the father of the third respondent. They and the appellants, who are the minor sons of the third respondent, constitute an undivided family. In 1923 the second and third respondents started a business, and for this purpose opened an account with

(1) (1879) I.L.R. 5 Cal. 148 (P.C.). (2) (1917) I.L.R. 39 All. 437 (P.C.).  
(3) 1934 M.W.N. 812.

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the bank. On 14th August 1923 in pursuance of an arrangement with the bank, which was willing to finance them, they executed a document in the following terms:

"In consideration of the Imperial Bank of India advancing us sums of money from time to time we hereby undertake not to alienate or in any way transfer or mortgage any of our immovable property as per schedule attached and which at present is not mortgaged to any one.

We hereby agree when called upon to do so to execute a legal mortgage of these properties, with or without possession or conveyance to the said bank as the bank may require, so long as we are indebted to the bank.

This agreement to be in force till cancelled by us by a registered letter."

From time to time the bank lent money to the second and third respondents without calling upon them to execute any mortgage in its favour. By 1931 the second and third respondents had become heavily indebted to the bank and in that year the bank obtained two decrees against them in respect of advances. The first decree was for a total sum of Rs. 25,482-11-0, made up of Rs. 5,070-1-0 due on a promissory note dated 19th December 1930, and Rs. 20,412-10-0 due on three hundis dated respectively 30th March 1930, 5th November 1930 and 29th November 1930. The second decree was for Rs. 5,099-3-0 due on a hundi dated 30th October 1930. In December 1930 the bank demanded that the second and third respondents should execute a mortgage to secure their indebtedness, but this demand was not complied with, and on 5th April 1932 the bank sued for specific performance of the agreement which I have just quoted. The suit was decreed and the sons of the third respondent were held to be liable to the extent of their interests in the family properties. They have appealed, and contend that

there can be no decree for specific performance so far as they are concerned, because the mortgage which the Court ordered to be executed was not in law a mortgage for an antecedent debt. As this question is of importance and as the decision in *Rajayya v. Satyanarayana-murthy*(1) would appear to be in conflict with certain decisions of the Privy Council the following question has been referred to us:—

"Whether money advanced to the father in a joint Hindu family in pursuance of an agreement to create a mortgage as and when required by the lender will constitute an antecedent debt so as to make the mortgage (when it comes to be executed) binding even on the shares of the sons of the borrower?"

In delivering the judgment of the Privy Council in *Sahu Ram Chandra v. Bhup Singh*(2) Lord SHAW said that the issue of the father could only be bound where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by the joint estate. The judgment concluded with the following statements:

"In truth in order to validate such a transaction of mortgage there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact. The Courts in India, wherever such antecedency is found to be unreal and is merely a cover for what is essentially a breach of trust, will not be slow to deny effect to a mortgage so brought into existence."

This judgment was considered by a Full Bench of five Judges of this Court in *Armugham Chetty v. Muthu Koundan*(3) and there WALLIS C.J. expressed the opinion that their Lordships only meant that if the so-called "antecedent debt" was incurred so shortly before the execution of the mortgage, say two

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(1) 1934 M.W.N. 812. (2) (1917) I.L.R. 39 All. 437 (P.C.).  
(3) (1919) I.L.R. 42 Mad. 711 (F.B.).



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third respondents not to alienate their properties. It is true that the second and third respondents had undertaken to provide security when called upon to do so, but this does not alter the fact that moneys were advanced without security. When security was called for, there was a debt really in existence. In our opinion, it cannot be said that there was here a breach of trust on the part of the second and third respondents or that the bank was a party to a colourable transaction. In other words it cannot be said that the debt was any part of the mortgage, or, to use the words of Lord DUNEDIN in *Brij Narain v. Mangal Prasad*(1), "part of the transaction impeached". In this country an agreement to mortgage creates no charge, and this is of importance in this connexion.

For the reasons stated we would answer the reference in this sense. If the agreement is merely to execute a mortgage, if and when called upon, and the money is lent on this understanding, the fact that subsequently a mortgage is called for and executed will not make the debt and the mortgage part of the same transaction within the meaning of *Armugham Chetty v. Muthu Koundan*(2), but the debt will constitute an "antecedent debt" within the meaning of Hindu law. The agreement must be a genuine agreement and not a device for evading the law.

MADHAVAN NAIR J.—I agree.

VARADACHARIAR J.—I agree. There is a real distinction between cases in which the lender and the borrower contemplate the giving of security as only a future possibility and cases in which from the outset the parties contemplate only a mortgage loan. In the former case, the lender is prepared to start with only

(1) (1923) I.L.R. 46 All. 95 (P.C.). (2) (1919) I.L.R. 42 Mad. 711 (F.B.).

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the personal liability of the borrower and conceivably may never call for the execution of a mortgage at all. Security is, in such cases, ordinarily called for only when in course of time it is found that the borrower has not been repaying his dues with the promptness with which he was expected to repay or is getting into financial difficulties. When, for such reasons, the creditor calls for the execution of a mortgage, there will be in existence an indebtedness which has for some time been outstanding merely on the personal liability of the borrower. This debt can at that very moment be recovered from the *whole* of the joint family property of the debtor including the shares of his sons and it is to avert proceedings to that end that the debtor will be called upon to give a security. It does not seem reasonable in such a case to speak of the "antecedency" of the debt as *illusory*; nor can it be said that there was no *bona fide* debt or that it was "colourably incurred for the purpose of forming a basis" for the mortgage; *per* STANLEY C.J. in *Chandradeo Singh v. Mata Prasad*(1).

If, as observed by Lord SHAW in *Sahu Ram Chandra v. Bhup Singh*(2), a further condition should be insisted on, before binding the son's share by the father's mortgage, namely, that at the time of advancing money the lender should not have had in view the "credit obtainable from immovable assets belonging to the joint family", the position might be different; but this condition can no longer be insisted on in view of the Full Bench decision in *Armugham Chetty v. Muthu Koundan*(3) and of the decision of the Judicial Committee in *Brij Narain v. Mangal Prasad*(4). It is true that in *Brij Narain v. Mangal Prasad*(4)

(1) (1909) I.L.R. 31 All. 176, 190 (F.B.).

(2) (1917) I.L.R. 39 All. 437, 447 (P.C.).

(3) (1919) I.L.R. 42 Mad. 711 (F.B.). (4) (1923) I.L.R. 46 All. 95 (P.C.).

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their Lordships speak (in proposition No. 4) of the debt being "not part of the transaction impeached"; the transaction referred to in this passage is the mortgage itself. The proposition has evidently been so worded with a view to give effect to the observations of Lord SHAW at the end of the judgment in *Sahu Ram Chandra v. Bhup Singh*(1), when, referring to a father "at the end of his personal resources", his Lordship instanced the case of a money-lender advancing money to him "relying upon an understanding express or implied" to give security.

Apart from attempts to evade the law, it may, even in cases where *only* a mortgage loan was contemplated, happen that there is some interval of time—long or short—between the advance of the money and the execution of the mortgage bond, e.g., because the requisite stamp papers are not immediately available, or details as to survey numbers, etc., relating to the property to be mortgaged have to be obtained, or one of the persons who has to join in executing the mortgage is not available, or the mortgagee is able to find only a portion of the money required and the execution of the document is postponed till he is able to find the balance. In these cases, it may well be said that, notwithstanding the interval, the loan and the mortgage are part of one and the same transaction. *Rajayya v. Satyanarayanamurthy*(2) will, on its facts, be found to fall in this group; because in that case, the original arrangement itself was for a mortgage loan of Rs. 5,000, but the lender was able to find only Rs. 3,000 immediately. The execution of the mortgage deed was postponed pending the advance of the balance of

Rs. 2,000 and in the meanwhile the first advance of Rs. 3,000 was acknowledged by the execution of a promissory note.

Solicitors for first respondent: *King and Part-ridge*.

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## APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and Mr. Justice Krishnaswami Ayyangar.*

THE OFFICIAL ASSIGNEE, MADRAS (APPLICANT),  
APPELLANT,

v.

P. SURYAKANTHAMMAL AND ANOTHER (RESPONDENTS),  
RESPONDENTS.\*

*Presidency-towns Insolvency Act (III of 1909), sec. 58 (5)—  
Scope of—Contempt of Court—Power of Court to commit  
an agent of an insolvent for—Not limited by sec. 58 (5)—  
Inherent power of Court.*

The powers of the High Court in its original insolvency jurisdiction to commit an agent of an insolvent for contempt are not limited to those conferred by sub-section 5 of section 58 of the Presidency-towns Insolvency Act. It has inherent power to commit to prison for contempt persons who deliberately aid an insolvent in defying an order of Court lawfully passed in the exercise of its insolvency jurisdiction.

*Seaward v. Paterson*(1) referred to.

APPEAL from the judgment of WADSWORTH J., dated 9th August 1937, in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 246 of 1937 in Insolvency Petition No. 417 of 1936.

\* Original Side Appeal No. 65 of 1937.  
(1) [1897] 1 Ch. 545.

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*K. P. Mahadeva Ayyar* for appellant.

*A. S. Nataraja Ayyar* for respondents.

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises a question with regard to the right of the Court to commit to prison for contempt persons who have deliberately aided an insolvent in defying an order of the Court lawfully passed in the exercise of the insolvency jurisdiction.

On 15th September 1936 one B. G. Sundaram Naidu was adjudicated insolvent. His assets included a house, No. 45, Gurusvappa Chetti Street, Chintadripet, in which he, his wife and his son were living. This property was mortgaged to one Lakshmi Ammal and in the course of the administration of the estate the Official Assignee sold the property to the mortgagee. At the time of the sale the insolvent and his family were occupying the upper floor of the house and the rooms downstairs were in the occupation of tenants. On 3rd May 1937 the learned Judge sitting in insolvency (WADSWORTH J.) passed an order requiring the insolvent to vacate the premises on or before the 7th of that month. The tenants vacated the room which they were occupying and the insolvent and his family vacated the upper floor, but, immediately, he installed his wife, his mother and his son in the rooms downstairs. On 8th June 1937 the Official Assignee complained of this fact in a report to the Court. On 19th July 1937 WADSWORTH J. held that the insolvent was playing with the Court and gave him twenty-four hours to vacate the premises. He failed to comply with this order and on 20th July 1937 he was committed to jail for two weeks for contempt of Court. The insolvent appealed to this Court, but his appeal was dismissed on 27th July

1937. On 30th July 1937 the Official Assignee presented a petition to the learned Judge stating that the insolvent's wife and others were in possession of the house as the agents of the insolvent, and asking for an order of the Court directing the bailiff to remove them from the premises. This application was heard by WADSWORTH J. on 2nd August 1937. After the case had been called, the learned Advocate who now appears for the respondents, the insolvent's wife and son, appeared in Court and having entered an appearance on their behalf asked that one week's time be given to him to file an affidavit in opposition to the order which the Official Assignee was seeking. The time asked for was granted and within the time allowed the insolvent's wife filed an affidavit in which she alleged that there had been an agreement between her and Lakshmi Ammal under which she was to be allowed to reside in the house until a sum of Rs. 3,000, which she alleged she had advanced to Lakshmi Ammal, had been repaid. The learned Judge dealt with the application of the Official Assignee on 9th August 1937. He did not believe this story and in his order stated that he had no doubt that the wife was acting at the instigation of the husband. He held, however, that he had no power to commit her for contempt of Court. He considered that his powers of committing an agent for contempt were limited to the powers conferred by sub-section 5 of section 58 of the Presidency-towns Insolvency Act which only refers to the delivery up to the Official Assignee of monies and securities. On this ground he dismissed the Official Assignee's application, and the present appeal is from the order of dismissal.

Before I discuss the law and the merits of the case I will first deal with an objection taken by the learned

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Advocate for the respondents that no appeal lies. He has cited the case of *P. Abdul Gaffor v. The Official Assignee*(1) in which a Bench of the Rangoon High Court held that section 8 of the Presidency-towns Insolvency Act does not allow an appeal from an order passed in insolvency unless the order comes within Order XLIII, rule 1, of the Code of Civil Procedure or is a judgment within the meaning of the Letters Patent. This decision has been criticised and it is in conflict with the decision of the Bombay High Court in *Mahomed Haji Essack v. Shaik Abdool Rahiman*(2), where a much wider view was taken on the question of the right of appeal from an order passed in insolvency. It is unnecessary for the purpose of this case to consider which opinion ought to be accepted, because it is clear that the order here passed was a judgment within the meaning of Clause 15 of the Madras Letters Patent. The learned Advocate for the respondents has also said that the Official Assignee is not an aggrieved party within the meaning of section 8 of the Presidency-towns Insolvency Act. I have been unable to follow why he should not be regarded as an aggrieved party. He made an application to the Court in a matter which concerned the administration of an estate in insolvency. The Court refused to pass an order on the ground that its powers were of a very limited nature and the powers which it had were not sufficient to commit an agent where the contempt was of an order relating to the delivery to the Official Assignee of immovable property. The Official Assignee says that the learned Judge had power to pass an order against the respondents and, if this is so, he certainly is an aggrieved party.

(1) (1925) I.L.R. 3 Ran. 605.

(2) (1915) I.L.R. 40 Bom. 461.

The learned Judge erred in his conclusion that his powers of committing for contempt an agent were limited to section 58 of the Presidency-towns Insolvency Act. The Court has the power to commit an insolvent who wilfully obstructs the Court and I have no doubt that it has inherent power to commit a person who with full knowledge deliberately obstructs the Court on his behalf. When exercising insolvency jurisdiction the Court is still the High Court. In *Seaward v. Paterson*(1) the Court of Appeal in England held that the Court has undoubted jurisdiction to commit for contempt a person who is not included in an injunction or who is not a party to the action but who knows of the injunction and aids and abets a defendant in committing a breach of it. RIGBY L.J. observed at page 558 :

“That there is a jurisdiction to punish for contempt of Court is undoubted. It has been exercised for a very long time—far longer than any of us can remember—and it is a punitive jurisdiction founded upon this, that it is for the good, not of the plaintiff or of any party to the action, but of the public, that the orders of Court should not be disregarded, and that people should not be permitted to assist in the breach of those orders in what is properly called contempt of Court. It is astonishing to me to find that jurisdiction questioned at this date.”

There can be no doubt in this case that the insolvent's wife and his son are deliberately obstructing a lawful order of the Court and are doing so at the instigation of the insolvent. The son who is the second respondent in this appeal is not mentioned in the learned Judge's order, but he is exactly in the same position as his mother and has relied on his mother's affidavit. As both respondents have with full knowledge of the position acted in deliberate defiance of the

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Court's order, I am of opinion that they are liable to be committed for contempt. In view of the fact that the learned Judge did not pass an order against them, I think, however, that they may be given a short period to vacate the premises. My learned brother agrees with the views I have expressed and we pass this order: The respondents will vacate the premises known as No. 45 Guruvappa Chetty Street, Chintadripet, Madras, by Monday, 9th May 1938, failing which they will be committed to prison for a fortnight for contempt of Court. The Official Assignee is entitled to his costs, which we fix at Rs. 100.

G.R.

## APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and Mr. Justice  
Madharan Nair.*

1938,  
April 4.

V. R. KM. KUMARAPPA CHETTIAR (PETITIONER),  
PETITIONER,

v.

K. M. V. R. CHIDAMBARAM CHETTIAR AND ANOTHER  
(RESPONDENTS), RESPONDENTS.\*

*Provincial Insolvency Act (V of 1920), sec. 35—Adjudication  
order passed without jurisdiction—Annulment of—Power  
of Court.*

Section 35 of the Provincial Insolvency Act empowers a Judge sitting in insolvency to annul an adjudication when it is clear that on the materials before the Court at the time the order of adjudication was passed it had no jurisdiction to pass the order. The section leaves the Court no discretion in the matter.

PETITION under section 75 of the Provincial Insolvency Act, praying the High Court to revise the decree of

\* Civil Revision Petition No. 1297 of 1937.

the District Court of Ramnad at Madura in Civil Miscellaneous Appeal No. 39 of 1936, preferred against the order of the Court of the Subordinate Judge of Devakottai, dated 23rd March 1936 and made in Interlocutory Application No. 338 of 1935 in Insolvency Petition No. 40 of 1934.

*V. Ramaswami Ayyar* for petitioner.

*V. Rajagopala Ayyar* for first respondent.

Second respondent was not represented.

The JUDGMENT of the Court was delivered by LEACH C.J.—On 22nd January 1935, P. L. S. P. L. Palaniappa Chettiar, the second respondent, was adjudicated an insolvent on the petition of K. M. V. R. Chidambaram Chettiar, the first respondent, by the Subordinate Judge of Devakottai. The adjudication was based on a transfer of immovable property, dated 23rd February 1934, which was said to constitute a fraudulent preference. The petition for adjudication was filed on 3rd July 1934, that is, more than three months after the transaction. Therefore the transaction, even if it constituted a fraudulent preference, could not be made the basis of an insolvency petition by reason of section 9 (1) (c) of the Provincial Insolvency Act. The reason given for filing the petition beyond three months was that the Court was closed for the summer vacation and it was not possible to file it before 3rd July 1934, but the fact the Court was closed made no difference as a Full Bench of this Court has pointed out: *Chenchuramana v. Arunachalam*(1). That was a case where the petition was filed on 29th June 1931, the re-opening day after the Court's vacation and the act of insolvency was a deed of sale said to have been executed fraudulently on 28th February 1931. The Court considered that the period of three months fixed by

(1) (1935) I.L.R. 58 Mad. 794 (F.B.).

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LEACH C.J. section 9 (1) (c) of the Provincial Insolvency Act was not a period of limitation, but constituted a condition to an adjudication and consequently where the alleged act of insolvency had taken place more than three months prior to the presentation of the petition it could not be set up as a ground for adjudication.

Before the second respondent was adjudicated by the Subordinate Judge of Devakottai, an adjudication order had been passed against him by the District Court of Tharrawady of Burma and his estate in Burma was being administered in insolvency by that Court. On 7th November 1935, the present petitioner applied to the Subordinate Judge of Devakottai for an order cancelling the adjudication. The application was made under section 35 of the Provincial Insolvency Act which provides that where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication. The petitioner is a creditor and his object in seeking the annulment of the adjudication by the Subordinate Judge of Devakottai was to ensure that the proceedings in Burma should not be interfered with. The learned Subordinate Judge granted the application and annulled the adjudication in view of the decision in *Chenchuramana v. Arunachalam*(1). From that order there was an appeal to the District Judge who considered that the Subordinate Judge was wrong in annulling the adjudication; his reason being that the order adjudicating the insolvent might have been wrong, and was wrong in the light of *Chenchuramana v. Arunachalam*(1), but there

(1) (1935) I.L.R. 58 Mad. 794 (F.B.).

was no appeal and, therefore, it ought not to be disturbed. Accordingly he reversed the order of the Subordinate Judge. The order of the District Judge now comes before us on an application for revision. KUMARAPPA  
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In the first instance the application came before BURN J., but it was placed before a Bench because the learned Judge was doubtful whether section 35 of the Provincial Insolvency Act gave authority to a Judge sitting in insolvency to revise, on the ground of want of jurisdiction, his own order or an order of a predecessor adjudicating a person insolvent. If on the materials before the Court at the time the order of adjudication was passed it is clear that the Court had no jurisdiction to pass the order, section 35 clearly empowers the Court to annul the adjudication. It is true that the Provincial Insolvency Act does not confer upon the Court the wide powers given by section 8 of the Presidency-towns Insolvency Act which allows the Court to review, rescind or vary any order made by it under its insolvency jurisdiction, but section 35 is sufficient for the purpose of this case and leaves the Court no discretion in the matter. The corresponding section in the Presidency-towns Insolvency Act is section 21 in which the word "may" is used, and therefore gives the Court a discretion.

What we have to ascertain in this case is whether the Court acted without jurisdiction when it passed the order of adjudication. The answer must be that it did. More than three months had elapsed from the date of the alleged fraudulent transfer to the date of the presentation of the petition and these facts were before the Court. There being no act of insolvency on which an adjudication order could be passed the Court had no jurisdiction to adjudicate.

A point which was not taken in the lower Courts has been taken before us and we will deal with it.

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LEACH C.J. When the case was in the list for hearing on 18th March 1938 it was postponed at the instance of the Advocate for the respondent as he wished to set up that there were other grounds for adjudication than the alleged fraudulent preference. All the necessary papers are now before us and it does appear that in paragraph 5 of the petition the first respondent did allege that the second respondent had, with a view to defeat and delay his creditors, secreted his jewels and movable properties and had "absented himself from the reach of his creditors." But in the next paragraph there was the definite allegation that the second respondent had given a fraudulent preference in favour of one P. L. P. P. V. R. Veerappa Chettiar on 23rd February 1934, and in paragraph 7 it was stated;

"The said transfer is an act of insolvency and as this Hon'ble Court was closed in May and June this application is filed to-day."

The prayer for adjudication then followed. Paragraph 7 clearly shows that the act of insolvency relied on was the alleged fraudulent preference, but as the adjudication order was passed by consent, the learned Advocate for the respondent says that it should be deemed to be based also on the allegations in paragraph 5 of the petition. He is in difficulty here, because in the counter-affidavit which his client filed in opposition to the petition under section 35 of the Provincial Insolvency Act his client said (paragraph 8):—

"I submit that as the respondent in Insolvency Petition No. 40 of 1934 has been adjudicated as an insolvent upon a definite act of insolvency and upon the admission of the respondent, it is not now open to the present applicant to question or set aside that order."

On his own showing the adjudication was upon one definite act of insolvency. The only definite act of

insolvency was the fraudulent preference set out in paragraph 6 of the petition for adjudication. More-  
over, not a word was said in the Subordinate Judge's Court about other acts of insolvency and in the memorandum of appeal to the District Court it was not alleged that the order of the Subordinate Judge's Court was bad because there were other acts of insolvency. In these circumstances we are unable to regard the adjudication as being based on other grounds than that of a fraudulent preference. The adjudication being on that ground alone and the transfer attacked having taken place more than three months before the presentation of the petition, the Court had, as I have already said, no jurisdiction to pass the order of adjudication.

For these reasons the petition will be allowed and the order of the District Court set aside. It follows that the adjudication is annulled; but this order will, of course, not affect the insolvency proceedings in Burma. The petitioner is entitled to his costs here and in the Court below.

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## APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and Mr. Justice  
Krishnaswami Ayyangar.*

1938,  
April 29.

KONETI DESIKACHARI AND FOUR OTHERS (PLAINTIFFS  
AND NIL), APPELLANTS,

v.

SRI MAHANT PRAYAG DASJI VARU (DEFENDANT),  
RESPONDENT.\*

*Indian Trusts Act (II of 1882), sec. 84—Scope of—Money paid  
to trustee of a public trust to defraud trust with  
full knowledge of the intended fraud—Purpose for which  
money was paid not carried out—Suit for return of money  
—Incompetency of.*

An agreement by which a certain sum of money is paid to the trustee of a public trust for the purpose of inducing him to defraud the trust is one which is contrary to public policy and section 84 of the Indian Trusts Act is not intended to compel a Court to enforce the return of money paid with full knowledge of the enormity of the agreement. The fact that the purpose has not been carried out does not make any difference in such a case.

(Case-law reviewed.)

APPEAL from the judgment and decree of WADSWORTH J., dated 7th May 1936 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 262 of 1933.

*K. Krishnaswami Ayyangar* for *A. Seshachari* for appellants.

*A. Suryanarayanaiah* for respondent.

LEACH C.J.—The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises a question with regard to the effect of section 84 of the Indian Trusts Act.

\* Original Side Appeal No. 65 of 1936.

The plaintiffs in the Court below were the second and third appellants and one Koneti Desikachari who is now dead and is represented by the fourth and fifth appellants. The appellants are members of a joint Hindu family of which Koneti Desikachari was the managing member. At all times material to the suit the family were the owners of two villages lying in the neighbourhood of the Tirumalai-Tirupathi Devas thanam, one of the most important Hindu temples in India. This temple is in the Tirupati Hills, Chittoor District. The suit was filed to recover certain sums alleged to have been paid by Koneti Desikachari to the respondent under a contract which he failed to fulfil and for damages resulting from his breach. The respondent was the sole manager of the temple at the time. The appellants had mortgaged these two villages, and Koneti Desikachari approached the respondent with a view to the respondent buying them on behalf of the temple, as the mortgagees were pressing for repayment. The appellants allege that an arrangement was arrived at by which they were to sell to the temple their two villages for a sum of Rs. 95,000 but that they were to receive only a sum of Rs. 85,000, the remaining Rs. 10,000 being retained by the respondent as his "commission". This arrangement involved a fraud on the trust to the extent of Rs. 10,000. The sale could not be carried through without the sanction of the District Court and the appellants allege that it was agreed between Koneti Desikachari and the respondent that if the Court refused sanction to this arrangement the respondent would buy the lands himself for a sum of Rs. 85,000. No application was made to the District Court for sanction of the sale of the villages to the temple, and the properties were left with the appellants, who say that they lost the benefit of a favourable

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arrangement with the mortgagees. They also allege that the respondent insisted on Rs. 10,000 being paid to him before he took steps in the matter. They say that, as the result of the respondent insisting on his "commission" being paid before he took any steps, they paid him Rs. 1,000 in the month of July 1930 and Rs. 3,000 in the month of May 1931, and executed two promissory notes, one for Rs. 2,100 and the other for Rs. 500 in his favour. The suit was filed to recover the Rs. 4,000 representing the two sums of Rs. 1,000 and Rs. 3,000 and Rs. 36,125 as damages and expenses alleged to have been suffered and incurred by the appellants as the result of the respondent having failed to carry out his part of the bargain. The defence was a complete denial of the truth of the appellants' allegations. The respondent admitted that he had received a sum of Rs. 2,500 from Koneti Desikachari but averred that this money was paid, not for the purpose alleged by the appellants, but on account of a debt owed to him by one Chevala Kamalamma. The suit was tried by WADSWORTH J. who held that there had been a fraudulent arrangement entered into between Koneti Desikachari and the respondent of the nature alleged in the plaint—that is how we read the judgment—and that the Rs. 1,000 had been paid by Koneti Desikachari to the respondent in pursuance of this illegal agreement. He also held that Rs. 3,000 had been paid by Koneti Desikachari to the respondent, but considered that this amount had been paid out of money provided by Chevala Kamalamma herself and had been paid on her behalf. With regard to the sum of Rs. 1,000 the learned Judge refused a decree on the ground that the arrangement was contrary to public policy. Although the learned Judge did not discuss the matter, his judgment amounted to a rejection of

the plea that there had been an alternative agreement under which the properties were to be sold to the respondent for Rs. 85,000 if the temple did not buy them.

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The appellants contend that the judgment of the learned trial Judge is wrong on all points, but their learned Advocate was compelled to admit that, if the Court rejects the plea that there was an alternative agreement and that the appellants' case has to rest on the agreement to sell the properties in fraud of the temple, no claim for damages can be sustained. We are firmly of the opinion that there was no alternative agreement of the nature alleged. We consider that it is an afterthought and has been alleged for the purpose of sustaining the claim for damages. Therefore the Court is called upon merely to consider whether the appellants are entitled to a decree for the recovery of the two sums of Rs. 1,000 and Rs. 3,000 paid under the agreement which involved a fraud on the temple. As I have indicated, the learned Judge has found as a fact that both the sums were paid to the respondent by Koneti Desikachari, but that the Rs. 3,000 was paid by him on behalf of Chevala Kamalamma. It is not necessary for us to inquire whether the sum of Rs. 3,000 was paid on her behalf, because we consider that the appellants cannot maintain their claim in law, even if this sum had been paid by Koneti Desikachari for the purpose alleged by him.

The appellants' own case is that these two sums of money were paid by Koneti Desikachari for the purpose of inducing the trustee of a public trust, a trust of national importance, to defraud the trust. Such an agreement is in our opinion contrary to public policy and the Court will not order a refund of money paid under an arrangement which falls within this category. The law in this connection was clearly stated by

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LUSH J. in *Parkinson v. College of Ambulance, Ltd., and Harrison*(1). That was a case in which the plaintiff sought to recover a sum of money which he had paid on the understanding that the payment would result in an honour being conferred on him. The honour was not conferred and he sued to recover what he had been induced to pay. LUSH J. held that the action did not lie and his reasons can be gathered from the following passage in his judgment :

"In the present case the plaintiff knew that he was entering into an illegal and improper contract. He was not deceived as to the legality of the contract he was making. How then can he say that he is excused? How can he say that he has suffered a loss through being defrauded into making a contract which he knew he ought never to have made? The answer is that he ought not to have made it. Where he was deceived was that he thought he would make a profit, derive a benefit from his unlawful act. He cannot be heard to say that. He has himself to blame for the loss that he has incurred."

That is the position in the present case. The learned Advocate for the appellants would have it that the principle here stated does not apply in this country by reason of the provisions of section 84 of the Indian Trusts Act. That section reads as follows :—

"Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor." The learned Advocate for the appellants contends that the case comes under both the first and second parts of the section. He says that the appellants are the owners of the property transferred to the respondent for an illegal purpose which has not been carried

(1) [1925] 2 K.B. 1.

into execution. He also says that they are not as guilty as the respondent.

I will deal with the second contention first because the answer is a short one. I can see no difference in the degree of the guilt of a person who instigates another to commit a fraud from which it is intended they shall both benefit and of the person who is willing to carry out the fraud.

With regard to the first contention, the learned Advocate says that there can be no doubt that the property has been transferred and that the illegal purpose for which the transfer has been made has not been effected. He says that the first part of the section applies in all cases where the purpose for which the property is transferred is illegal. If this were so, it would mean that if A gave Rs. 500 to B to murder C and B repented, or was prevented from carrying out the crime, A could recover the Rs. 500 under this section. The learned trial Judge has dealt in his judgment with this very question, and we agree with him that the argument is going very much too far.

It is an accepted rule of law that where property is transferred for an illegal purpose the property can be recovered when the purpose has not been carried out and the person who transfers repudiates the contract. This principle was stated in *Taylor v. Bowers*(1) and was accepted by the Privy Council in *Petherpermal Chetty v. Muniandy Servai*(2). *Taylor v. Bowers*(1) was a case where there was an agreement to defraud creditors and so was *Petherpermal Chetty v. Muniandy Servai* (2). In inserting section 84 in the Indian Trusts Act the Legislature could not have intended to compel a Court to hear and decide a case

(1) (1876) 1 Q.B.D. 291.

(2) (1908) I.L.R. 35 Cal. 551 (P.O.)

DESİKACHARI which is entirely opposed to public policy. It seems to me that it had in view the principle stated in the cases to which I have just referred and this principle does not apply to the present case. The contract between Koneti Desikachari and the respondent was a contract which was opposed to public policy, and, in these circumstances, we consider that the appellants are not entitled to ask the Court to enforce the return of money paid with full knowledge of the enormity of the agreement. The Calcutta High Court gave expression to the same opinion in *Ledu Coachman v. Hiralal Bose*(1).

For these reasons the appeal fails and must be dismissed with costs. As the appeal has been filed in *forma pauperis* the appellant will be required to pay the requisite court-fee to Government.

G.R.

## APPELLATE CIVIL.

Before Mr. Madhavan Nair, Officiating Chief Justice, and  
Mr. Justice Krishnaswami Ayyangar.

H. M. EBRAHIM SAIT (DEFENDANT), APPELLANT,

v.

THE SOUTH INDIA INDUSTRIALS, LIMITED  
(PLAINTIFF), RESPONDENT.\*

*Original Side Rules, Madras, O. VII, r. 7 (2)—Unconditional leave to defend under—When defendant is entitled to—Discretion of Court to put defendant on terms—When to be exercised.*

Under Order VII, rule 7 (2), of the Original Side Rules the Court has discretion to decide whether leave to defend should

(1) (1915) I.L.R. 43 Cal. 115.

\* Original Side Appeal No. 50 of 1938.

be given unconditionally or subject to terms. In order to entitle a defendant to ask for unconditional leave to defend, his case should be a *bona fide* one and should raise a triable issue which would show that he has a fair defence to put forward against the plaintiff's claim. It is not necessary that the Court should enter fully into the merits of the case and decide, but it should be satisfied that the defence raised shows that there is a fair issue to be tried by a competent tribunal.

*Sundaram Chettiar v. Valli Ammal*(1) referred to and explained.

*Periya Miyana Marakayar v. Subramania Aiyar*(2) discussed.

*Blaiberg v. Abrams*(3) and *Saw v. Hakim*(4) referred to.

APPEAL from the order of GENTLE J., dated 29th April 1938 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 439 of 1938 in Application No. 2317 of 1937 in Civil Suit No. 167 of 1937.

*V. Ramaswami Ayyar* and *S. Narasinga Rao* for appellant.

*V. Rajagopalachariar* and *K. P. Raman Menon* for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR Offg. C.J.—This is an appeal against the order of GENTLE J. confirming the order of the Master giving the appellant (defendant in Civil Suit No. 167 of 1937) leave to defend on his furnishing security for a sum of Rs. 25,000 within a period of two months from the date of his order. The security has not been furnished. The appellant contends that leave to defend the suit should have been given to him unconditionally.

(1) (1934) I.L.R. 58 Mad. 116.

(3) (1884) 77 L.T.Jo. 255 (C.A.).

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

(4) (1888) 5 T.L. Rep. 72.

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The circumstances are these. The respondent (plaintiff) is the South India Industrials, Ltd. The suit has been filed by its managing director. The appellant is another managing director. The claim against the appellant is for a sum of Rs. 2,83,878-6-11, the amount overdrawn by him from the company previous to the year 1928. There is no contest regarding this amount owing by the appellant to the company. In defence the appellant raised various contentions, the most important of which is that the suit has not been filed with proper authority, inasmuch as the plaint purports to be signed by the managing director. His case on this point is that there is nothing to show that he has been properly authorized to file the suit on behalf of the company. So far as the merits of the claim are concerned the defences are twofold. The appellant seeks to set off against the amount claimed a considerable sum of money, we are told that it would amount to a little over a lakh of rupees, owing to him by the company in respect of unpaid bonus declared some years ago. He claims also to set off another amount, namely, the amount which he as a shareholder might receive upon the winding up of the company. The third point raised is that the suit is barred by limitation.

On behalf of the company it is alleged that the proceedings of the board of directors will show that the managing director who has signed the plaint is authorised to institute suits on behalf of the company, that there is no substance in the two claims to set off made by the appellant, for he has waived his right to claim the bonus, and that a shareholder cannot claim to set off what he might eventually receive on a winding up of the company against the amount which he

owes to the company. It is also urged by the respondent that the plea that the suit is barred by limitation cannot stand, having regard to the letter written by the appellant acknowledging his liability to pay the amount claimed.

Both the Master and the learned Judge were not impressed with the defences raised, but, as they did not desire to shut out altogether an opportunity for defending the suit, the appellant was given permission to defend it provided he furnished security for the sum of Rs. 25,000. As already stated, it is urged before us that in the circumstances of the case the Court is bound to grant the appellant permission to defend unconditionally.

Order VII, rule 7 (2), of the Original Side Rules says:

“Leave to appear and defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues, or otherwise as the Master thinks fit . . .”

Order XIV, rule 6, of the Rules of the Supreme Court says:

“Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the Judge may think fit.”

According to both the rules the Court has discretion to decide whether leave to defend should be given unconditionally or subject to terms. The important English decisions bearing on the question are referred to in the note to Order XIV, rule 6, in the Annual Practice. According to these decisions it may be stated that

“as a general rule where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend.”

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See *Saw v. Hakim*(1) and the other cases referred to in the note. In *Jacobs v. Booth's Distillery Company*(2) it is laid down that where there is a triable issue, though it may appear that the defence is not likely to succeed, the defendant should not be shut out from laying his defence before the Court either by having judgment entered against him, or by being put on terms to pay money into Court as a condition of obtaining leave to defend. From this, one is apt to understand, as has been argued before us, that all that is required to entitle the defendant to claim the privilege of being allowed to defend without any condition is a mere allegation of facts which might amount to a defence; but that it is not so is clear from the following observations of the Lord Chancellor (Lord HALSBURY):

“There are some things too plain for argument, and where there were pleas put in simply for the purpose of delay which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV was intended to put an end to that state of things and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.”

In other words, triable issues must be such as would show that the defendant has a *bona fide* defence. This aspect of the question is sometimes apt to be forgotten. Further it must be remembered that

“in deciding whether the defence set up is a real defence or not, all the circumstances must be looked at”;

*per* BOWEN L.J. in *Blaiberg v. Abrams*(3). The decision in *Jacobs v. Booth's Distillery Company*(2) is followed in the decision in *Sundaram Chettiar v. Valli Ammal*(4) strongly relied upon by the appellant but it

(1) (1888) 5 T.L. Rep. 72.

(2) (1901) 85 L.T. Rep. 262.

(3) (1884) 77 L.T.Jo. 255 (C.A.)

(4) (1934) I.L.R. 58 Mad. 116.

appears to us that in stating the rule the learned Judges, if we may say so respectfully, have not sufficiently emphasized the qualification that, in order to bring the defendant within the rule which entitles him to ask for leave to defend without any condition, the defence should be a *bona fide* one and not a mere attempt to prolong or delay the case, although it may be said that this aspect cannot be said to have been altogether overlooked, because reliance has been placed by them on the decision of this Court in *Periya Miyana Marakayar v. Subramania Aiyar*(1) where the following observations occur:

“By triable issue is meant a plea which is at least plausible. The defendant must state what his defence is, and must as a rule bring something more before the Court to show that it is a *bona fide* defence, and not a mere attempt to gain time by getting leave to defend.”

We do not understand the decision in *Sundaram Chettiar v. Valli Ammal*(2) as laying down the broad proposition that the mere setting up of a defence, with the possibility of the defendant proving it, would by itself and without regard to other considerations be enough to entitle the defendant to claim that leave should be given to him to defend the suit unconditionally. As we have pointed out the decision in *Jacobs v. Booth's Distillery Company*(3) itself makes this point clear. All the cases cited before us indicate that the defendant's case should be a *bona fide* one and should raise a triable issue which would show that he has a fair defence to put forward against the plaintiff's claim. It is not necessary that the Court should enter fully into the merits of the case and decide, but it should be satisfied that the defences raised show that there is a fair issue to be tried by a competent

(1) (1923) 46 M.L.J. 255.

(2) (1934) I.L.R. 58 Mad. 116.

(3) (1901) 85 L.T. Rep. 262.

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tribunal before leave to defend is given unconditionally.

We will now examine whether with respect to the contentions put forward by the appellant he has a fair case to set up against the respondent. Having regard to the facts the only point which appears to be of some importance is whether the suit has been properly filed on behalf of the company.

[His Lordship discussed the evidence and proceeded:]

It follows that the two persons mentioned have power either *jointly or severally* to "manage the business of the company". It appears to us that managing the business of the company would include institution of suits as well, when it becomes necessary in the course of management to recover moneys due to the company. The present one is a case of this kind. No authority has been quoted to show that institution of legal proceedings would not fall within the meaning of the expression "to manage the business of the company". As such management as has been delegated to them by the directors can be conducted by either of them, the suit instituted by the respondent would certainly be a validly instituted suit. We are told that as a matter of fact in the past both the respondent and the appellant have instituted suits on behalf of the company each by himself and this practice is relied on as lending additional support to the respondent's contention. We have no doubt that the resolution read with clauses 69 (k) and 69 (d) of the Articles of Association enables the respondent to institute suits validly on behalf of the company. In this view it is not necessary to canvass the question whether the respondent can rely on the special resolution of the company, dated 30th July 1937, authorizing the company to file a suit against the appellant in support of

his argument. However, we may point out that in law a meeting of directors is not duly convened unless due notice has been given to all the directors; see Halsbury's Laws of England, Hails. Edn., Vol. 5, page 337. And if this is so, the resolution cannot be called in aid to support the respondent's position, as admittedly no notice of the meeting was given to the appellant. But, as we have stated, the other proceeding referred to gives sufficient power to the respondent to institute the suit validly.

On the merits, the contentions of the appellant have no force at all. He may have a claim for a portion of the undistributed bonus but this claim amounting at best only to Rs. 1,00,000 and odd has been given up by him by letter, dated 8th June 1927, wherein he says: "I find that there is absolutely no chance of recovering all or any portion of the bonus and dividends due to me and as such I hereby release my right to the same". It is true that, owing to some legal formalities not having been complied with, it was resolved that the acceptance of this surrender might not be given effect to till the said legal formalities have been complied with, but we know nothing as to whether these have been complied with or not. The other directors also have surrendered their claims to bonuses and suitable entries have been made in the company's books in all cases. In the circumstances the appellant can have no right to set off his claim to bonus as against the claim made by the company. With regard to the other claim to set off, no authority has been shown that a shareholder is entitled to set off what he might receive on a winding up against moneys due by him. The contention appears to be a novel one. Surely, the company cannot be expected to await the winding up for the recovery of the moneys due to it from the shareholders.

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The plea of the bar of limitation stands on an equally slender basis. The appellant has acknowledged his liability to pay the amount and the letter, Exhibit A, dated 18th November 1934, will save the suit from this plea.

It is not necessary for us to go into the merits of the appellant's case, but from the facts which appear from the affidavits and the papers filed before us it is clear that these pleas are vexatious and not *bona fide*. He admits the correctness of the amount due from him and acknowledges also his liability to pay it. He knows full well that as managing director he or the respondent can institute suits validly each by himself as they have done in the past. He also knows that he surrendered his right to claim the bonus. In the circumstances, the pleas urged by him in defence of the suit cannot be considered to be *bona fide* but must be considered as being urged simply to gain time. For these reasons we confirm the order passed by GENTLE J. and dismiss the appeal with costs.

Time for furnishing security is extended for three weeks from this day.

G.R.

## APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice  
Abdur Rahman.

SRI RAJAH VENKATADRI APPARAO BAHADUR  
ZAMINDAR GARU AND SIXTEEN OTHERS  
(DEFENDANTS 1 TO 6, 8, 9, 11, 12 AND 14 TO 18  
AND NIL), APPELLANTS,

1938,  
February 16.

v.

MORIVINENI SEETHARAMAYYA AND NINETEEN OTHERS  
(PLAINTIFFS AND DEFENDANTS 10 AND 20 TO 30 AND NIL),  
RESPONDENTS.\*

*Water—Riparian right—Nature of—Natural right and not a mere easement—Right of access to a stream and proximity to same—Essential ingredients for creation of riparian right—Riparian tenement—What comes under the category of—Riparian proprietor—Who is—Right of—English and Indian law—Distinction between—Who is considered owner of land for finding out the contact of land with a stream, zamindar or his ryot?*

*Held:* (i) A riparian right arises from the right of access to a stream which landowners on its banks have by the law of nature.

(ii) Zamindars and similar proprietors and not their ryots should be considered the owners for deciding the question of the contact with a stream.

(iii) A riparian tenement connotes, in addition to contact with a river, a reasonable proximity to the river bank. What is a riparian tenement does not depend upon any arbitrary rule but must in each case be a question depending upon the circumstances.

(iv) Each riparian proprietor has a right to the water flowing past his lands; but it is a right only to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors on the banks on each side to the reasonable enjoyment of it. A riparian proprietor may use the water

\* Appeal No. 563 of 1931.

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(a) for ordinary or primary purposes, (b) for extraordinary or secondary purposes, and (c) for purposes foreign to or unconnected with his riparian tenement. The first two purposes are legitimate, whereas the third is not.

(v) Irrigation is a secondary purpose and the English law is that the water should be restored, after the object of the irrigation is answered, in a volume substantially equal to that in which it passed before. The English rule has been modified in its application to India. When only a part of a stream is taken for purposes of irrigation, the only limitation is that the amount taken shall not be so much as to hurt the right of the inferior owner to have the stream passed on to him practically undiminished.

(vi) The right of a riparian owner to take the water is a natural right and not in the strict sense of the word an easement.

(vii) When a riparian owner taking advantage of his position uses the water for purposes unconnected with his riparian tenement, he will be prevented by an injunction from doing so, although no actual injury has been sustained by the other party.

APPEAL against the decree of the Court of the Subordinate Judge (Principal) of Ellore, dated 17th November 1930, in Original Suit No. 20 of 1938.

*P. Satyanarayana Rao* for *Y. Govindarajulu* for appellants 2 to 5.

*B. Lakshminarayana* for first appellant.

*P. V. Rajamannar* and *K. Subba Rao* for respondents 1 to 6.

*Cur. adv. vult.*

VENKATASUBBA  
RAO J.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—Once the facts of this somewhat difficult case are found, the principles governing it seem well settled by authority. After having heard the matter fully argued on both sides we have come to the conclusion that the findings of the Court below are right and should be accepted.

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We are concerned here with two villages, Nadupalli and Velupucherla. The first defendant, the zamindar owning the Medur estate, is the overlord in respect of both the villages. The plaintiffs are the mokhasadars of Velupucherla and defendants 2 to 5 of Nadupalli. It may be mentioned that the zamindar has made common cause with the mokhasadars of Nadupalli and as the real contest is by the latter, defendants 1 to 5 will be referred to as the defendants.

The dispute relates to the waters of a natural stream known as Tammileru. As the lower Court points out, excepting in the rainy season when the current is swift, there is scanty flow; during periods of scarcity a witness deposes there is a general scramble, each man being anxious to abstract as much water as he can. Nadupalli is bounded on the west by this river, Tammileru, and lower down the stream is Velupucherla, but the plaintiffs' lands in it do not abut on the stream, so that the position is shortly this: whereas the defendants are upper riparian proprietors, the plaintiffs for the purpose of this case do not answer the description of lower heritors. But the plaintiffs have long been using the water of a channel (Balive Velupucherla Irrigation Channel) taking off from Tammileru for irrigating Velupucherla lands, admittedly not in contact, as stated above, with the flow of the stream. The lower Court has, however, found that this is an ancient channel and that the plaintiffs' rights must be "referred to a lawful origin".

To make the point at issue clear, we must here state that there is in Nadupalli a tank shown in the map (the commissioner's plan, Exhibit III) as "Ura tank" which has been receiving water through a "supply channel" (so called in the map) from various sources with which we are not concerned. What gave



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occasion to the present suit was the excavation by the defendants of a new channel 1,650 feet long (called the "suit channel" in the map) which was made to connect Tammileru with the "supply channel" already referred to. It will be manifest from what has been stated that the defendants dug the new channel with the object of drawing off water from Tammileru into the Ura tank. That they have succeeded in producing the desired result has not been denied. There was a good deal of contest in the case whether this channel was newly dug or was, as alleged by the defence, an ancient one. The lower Court has found, and quite rightly, that this is a new excavation. It is with a view to get this new channel closed up that this suit has been brought, and the Court below has decided in favour of the plaintiffs. The defendants who are the appellants here question the correctness of its decision.

The plaintiffs' "immemorial user" (to quote the words of the lower Court) of the water in the manner alleged by them has been admitted by the defendants. The learned Judge, as already observed, says that their user must be referred to a "lawful origin". That statement seems sufficient for the present purpose, as it is unnecessary to enquire how this undisputed right originated. But to clarify the position, it may be stated that the plaintiffs do not claim as against Nadupalli owners, i.e., those higher up the stream that they acquired a right by prescription. At any rate, that position has been made clear by Mr. Rajamannar, their learned Counsel, in his lucid argument. Prescription involves the idea that the right acquired is in derogation of another person's right. But the plaintiffs do not suggest here that the right they acquired in any way impaired the fullness of the defendants' legal right. The simple question then is, did the defendants

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by making the new excavation and drawing off water into their Ura tank infringe the plaintiffs' admitted rights? The lower Court has in effect decided (and we think correctly) that, while the plaintiffs are entitled to relief, their acquired right has, however, no operation as against the natural rights of the Nadupalli mokhasadars.

This raises the question, is the abstracting of the water by the new excavation in excess of the defendants' natural riparian rights? The channel having been found to be a new excavation, the Subordinate Judge, it may be mentioned, has negatived the prescriptive right set up by the defendants to divert the water into the Ura tank. Then the question, as already stated, is, was the user justified by the defendants' natural rights?

This question must be answered with reference to the following considerations:

(i) A riparian right arises from the right of access to the stream which landowners on its banks have by the law of nature. In other words, it is necessary for the existence of a riparian right that the land should be in contact with the flow of the stream (Coulson & Forbes on Waters, 5th edition, page 81). Even if the portion on the bank be a narrow strip, the back lands enjoy riparian rights if they be in the same ownership as the bank (*ibid*, page 111).

(ii) In the case of zamindars and similar proprietors, are they to be considered the owners or the ryots for deciding the question of the contact with the stream? The contention, in this respect, of Mr. P. Satyanarayana Rao, the appellants' learned Counsel, must prevail. It seems consonant to reason to hold that a zamindar should be treated as a proprietor for this purpose. The rights possessed by the tenants may be very valuable, such as permanent occupancy rights, but that does not justify the view that zamindars are not the proprietors of the soil. The Permanent Settlement Regulation (Madras Act XXV of 1802) declares that the British Government has

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resolved to grant to zamindars and other landholders a permanent property in their land and the sanad granted to them is styled a deed of permanent property and they are called proprietors of land. If *Gopichetti Narayanaswami Naidu v. Madula Venkanna*(1) is to be understood as laying down a different rule, we must, with all respect, express our dissent from it.

(iii) The ownership of the zamindar, as distinguished from that of the ryot, being then the decisive factor, is the whole of the land a riparian estate on the ground that it belongs to a single owner? The proposition that every piece of land in the same occupation, which includes a portion of the river bank and therefore affords access to the river, is a riparian tenement is, as LAWRENCE J. observes, far too wide: "Nobody in their senses would seriously suggest that the site of Paddington Station and Hotel is a riparian tenement, although it is connected with the river Thames by a strip of land many miles long."; *Attwood v. Llay Main Collieries*(2). See also Coulson and Forbes on Waters, 5th edition, page 111. A riparian tenement, as the learned Judge points out, connotes in addition to contact with the river, a reasonable proximity to the river bank; vide the observations of ABDUR RAHIM J. in *The Secretary of State for India v. Ambalavana Pandara Sanadhi*(3) and of SADASIVA AYYAR J. in *Lakshminarasu Avadhanulu v. Secretary of State for India*(4). What is a riparian tenement does not depend upon any arbitrary rule (the depth of half a furlong suggested by SADASIVA AYYAR J. was not intended to be absolute), but must in each case be a question depending upon the circumstances.

(iv) Each riparian proprietor has a right to the water flowing past his land; but it is a right only to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors on the banks on each side to the reasonable enjoyment of it; *Embrey v. Owen*(5). As observed by Lord MACNAGHTEN (citing Lord CAIRNS) in *Swindon Waterworks Company v. Wilts and Berks Canal Navigation Company*(6), a riparian proprietor may use the water (a) for ordinary

(1) 1914 M.W.N. 481.

(3) (1917) 33 M.L.J. 415, 424.

(5) (1851) 6 Ex. 353; 155 E.R. 579, 586.

(2) [1926] 1 Ch. 444, 459.

(4) (1917) 34 M.L.J. 223, 226.

(6) (1875) L.R. 7 H.L. 697.

or primary purposes, (b) for extraordinary or secondary purposes and (c) for purposes foreign to or unconnected with his riparian tenement. The first two purposes are legitimate, whereas the third is not; *McCartney v. London-derry and Lough Swilly Railway*(1).

(v) Irrigation is a secondary purpose and the English law seems to be that the water should be restored, after the object of the irrigation is answered, in a volume substantially equal to that in which it passed before; see Lord CAIRNS in *Swindon Waterworks' case*(2) and Lord MACNAGHTEN in *McCartney's case*(1). The rule has been somewhat modified in its application to India. The Judicial Committee observed:

"Now in speaking of the returning of the water it must be remembered that both Lord CAIRNS and Lord MACNAGHTEN were speaking of a diversion of the whole stream. When only a part of the stream is taken, and that for the purposes of irrigation, the only limitation is that the amount taken shall not be so much as to hurt the right of the inferior owner to have the stream passed on to him practically undiminished"; *Secretary of State for India v. Subbarayudu*(3).

(vi) The right of a riparian owner to take the water is a natural right and not in the strict sense of the word an easement and is not capable of being lost by non-user (*ibid*).

(vii) When a riparian owner taking advantage of his position uses the water (as here) for purposes unconnected with his riparian tenement, he will be prevented by an injunction from doing so, although no actual injury has been sustained by the other party. This is put upon the ground that the wrongdoer, if not prevented, will at the end of the statutory period, gain a prescriptive right to continue the unlawful use for ever; per Lord MACNAGHTEN at page 309 and Lord LINDLEY at page 313 in *McCartney's case*(1) above cited.

These are the principles touching riparian rights which become applicable to the facts as found by the lower Court. Its findings are (a) that the channel is a new excavation recently dug, (b) that a large quantity of water is impounded in the Ura tank, (c) that the water is used not only for irrigating some distant

(1) [1904] A.C. 301, 306.

(2) (1875) L.R. 7 H.L. 697.

(3) (1931) L.R. 59 I.A. 56; I.L.R. 55 Mad. 263.

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lands stretching far away from the river bank in Nadupalli, but also other lands *totally unconnected* with the riparian tenement and (d) that the plaintiffs have not succeeded in proving that they sustained any actual injury.

On these findings the question is, to what reliefs will the plaintiffs be entitled? The lower Court has granted an injunction restraining the defendants "from taking the water of Tammileru through the suit channel (the new excavation) to Nadupalli Ura tank." To this extent the lower Court's decree is right, but the learned Judge has, unnecessarily in our opinion, added two further directions and that in the defendants' favour: *firstly*, that they may store water in a *separate tank* to be used for irrigating lands within a distance of half a furlong from the river bund; *secondly*, that they are entitled to use the new excavation for taking Tammileru water into the tank to be *newly dug*. The making of these declarations does not fall within the purview of the suit, which was brought simply with a view to get the new channel filled up. The Judge has attempted to define the limit of the defendants' riparian right, although there was no material before him which could enable him to do so. The only question before him was whether or not the defendants' alleged act was wrongful, and he was not called upon to define the extent of their natural rights. That the lower Court's decree is apt to lead to confusion and complication is obvious enough. At what distance from the river bank is the new tank to be built and what are its dimensions to be? Is the water to be permanently impounded in the proposed tank? As regards the impounding of the water, some argument has been addressed to us, but we do not think that is a question that arises here. We may in this

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connection refer usefully to the observations of Lord WATSON in *Debi Pershad Singh v. Joynath Singh*(1). His Lordship points out that the pleadings in that case were silent in regard to the size and character of the dam in question or, as to the quantity of water which it had the effect of diverting, and goes on to say that "without an investigation into facts which have neither been averred nor made the subject of proof", it would be most unsatisfactory to proceed to give a decision. These observations apply here with very great force.

There is one other matter to which we may refer. The learned Subordinate Judge observes that the defendants may go higher up the stream for the purpose of putting up Kongarakutta (sand bunds). This obviously affects interests of parties not before us and in view of what we have said that the extent of the defendants' riparian rights does not fall to be determined here, it is unnecessary to enquire how far the learned Subordinate Judge's view on this matter is right.

It seems to us that the decree to be passed here may be modelled on the decree passed in the case of the *Swindon Waterworks Company v. Wilts and Berks Canal Navigation Company*(2). It is declared that the plaintiffs are entitled to use Tammileru and its waters as the same have been accustomed (before the interference therewith, complained of) to flow down to and into their channel (the Balive Velupucherla Irrigation Channel), so far as the said stream and waters are required for the supply of their said channel, but subject to such reasonable use by the defendants as riparian owners higher up the stream, and it is ordered

(1) (1897) L.R. 24 I.A. 60, 69; I.L.R. 24 Cal. 865.  
(2) (1875) L.R. 7 H.L. 697.

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that an injunction be awarded restraining the defendants from diverting into their Ura tank, the said stream and waters. To this must be added, having regard to the circumstances here, a mandatory injunction directing the defendants to fill up the newly excavated channel.

The appeal fails and is dismissed with costs. It is unnecessary, in view of the decree we have made, to make any special order upon the memorandum of objections. There will be no order as to costs in the memorandum of objections.

G.R

### APPELLATE CIVIL.

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

A. SUBRAMANIA IYER (SECOND DEFENDANT), APPELLANT,

v.

K. S. VENKATARAMA IYER AND SEVENTY-TWO OTHERS  
(PLAINTIFFS AND DEFENDANTS 1 AND 3 AND NII),  
RESPONDENTS.\*

*Madras Estates Land Act (I of 1908), sec. 172—Republication of settlement record after confirmation by Collector—Exercise by Board of Revenue of its revisional powers under sec. 172 before—Jurisdiction—Proceedings under Ch. XI of Act—Money rent in respect of village where only rent in kind in vogue—Fixing of—Power of—Sec. 172—Paddy rent fixed by Board—Conversion of, into money rent at price fixed by Board itself—Order of Board under sec. 172 having effect of—Validity of.*

(i) There is no warrant for the view that the Board of Revenue has no jurisdiction to exercise its revisional powers

\* Appeal No. 289 of 1934.

under section 172 of the Madras Estates Land Act till after the settlement record has been republished after confirmation by the Collector.

All that section 172 does is to fix the outer limit of time within which the powers of revision may be exercised, namely, "at any time within two years from the date . . . of republication under sub-section (3) of section 170." This does not necessarily imply that the Board has no power of interference before the republication.

(ii) There is nothing in the scheme of Chapter XI of the Madras Estates Land Act to restrict the authorities settling the rent to the system of payment theretofore in vogue. In proceedings under that chapter the Board of Revenue has power in appropriate cases to fix a money rent in respect of a village where only rent in kind had theretofore been in vogue.

(iii) In the course of settlement proceedings under Chapter XI of the Madras Estates Land Act, the Board of Revenue purporting to act under section 172 of the Act passed an order fixing the landlord's share at eighty-seven kalams per veli instead of sixty-five kalams fixed by the Collector and directing the conversion of the paddy rent fixed by it into cash at a specified average price per kalam (as reported by the Collector) subject to a deduction of fifteen per cent for cartage, etc., charges. Even when the matter was before the Revenue Divisional Officer the landlord had opposed the proposal to fix the rent in cash; from that stage till the matter came up before the Board of Revenue no reference whatever was made to the question of cash rent and the whole procedure adopted by the Revenue Officer and by the confirming authority proceeded on the basis that the rent was to be fixed in kind; the data with reference to which settlement of rent in cash could be made were therefore never investigated and collected; and when the matter was before the Board and it gave an opportunity to the parties to show cause why cash rent should not be fixed the ryots objected to the fixing of cash rents.

*Held* that the Board of Revenue acted without jurisdiction in so far as it fixed money rents on the basis of a conversion rate.

If the Board had thought that it would be proper to fix rents on a cash basis, it must have sent the papers back to the Revenue Officer to make a re-settlement on that basis and not

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A mere conversion of the paddy rate fixed by the Board into money on the basis of the average price of the last ten years is not what was contemplated by the Legislature as the settlement of rent in cash.

APPEAL against the decree of the Court of the Subordinate Judge of Kumbakonam in Original Suit No. 1 of 1933.

K. S. Krishnaswami Ayyangar and S. Ramachandra Ayyar for appellant.

T. R. Venkatarama Sastri for M. S. Venkatarama Ayyar for respondents.

VARADACHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal arises out of a suit instituted by the tenants of an inam village in the Tanjore District for a declaration that the entry in the record-of-rights, published in the village on 22nd June 1932, with reference to the rent payable by the ryots in respect of their holdings cannot be enforced. This publication was made in pursuance of a notice issued by the Sub-Collector of Kumbakonam on 10th June 1932 (Exhibit F) and that notice was given in pursuance of an order of the Board of Revenue (Exhibit D), dated 6th May 1932. It is this order of the Board of Revenue that is really challenged in the plaint. The order was passed by the Board in the course of proceedings taken under Chapter XI of the Madras Estates Land Act on an application made by the ryots for the preparation of a record-of-rights and for the settlement of rents in the village. The action is not one under section 173 of the Act and it is not based on any of the grounds specified in clause 3 of that section. As pointed out in *Zamindar of Khallikote v.*

*Beero Pollai*(1), the suit is one under the general law and is based on the ground that in passing the order, SUBRAMANIA  
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Exhibit D, the Revenue Board acted without jurisdiction and that in settling the rents and proclaiming the same in pursuance of that order, the Sub-Collector was not acting as the Revenue Officer exercising his powers under the Act, but merely as the mouthpiece of the Revenue Board [cf. *Sappani Asari v. The Collector of Coimbatore*(2) and *Mahabunnessa Bibi v. Secretary of State for India*(3)].

VARADACHARIAR J.

The learned Subordinate Judge made a declaration to the effect that the order of the Sub-Collector, dated 10th June 1932, directing the publication of the record-of-rights incorporating the settlement of rent made by the Board of Revenue in its order, dated 6th May 1932, is *ultra vires* and made without jurisdiction. It is against this decree that one of the landholders has preferred this appeal making the ryots and the other landholders respondents. Objection has been taken to the form of the decree as not corresponding to the prayer in the plaint; but it is much more satisfactory to deal with the real points in controversy between the parties and the objection to the form of the decree is not of much significance.

To bring out the grounds on which the validity of the Revenue Board's order has been attacked, it is necessary very briefly to narrate the history of the settlement proceedings. The Sub-Collector of Kumbakonam (who acted as the "Revenue Officer" in this case) passed an order on 28th June 1930 in the following terms:—

"Fifty kalams of paddy for one veli of wet land seem to be fair and equitable rent for the village. . . I therefore

(1) (1935) I.L.R. 59 Mad. 825, 848 (F.B.). (2) (1903) I.L.R. 26 Mad. 742.  
(3) (1925) I.L.R. 53 Cal. 561.

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declare that a rent of fifty kalams for one veli of wet land may be fixed."

According to the pre-existing rights of the parties, based on the pattas then in force, the landholders claimed that they were entitled to rent at a much higher rate. They accordingly preferred objections to this order of the Revenue Officer under section 169; and when dealing with the objections, the then Sub-Collector fixed sixty-five kalams per veli of wet land as a fair and equitable rent. This rent was fixed as payable not merely when a single crop was grown but also for both crops together when two crops were grown. The matter went up before the Collector of Tanjore as the "confirming authority." He agreed with the Revenue Officer so far as the fixing of sixty-five kalams per veli was concerned, but he added that the ryot will be liable to pay additional rent for *thaladi* or second crop cultivation. In paragraph 11 of his order, he directed the Sub-Collector to complete the rent roll and revise it in accordance with the Sub-Collector's conclusions and the observations contained in the order of the Collector and to submit it for final confirmation. This order of the Collector was passed on 17th August 1931.

It appears from the pleadings that some appeals had been preferred to the Board of Revenue against the Revenue Officer's order but in all probability the appeals were preferred too late. However, there were also three revision petitions to the Board, two by the landholders in October 1931 and one by some of the ryots in November 1931. When these revision petitions came on before the Board on 19th February 1932, a suggestion was thrown out that the rents might be settled in cash and both parties were asked to show cause at the adjourned hearing why cash rents should

not be fixed. The petitions came on finally before Mr. SUBRAMANIA  
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(now Sir CHARLES) SOUTER on 6th May 1932. By the order then passed, the Board fixed the landlord's share at eighty-seven kalams per veli instead of sixty-five kalams fixed by the Collector, the main reason being that the proportion of sixty and forty in which according to the custom of the village the crop was divisible between the landholder and the ryot should be worked with reference to the gross yield and not after allowing a deduction for expenses of cultivation. The order next proceeded to deal with the question whether the rent should not be fixed in cash; and, holding that that was the proper thing to do, it directed conversion into cash at the average price of Rs. 2-15-0 per kalam (as reported by the Collector) subject to a deduction of fifteen per cent on account of the distance of the village from the nearest town market. The Sub-Collector was asked to work out money rents on the above basis.

The validity of this order has been challenged in the plaint on several grounds. Three grounds in particular have been pressed before us: (i) that the order is not one passed under section 172 of the Estates Land Act and that if it was intended to be one under section 172 the Board had no power to interfere in revision at that stage; (ii) that in proceedings under Chapter XI the Board had no power to fix a money rent in respect of a village where only rent in kind had hitherto been in vogue; and (iii) that the Board of Revenue could even under section 172 only *direct* a revision and not itself fix the rent. It is unnecessary to refer in detail to the judgment of the lower Court and the views expressed in that judgment on the above points. There has undoubtedly been some uncertainty and conflict of judicial opinion on the interpretation of some of the

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relevant sections of the Act and the learned Subordinate Judge when he pronounced judgment had not before him the later decision of this Court in *Zamindar of Khallikote v. Beero Pollai*(1).

Out of the three objections above referred to, we may state that we do not see much force in the first or in the second. It is true that at the time the order of the Board was passed, the Revenue Officer had not completed the settlement in accordance with the directions of the confirming authority nor had the republication under clause 3 of section 170 been made. But we are not prepared to interpret section 172 of the Act as giving powers of revision to the Board only after the republication under section 170, clause 3, had been made. All that section 172 does is to fix the outer limit of time within which the powers of revision may be exercised, namely,

“at any time within two years from the date . . . of republication under sub-section (3) of section 170.”

This does not necessarily imply that the Board has no power of interference before the republication. Its powers as an appellate authority under section 171 can certainly be invoked and exercised independently of the question of confirmation by the Collector or republication under section 170, clause 3; under the provisions of section 174 the orders passed under section 171 are directed to be incorporated in the settlement record already published under section 170 (3). Section 172 gives the Board powers of revision both *suo motu* and on the application of parties. We see nothing either in the language of the section or in the reason of the thing to justify the view that even where the Board is satisfied that the proceedings before the Revenue

(1) (1935) I.L.R. 59 Mad. 825 (F.B.)

Officer require to be set right, it must wait till after the procedure under section 170 has been gone through and cannot interfere at an earlier stage and give necessary directions. It may often be convenient and help to save time to give the directions at the proper stage instead of waiting for the formal completion of the settlement records. Whether, in any particular case, the Board will find it more convenient to adopt the one course or the other is a different matter; but it seems to us that there is no warrant for saying that the Board has no jurisdiction to exercise its revisional powers till after the settlement record has been republished after confirmation by the Collector.

Similarly, it seems to us that there is nothing in the scheme of Chapter XI to restrict the authorities settling the rent to the system of payment theretofore in vogue. Circumstances are conceivable in which the settlement of a fair and equitable rent can be better accomplished by fixing a rent in money. The provision in section 178 against the commencement or continuation of proceedings under sections 30, 38 and 40 of the Act during the pendency of settlement proceedings clearly implies the possibility that what could be done under these three sections might be done as part of the settlement proceedings. Here again it is one thing to say that the settlement officer is not bound to carry out the duties imposed upon the Collector under sections 30, 38 and 40 in independent proceedings, but a different thing to say that the settlement officer has no power to do such things even when he thinks it necessary to adopt that course in order to effect a satisfactory settlement of rent. The decision in *Ryots of Garabandha, etc., villages v. Zamindar of Parlakimedi*(1) and rule 22 of the rules framed by the Local Government under

(1) I.L.R. [1938] Mad. 858.

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the Act clearly assume that in the course of the settlement proceedings steps like those contemplated by sections 30, 38 and 40 of the Act might be taken.

It remains to deal with the third ground of objection, namely, that section 172 only contemplates the Board *directing* a revision by the subordinate authority and not the fixing of rent by the Revenue Board itself. That this is the appropriate construction of section 172 was laid down in *Zamindar of Khallikote v. Beero Pollai*(1) following *Zamindarini of Mandasa v. Ryots of Mandasa Zamindari*(2); but it was also laid down in those cases that in certain circumstances a procedure which goes further than merely direct a revision by a subordinate authority might not amount to anything more than an "irregularity." Whether what has happened in any particular case must be regarded as only an irregularity or as something done without jurisdiction or in excess of jurisdiction will depend upon the circumstances of each case. If, on the facts of any particular case, what the Board did in addition to what is contemplated by section 172 amounted to little more than a mere arithmetical calculation or something of that kind, it might well be held that though it was unnecessary there was nothing in the nature of excess of jurisdiction in the exercise of such powers. Where, on the other hand, the Board has proceeded to do something which is really more than a ministerial or arithmetical step and which if it had been directed to be done by the Revenue Officer would have involved a consideration of a number of matters which were not and could not have been before the Board at the time that it passed such order, it will only be reasonable to hold that so much of the Board's order as goes beyond what is contemplated by section 172 is done without jurisdiction. Dealing with the

(1) (1935) I.L.R. 59 Mad. 825 (F.B.) (2) (1932) I.L.R. 56 Mad. 579.

order of the Board in the present case in the light of this test, we are of opinion that the Board acted without jurisdiction in so far as it fixed money rents on the basis of a conversion rate of Rs. 2-15-0 per kalam subject to a deduction of fifteen per cent for cartage, etc., charges.

It is a matter of some significance in this case that at an early stage in the proceedings when the matter was before the Revenue Divisional Officer, the landlord *opposed* the proposal to fix the rent in cash. [See Exhibit G, paragraph 2 (b).] From that stage till the matter came up before the Board of Revenue, no reference whatever was made to this question of cash rent and the whole procedure adopted by the Revenue Officer and by the confirming authority proceeded on the basis that the rent was to be fixed in kind. The data with reference to which settlement of rent in cash could be made were therefore never investigated and collected. It is true that when the matter was before the Board the parties were given an opportunity to show cause why cash rents should not be fixed; we are informed that at that stage the ryots objected to the fixing of cash rents. The matter seems to have been argued only as a point of law and the Board of Revenue, so far as one can judge from the terms of Exhibit D, seems to have been of the opinion that a settlement of rent under Chapter XI can be *only* on a cash basis. We are not sure that Chapter XI can be so restricted; but we should not have thought fit to interfere with the Board's order merely on the ground of this error if, after deciding that the settlement should be on a cash basis, the Board had sent the case back to the Revenue Officer to settle rents on a cash basis after making the necessary investigation. As we have already observed, this is the procedure contemplated by section 172. The Board seems to have

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assumed that a mere conversion of the paddy rate fixed by it into money on the basis of the average price of the last ten years would amount to a settlement of rent on a cash basis. With all respect, we do not think that that is what was contemplated by the Legislature as the settlement of rent in cash. If it had at all been present to the mind of the Revenue Officer that the rent payable by the ryots should be fixed in cash, he would have investigated a number of matters relevant to that question. Even in proceedings under section 40, the average of the last ten years excluding famine years is only *one* of the factors to be taken into account; and in proceedings for settlement of rent it must *a fortiori* be true that the average price of the preceding ten years is not the only factor to be considered. In these circumstances, we are unable to hold that what the Board did in the present case in the matter of fixing cash rent is within the powers conferred upon it by section 172. If it had thought that it would be proper to fix rents on a cash basis, it must have sent the papers back to the Revenue Officer to make a resettlement on that basis and not merely given him a direction to carry out a simple process of conversion of paddy rent into money rent at a price fixed by the Board itself. We however see no objection to the rest of the Board's order on any ground of jurisdiction.

The result is that this appeal must be allowed in part. In modification of the lower Court's decree the order of the Board and the consequent settlement of rent by the Sub-Collector will be declared *ultra vires* only in so far as they related to the conversion of the paddy rent fixed by the Board into money rent. In the circumstances, we direct the parties to bear their respective costs in the appeal.

A.S.V.

## APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice.  
Abdur Rahman.

NAMA NAGAYYA (PLAINTIFF), PETITIONER,

v.

KALLE NARASAYYA DESCRIBED AS KALLE NARASIM-  
HAYYA IN RECORDS OF THE LOWER COURT (DEFENDANT),  
RESPONDENT.\*

1938,  
April 26.

*Indian Limitation Act (IX of 1908), ss. 21, 19 and 20—  
“ Lawful guardian ” within meaning of sec. 21—Hindu  
minor—De facto guardian of—“ Lawful guardian ” with-  
in sec. 21, if—Acknowledgment by him—Binding on  
minor, if.*

A *de facto* guardian of a minor, who is not either the natural or the testamentary guardian, cannot be considered to be a lawful guardian within the meaning of section 21 of the Indian Limitation Act for the purpose of acknowledging a debt to keep it alive against the minor.

*Ganjayya v. Ramaswami*(1) disapproved.

*Ramaswamy v. Kasinatha*(2) followed.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Proddatur, dated 25th March 1936 and passed in Small Cause Suit No. 574 of 1935.

The petition originally came on for hearing before VENKATARAMANA RAO J. when his Lordship made the following

### ORDER OF REFERENCE TO A FULL BENCH:—

The question raised in this civil revision petition is one of importance. It is this: whether an acknowledgment of liability by a *de facto* guardian of a minor would be a valid acknowledgment on his behalf under section 19 of the Limitation Act,

\* Civil Revision Petition No. 997 of 1936.

(1) (1913) 24 M.L.J. 428.

(2) A.I.R. 1928 Mad. 226.

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i.e., whether an acknowledgment by a *de facto* guardian would be an acknowledgment by a lawful guardian within the meaning of section 21 of the Limitation Act. In *Ganjayya v. Ramaswami*(1) BAKEWELL J. seems to have taken the view that a *de facto* guardian can be a lawful guardian within the meaning of section 21. This view was expressly dissented from in *Ramaswamy v. Kasinatha*(2) by KUMARASWAMI SASTRI and CURGENVEN JJ., but it is urged before me that the observation therein is only *obiter* because the learned Judges also held that the *de facto* guardian had no authority to acknowledge the debt because the amount due under the bond in question in that case could have been paid out of the income and there was no necessity to keep the debt alive. Mr. Ramaswami Ayyar has brought to my notice the decision in *Bireswar Mukerjee v. Ambika Charan Bhattacharjee*(3) which takes the same view but a different view appears to have been taken in the Patna High Court which is in consonance with the view of BAKEWELL J.

As the question is of frequent occurrence it is desirable that there should be a decisive ruling of a Bench on this point and I therefore refer this civil revision petition for disposal by a Bench.

The petition came on for hearing in pursuance of the above Order of Reference before the Bench constituted as above.

N. Vasudera Rao for petitioner.

V. Ramaswami Ayyar and M. Natesan for V. Seshadri for respondent.

MADHAVAN NAIR J. The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The plaintiff is the petitioner. In this revision petition we are called upon to consider the question whether an acknowledgment of a debt made by a person described as *de facto* guardian of a minor would keep the debt alive against the minor which would otherwise become barred. The *de facto*

(1) (1913) 24 M.L.J. 428.

(2) A.I.R. 1928 Mad. 226.

(3) (1917) I.L.R. 45 Cal. 630.

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guardian is the son of the sister of the grandfather of the minor.

• Section 19, explanation 2, of the Limitation Act says that an acknowledgment to be effective against the person making it must be signed “either personally or by an agent duly authorized in this behalf.” Section 20 requires that effective payment must be made by the person liable to pay or by his agent duly authorized in this behalf. Section 21 of the Limitation Act explains the expression “agent duly authorized in this behalf” and says “in sections 19 and 20” it “shall, in the case of a person under disability, include his lawful guardian, committee or manager, etc.” This sub-section was introduced because there was a conflict of decisions as to whether a guardian of a minor was an agent within the meaning of sections 19 and 20. The question we have got to consider is whether the *de facto* guardian in the present case is an agent duly authorized to acknowledge this debt on behalf of the minor.

It may be stated at once that he is not a lawful guardian of the minor under the Hindu law, nor has he been appointed a guardian by authority or by a will. The learned Counsel for the petitioner in support of the contention that the *de facto* guardian is a lawful guardian relied mainly on two decisions, one a decision of this Court and another a decision of the Patna High Court. The decision of this Court is reported as *Ganjayya v. Ramaswami*(1). That is a decision by a single Judge. In that case, the learned Judge, BAKEWELL J., was of opinion that a person who is acting as lawful guardian, though not legally appointed, can bind the estate for necessary purposes and that such a person is a lawful guardian within

(1) (1913) 24 M.L.J. 428.

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the meaning of section 21. This decision no doubt supports the petitioner. The decision of the Patna High Court is reported as *Gita Prosad Singh v. Ragho Singh*(1). In that case, payment of money due under a mortgage bond was made by the *de facto* guardian of a minor in order to avoid the immediate bringing of a suit on the bond against the minor. The question was whether the payment made would save the bar under section 20 of the Act. The learned Judge has held that the *de facto* guardian would come within the description of the term "lawful guardian" in section 21. This also supports the petitioner's case. The decision has got to be taken in connection with the facts of the case. Both these cases were considered by a Bench of this Court in a decision reported as *Ramaswamy v. Kasinatha*(2). In that case, KUMARASWAMI SASTRI J., who wrote the leading judgment, dissented from the view of BAKEWELL J. in *Ganjayya v. Ramaswami*(3) and explained the circumstances bearing upon the decision in *Gita Prosad Singh v. Ragho Singh*(1). In that Patna case, the person who made the payment was no doubt the *de facto* guardian but the learned Judge pointed out that there was nothing tangible on the record to show that he was not the lawful guardian. Reference is made in the judgment to certain suits and orders where he was described as guardian and it was in such circumstances that the payment made by him was held to be an effective payment. Barring these three decisions no decision directly bearing on the question has been brought to our notice by the learned Counsel. There is a decision of the Calcutta High Court reported as *Bireswar Mukerjee v. Ambika Charan Bhattacharjea*(4) which supports

(1) (1917) 40 I.C. 809.

(3) (1913) 24 M.L.J. 428.

(2) A.I.R. 1928 Mad. 226.

(4) (1917) I.L.R. 45 Cal. 630.

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the contention of the defendant that a *de facto* guardian cannot be considered to be a lawful guardian within the meaning of section 21 of the Limitation Act. This case also has been considered by the learned Judges who decided the case of *Ramaswamy v. Kasinatha*(1). We were referred to a series of cases by the learned Counsel for the petitioner to show that alienations made by *de facto* guardians under the Hindu law were held valid if they were for the benefit of the minor. None of those cases has any bearing on the question. We are not concerned with the question whether an alienation should be binding or not.

The question we have to consider is whether the person described as *de facto* guardian would come within the description of lawful guardian within the meaning of section 21 of the Limitation Act. As already stated, he is not the natural guardian nor was he testamentary guardian. His position, strictly speaking, is only that of an intermeddler in the estate of the minor. No doubt he may have been managing the estate of the minor and probably he may have been managing the estate to the advantage of the minor as well. He remains an intermeddler all the same. By a constant course of management, his position as that of an intermeddler cannot be converted into that of a lawful guardian. We accept with great respect the reasoning of KUMARASWAMI SASTRI J. in *Ramaswamy v. Kasinatha*(1), which was concurred in by CURGENVEN J. For the reasons given by the learned Judge we hold that a *de facto* guardian cannot be considered to be a lawful guardian within the meaning of section 21 for the purpose of acknowledging a debt to

(1) A.I.R. 1928 Mad. 226.

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keep it alive against the minor. In our opinion the decision in *Ganjayya v. Ramaswami*(1) does not state the law correctly. As the suit debt is therefore barred as it has not been acknowledged validly by the respondent's guardian, the suit was rightly dismissed by the lower Court. The civil revision petition is dismissed with costs.

A.S.V.

## APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice  
Abdur Rahman.

S. MUNIYANDIA PILLAI (PLAINTIFF), PETITIONER,  
v.

MUTHUSAMI SERVAI AND ANOTHER (DEFENDANTS 2  
AND 3), RESPONDENTS.\*

*Hindu law—Father—Chit fund conducted by—Money  
subscribed to—Liability of his sons for.*

A subscriber to a chit fund conducted by a Hindu sued him and his sons for the recovery of money subscribed by him to the chit fund. The lower Court decreed the suit as against the father but dismissed it as against the sons.

Held that, as the liability of the father arose out of a transaction which was illegal, the sons were not liable for the debt of their deceased father, and the decree of the lower Court exempting them from liability was right.

*Muthusami Servai v. Mytheen Pichai Rowther*(2) approved.

PETITION under sections 25 of Act IX of 1887 and 224 of the Government of India Act, praying the High Court to revise the decree of the Court of the Subordinate Judge of Sivaganga, dated 18th January 1937 and passed in Small Cause Suit No. 123 of 1936.

(1) (1913) 24 M.L.J. 428.

(2) (1937) 1 M.L.J. 231.

\* Civil Revision Petition No. 654 of 1937.

*L. S. Veeraraghava Ayyar* for petitioner.

*V. Ramaswami Ayyar* for respondents.

MUNIYANDIA  
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The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—In this case the plaintiff, a subscriber to a chit fund conducted by the first defendant and the father of defendants 2 and 3, sued for the recovery of money subscribed by him to the chit fund. A decree was given in his favour as against the first defendant but the suit was dismissed as against defendants 2 and 3, the sons of the deceased stake-holder. The decree as against the first defendant was based upon the Full Bench decision reported as *Sesha Ayyar v. Krishna Ayyar*(1). In that case, it was held that the stake-holders were personally responsible for the refund of the money to the subscriber and that they in conducting the chit fund committed an offence under section 294-A, Indian Penal Code.

In this revision petition it is argued that the lower Court should have given a decree against defendants 2 and 3 also. The question whether the sons of a deceased stake-holder are liable to pay their father's debt out of joint family properties in their hands in a case precisely like the present was raised in Civil Revision Petition No. 303 of 1936 decided by HORWILL J. The decision is reported as *Muthusami Servai v. Mytheen Pichai Rowther*(2). The learned Judge held that the sons were not liable because he was of opinion that the debt was in the nature of an avyavaharika debt, i.e., it was founded upon a criminal offence committed by the father. In support of that conclusion he relied upon a decision of this Court in *Muthammal v. Sivakami Ammal*(3). In that case,

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(1) (1935) I.L.R. 59 Mad. 562 (F.B.).

(2) (1937) 1 M.L.J. 231.

(3) (1925) 21 L.W. 606.

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it was pointed out that the sons were not liable for the father's debt if the debt of the father arose out of conduct on his part which is utterly repugnant to good morals, or is grossly unjust, or flagrantly dishonest (*see* judgment of VENKATASUBBA RAO J. at page 627). I, who was a party to that decision, pointed out that a liability which arose out of the commission of an offence by the father has always been held to be immoral and that such a liability need not be discharged by the sons. Since the liability of the father in the present case arose out of a transaction which was held in *Sesha Ayyar v. Krishna Ayyar*(1) to be illegal we must hold that defendants 2 and 3 are not liable for the debt of their deceased father. In our opinion the present case falls exactly within the decision of HORWILL J. in *Muthusami Servai v. Mytheen Pichai Rowther*(2). We may also in this connection refer to a recent decision of the Privy Council, *Toshanpal Singh v. District Judge of Agra*(3). In that case, the Secretary of a School Committee who was in charge of a fund deposited with the bank was authorised to draw upon it for certain specific purposes connected with the school. After his death the Committee sued the sons to recover from them out of property left to them by their father or out of the property of their joint Hindu family an alleged deficiency in the fund. The deficiency amounted to Rs. 42,993 and according to the father's own admission Rs. 30,016 of it was due to drawings by him for purposes other than those authorised. It was held by the Privy Council that the drawings in question were criminal breaches of trust within section 405, Indian Penal Code, and that under Hindu law the

(1) (1935) I.L.R. 59 Mad. 562 (F.B.).

(2) (1937) 1 M.L.J. 231.

(3) (1934) I.L.R. 56 All. 548 (P.C.).

sons to that extent were not liable but that they were liable for the balance of the deficiency as they had not shown that they were not under a pious obligation in respect of it. This decision lends additional support to the conclusion arrived at by HORWILL J. in *Muthusami Servai v. Mytheen Pichai Rowther*(1). In our opinion the decision of HORWILL J. is correct and the decree of the lower Court exempting defendants 2 and 3 from liability is right.

This civil revision petition is dismissed with costs.  
A.S.V.

### APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice  
Abdur Rahman.

SANKARALINGAM PILLAI AND TWO OTHERS (DEFENDANTS  
8 TO 10—RESPONDENTS 8 TO 10), PETITIONERS,

1938,  
April 22.

v.

ARUMUGAM PILLAI AND ANOTHER (PETITIONER—TRANS-  
FEREE-DECREE-HOLDER AND ELEVENTH RESPONDENT—  
PLAINTIFF), RESPONDENTS.\*

*Code of Civil Procedure (Act V of 1908), O. XXI, r. 16—  
Money decree—Executability of—Decree-holder becoming  
one of judgment-debtors—Effect—Merger—Doctrine of—  
Applicability of.*

A, as the assignee of a promissory note, obtained a decree against the executants of the note and B, the payee and the assignor, a Hindu female. B died and A and defendants 8 to 10, her reversionary heirs, became entitled each to a fourth share of the property held by her. The question was whether the decree became inexecutable against defendants 8 to 10 in virtue of the doctrine of merger.

(1) (1937) 1 M.L.J. 231.

\* Civil Revision Petition No. 1126 of 1933.

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*Held* that the decree did not become inexecutable in its entirety but that it became inexecutable to the extent of the one-fourth share of A and that defendants 8 to 10 could be proceeded against for three-fourths of the amount of the decree.

There was no complete merger in the case so as to render the decree inexecutable in its entirety. But there was a merger to the extent to which A had become partially liable under the decree and it should be treated as satisfied to the extent of A's share.

*Subramanian Chetty v. Kasi Chetty*(1) and *Asia Bibi v. Malik Aziz Ahmad*(2) followed.

*Mad. Abdul Kadir v. Abdul Kadir*(3) treated as having been overruled by *Subramanian Chetty v. Kasi Chetty*(1).

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Tuticorin, dated 1st March 1933 and made in Execution Application No. 844 of 1932, Small Cause Suit No. 522 of 1930.

*V. Mahadeva Sastri* for petitioners.

*S. Theagaraja Ayyar* for *A. Swaminatha Ayyar* for first respondent.

Second respondent was not represented.

VENKATASUBBA RAO J.—The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—This revision petition has been referred to a Bench as it raises an important question of law. The plaintiff, as the assignee of a promissory note, obtained a decree against defendants 1 to 6, the executants of the note (with whom we are not concerned), and the seventh defendant, the payee and the assignor, a Hindu female. The seventh defendant died and the plaintiff and defendants 8 to 10, her reversionary heirs, became entitled each to a fourth share of the property held by her. The plaintiff then transferred the decree to the petitioner in the lower Court,

(1) A.I.R. 1927 Mad. 937.

(2) (1931) I.L.R. 54 All. 448.

(3) A.I.R. 1926 Mad. 1141; 51 M.L.J. 443.

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who applied for execution; but nothing turns upon the transfer, as the transferee stands in the shoes of the plaintiff. The question to decide is, has the decree become inexecutable in virtue of the doctrine of merger? The Court below has allowed execution and its order is challenged here by defendants 8 to 10.

Order XXI, rule 16, Civil Procedure Code, has been relied upon by their learned Counsel, but there can be no doubt that the provision does not in terms apply. It enacts that where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others. True, this rule applies whether the transfer has been effected by operation of law or by act of parties. To give an example of the former class of transfer, let us suppose that A obtains a decree against X and Y. A dies and X as his heir becomes under the law the assignee of the decree. The rule enacts that the decree should be deemed extinguished and that X should not be permitted to execute it as against Y. But the case in hand is the converse of the illustration just put. If in the example given above X dies and A as his heir becomes liable under the decree (which is very different from becoming entitled to the rights under the decree), the section in terms, it is obvious, does not apply. Here there has been no transfer of the decree and what is equally patent there has been no transfer in favour of one of the judgment-debtors—that being what the rule cited above contemplates. But apart from the letter of the section, there is a principle which it embodies, namely, where the decree-holder's right and the judgment-debtor's liability become united in one and the same individual, it stands to reason that the decree should be treated as satisfied. The question then is, whether there has been

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such a merger in the case as to render the decree inexecutable. As has been pointed out by SULAIMAN C.J. and YOUNG J., *complete merger* involves the co-extensiveness of the right and the liability; *Asia Bibi v. Malik Aziz Ahmad*(1). Let us now look at the position that has resulted from the death of the seventh defendant. The plaintiff has remained the judgment-creditor, but who are those that have become the judgment-debtors? The plaintiff himself and defendants 8 to 10. In other words, the plaintiff holds a decree against himself and three other persons. To the extent to which the plaintiff has become partially liable under the decree, to that extent there has undoubtedly been a merger. But the consequences of a *partial* merger are totally different from those of a *complete* merger. Let us again take an example. A obtains a decree against X for Rs. 300; X dies, leaving A, B and C as his heirs, each being entitled to an equal third of his estate. The true position then is, that A has a decree against A, B and C; the decree is extinguished to the extent of A's share but he can execute it against B and C to the remaining extent of Rs. 200. This is in consonance with reason and justice, but the learned Counsel for defendants 8 to 10 contends, on the authority of *Md. Abdul Kadir v. Abdul Kadir*(2) decided by MADHAVAN NAIR J., that the decree has become inexecutable in its entirety. That is a decision we are unable to follow, as it ignores the distinction between a partial and a complete merger. Indeed, this case must be treated as having been overruled by a later Bench decision, *Subramanian Chetty v. Kasi Chetty*(3) to which MADHAVAN NAIR J.

(1) (1931) I.L.R. 54 All. 448, 450.  
(2) A.I.R. 1926 Mad. 1141; 51 M.L.J. 443. (3) A.I.R. 1927 Mad. 937.

was a party. The learned Judges there purport to distinguish the earlier case; but, as has been pointed out in *Asia Bibi v. Malik Aziz Ahmad*(1) already referred to, it is difficult to discover on what basis the decision has been distinguished. The later ruling is clearly opposed to the earlier one and in our opinion lays down the correct principle. The Allahabad High Court in the decision already cited has discussed the matter clearly and adopted the same view.

But adopting the same principle, the Allahabad case and the Madras Bench case have applied it differently. In the former, the decree has been treated as having become satisfied *pro tanto*; in the latter, the judgment-creditor has been directed to execute his decree in its entirety against the entire property both in his possession and in the possession of the other heirs. In our opinion, the more logical course is that adopted in the Allahabad case. In so far as the judgment-creditor and the judgment-debtor happen to be the same person, to that extent it is reasonable and correct on principle to hold that the decree is satisfied. In the ultimate result it makes no difference or, to be more accurate, it ought to make no difference, which of these two methods in the process of execution is adopted; for it must be noted that the real rights of parties can be worked out only in a suit for contribution. Let us suppose, for instance, that A obtains a decree against B the principal debtor and C the surety. A transfers the decree to C, which thereupon must be treated as having become satisfied for the purpose of execution. But that does not prevent C from pursuing his remedy against B by a suit for contribution.

(1) (1931) I.L.R. 54 All. 448.

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RAO J.

In the result, we must hold that the decree has become inexecutable to the extent of the one-fourth share of the plaintiff. Defendants 8 to 10 can be proceeded against for the three-fourths of the amount of the decree that has been passed. The execution petition will therefore be remitted to the lower Court for being dealt with in the light of our judgment.

We direct that each party shall bear his costs both here and in the Court below.

A.S.V.

### APPELLATE CIVIL.

*Before Mr. Justice Venkatasubba Rao and Mr. Justice Abdur Rahman.*

VEDAKANNU NADAR (DEFENDANT), PETITIONER,  
v.

GNANAYYA NADAR (FIRST PLAINTIFF), RESPONDENT.\*

*Provincial Small Cause Courts Act (IX of 1887), sch. II,  
art. 28—Scope and applicability of.*

Article 28 of the Second Schedule to the Provincial Small Cause Courts Act contemplates a suit between rival claimants to the property of an intestate. There must be a claim made by an heir as such, which claim is resisted by another person advancing a similar claim; otherwise the article does not apply.

*Samu Asari v. Anachi Ammal*(1) and *Rethinasami v. Nataraja*(2) disapproved.

*Chhedi v. Gulabo*(3) and *Tika Sahu v. Chirkat Sahu*(4) followed.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court

\* Civil Revision Petition No. 1004 of 1934.  
(1) (1925) 49 M.L.J. 554. (2) A.I.R. 1933 Mad. 346.  
(3) (1905) I.L.R. 27 All. 622. (4) (1914) 19 C.W.N. 614.

of the Subordinate Judge of Tinnevely in Small Cause Suit No. 1185 of 1932. VEDAKANNU  
v.  
GNANAYYA

*M. C. Sridharan* for petitioner.

*J. S. Vedamanikkam* for respondent.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—This civil revision petition has been referred to a Bench on the ground that it raises an important question of law. The question turns upon the construction of article 28 of the Second Schedule to the Provincial Small Cause Courts Act. Under that article

“ a suit for a legacy, or for the whole or a share of a residue bequeathed by a testator, or for the whole or a share of the property of an intestate ”

is excepted from the cognisance of a Provincial Small Cause Court. The plaintiff sues for the recovery of certain jewels as the heir of his deceased wife. He alleges that upon her death in the house of her brother, the defendant, the latter wrongfully took possession of her jewels. That the plaintiff has succeeded to his wife's property is not disputed by the defendant; in other words, the case raises no question of a disputed succession. In our opinion, on a proper construction of the relevant words, there must be a claim made by an heir as such, which claim is resisted by another person advancing a similar claim; otherwise the article does not apply. This follows, as the various decisions on the point have held, from the very use of the word “ intestate ” in the section. The matter has been put clearly by BANERJI and RICHARDS JJ. who observe that the article contemplates a suit between rival claimants to the property of an intestate; *Chhedi v. Gulabo*(1). The authorities on the point have been fully considered by a Bench of the Calcutta High Court which has

(1) (1905) I.L.R. 27 All. 622.



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RAO J.

adopted the same view [*Tika Sahu v. Chirkat Sahu* (1)] and it is unnecessary to refer to the same authorities again. As pointed out in that decision, in no previous case has a different view prevailed. The lower Court in holding that the article in question does not apply to the present suit, has thus come to a correct conclusion.

But Mr. Sridharan, the learned Counsel for the defendant-petitioner, contends that the lower Court's view is wrong and relies in support of his contention upon two cases of our Court; *Samu Asari v. Anachi Ammal*(2) and *Rethinasami v. Nataraja*(3). The first of them was decided by RAMESAM J. and the second is also a decision of a single Judge (PAKENHAM WALSH J.) who follows the earlier decision. We are unable to follow these cases, for, as a question of construction, we are inclined to agree that the view taken by the Calcutta and the Allahabad High Courts is right. As to *Chinnayya v. Achammah*(4), the present question did not arise there and there is no more than a passing observation on which the petitioner can rely.

The object of the relevant part of the article seems to be to remove from the cognisance of a Small Cause Court matters involving disputed succession, for they may raise complicated questions. A reference to the earlier part of the section strengthens this view. A suit for a legacy or a residue, as is evident from the provisions of the Succession Act, may raise intricate questions of law and a Small Cause Court is not expected to deal with such questions.

In the result, the civil revision petition is dismissed, but we make no order as to costs.

A.S.V.

(1) (1914) 19 C.W.N. 614.  
(3) A.I.R.1933 Mad. 346.

(2) (1925) 49 M.L.J. 554.  
(4) (1912) I.L.R. 37 Mad. 538.

## APPELLATE CIVIL.

Before Mr. Justice Wadsworth.

RAMANATHA GURUKKAL *alias* PARAMESWARA  
GURUKKAL (PLAINTIFF), APPELLANT,

v.

V. V. R. ARUNACHALAM CHETTIAR AND ANOTHER  
(DEFENDANTS 1 AND 3), RESPONDENTS. \*

*Madras Hindu Religious Endowments Act (II of 1927),  
sec. 43—Hereditary archaka of a non-excepted temple—  
Dismissal of, by trustee—Appeal to Committee or Board not  
preferred under sec. 43 of Act—Suit by archaka against  
trustee—Jurisdiction of Civil Court to entertain.*

The plaintiff, the hereditary archaka in a non-excepted temple the control of which was regulated by the Madras Hindu Religious Endowments Act of 1927, was dismissed from the office by the trustee, and the order of dismissal was communicated to the plaintiff. Instead of preferring an appeal to the Committee or to the Board, he filed a suit for a declaration of his right to the office and for an injunction restraining the trustee from interfering with the performance of his duties. The plaint averred *inter alia* that the order of dismissal was arbitrary.

Held that Civil Courts had no jurisdiction to question the propriety of the order of dismissal and that the suit was therefore incompetent.

The suit was in effect one to set aside a dismissal by a trustee in the exercise of the powers of administration and management conferred upon him under the Religious Endowments Act and was a suit in respect of the administration or management of the religious endowment within the meaning of section 73 of the Act and section 73 is a clear indication that the provisions of section 43 of the Act setting up a special machinery of appeal and conferring finality on the decisions in appeals by dismissed office-holders was intended to oust the jurisdiction

\* Second Appeal No. 381 of 1934.

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of Civil Courts to question the propriety of an order of dismissal passed under that section and communicated to the person dismissed. A mere allegation that the order of dismissal was one which from its arbitrary nature deserved scrutiny would not be sufficient to confer jurisdiction on Civil Courts. Physical disability which made the plaintiff unfit to hold office might be treated as indicating an incapacity to hold office sufficient to clothe the trustee with the power to pass an order of dismissal under section 43 of the Act.

APPEAL against the decree of the Court of the Subordinate Judge of Trichinopoly, dated 18th December 1933 and passed in Appeal Suit No. 24 of 1933 preferred against the decree of the Court of the District Munsif of Kulittalai in Original Suit No. 240 of 1928.

*T. V. Muthukrishna Ayyar* for appellant.

*N. Sivaramakrishna Ayyar* for *M. Subbaroyu Ayyar* for first respondent.

Second respondent was not represented.

#### JUDGMENT.

WADSWORTH J. RAMANATHA J.—This appeal raises the question of the precise force of the words, “ the decision of the Board shall be final ” at the end of section 43, clause 3, of the Madras Hindu Religious Endowments Act (II of 1927).

The appellant was the hereditary archaka in a non-excepted temple the control of which is regulated by the Religious Endowments Act. It is found as a fact by the lower appellate Court that he was dismissed from the office by the trustee, the first defendant, and that the order of dismissal was communicated to him. Instead of preferring an appeal to the Committee or to the Board, he filed a suit praying for a declaration of his right to the office and for an injunction restraining the trustee from interfering with the performance of his duties. Various contentions have been raised

for the appellant by Mr. Muthukrishna Ayyar, some of which seem to me to have little force. It is contended that assuming that there is a statutory exclusion of the jurisdiction of Civil Courts, this exclusion can only relate to orders of dismissal which are not arbitrary and that once there is an averment that a temple servant has been dismissed in an arbitrary manner, the suit must be treated as one relating to an act which is not a legal order of dismissal at all and that the Civil Courts can exercise a jurisdiction which otherwise they would not possess. It seems to me that this contention is unsound and that if an order of dismissal validly communicated is one which the Civil Courts cannot scrutinise a mere allegation that it is an order which from its arbitrary nature deserves scrutiny would not be sufficient to confer jurisdiction.

It is also contended that section 43 applies only to punishments for causes enumerated in clause (1) of that section, namely, breach of trust, incapacity, disobedience, neglect of duty, misconduct or other sufficient cause and that the present order of dismissal does not fall within those categories. But actually in the present case, the reason put forward by the trustee for dismissing the plaintiff was that he suffered from a physical disability which made him unfit to hold office. Whether or not there in fact were other matters which led to the plaintiff's dismissal the ground of dismissal stated is, to my mind, one which, if true, might be treated as indicating an incapacity to hold office sufficient to clothe the trustee with the power to pass an order of dismissal under section 43 of the Act.

The substantial ground upon which this appeal is based relates to the machinery of appeal set up by section 43 and the interpretation of the word “ final ” in sub-clause (3) of section 43. Sub-clause (2) provides for an appeal to the Committee against an order

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RAMANATHA v. ARUNACHALAM. of the trustee under sub-clause (1) and sub-clause (3) provides that :

WADSWORTH J. " A hereditary office-holder or servant of a temple may prefer an appeal to the Board against the order of a Committee on an appeal under sub-section (2) and the decision of the Board shall be final."

It is argued the machinery of appeal set up in the section is not intended to oust the jurisdiction of the Civil Courts and that the word " final " means only final so far as the process of appeal to what I may call the executive authority is concerned. The argument is that the right of a hereditary archaka to his office is a common law right and that the jurisdiction of Civil Courts to protect that right cannot be taken away except by express words or by words of which the necessary implication is that the jurisdiction of the Court has been removed. The case law on this subject has been summarised by VARADACHARIAR J. in *Kamaraja Pandiya Naicker v. The Secretary of State for India in Council*(1). The principles underlying the cases have been stated in terms which I would respectfully adopt. The learned Judge points out that a statute may attach finality to particular orders in the sense of precluding a further appeal to the statutory authorities ; whether it was intended to go further and oust the jurisdiction of the Civil Courts as well, will depend not upon words of that kind but upon the general scheme of the particular legislation. He goes on to point out that the ordinary rule is that where a person's liberty or property is interfered with under colour of statutory powers, he has a cause of action which the Civil Courts are bound to entertain unless a bar to such entertainment has been enacted expressly or at least by necessary implication. Applying these principles to the present case, what we have is a claim to be restored to a

(1) (1934) 69 M.L.J. 695.

RAMANATHA v. ARUNACHALAM. WADSWORTH J. common law office from which the plaintiff has been removed in the exercise of powers created by a particular statute, which statute prescribes two separate appeals to authorities specially constituted for the purpose and superior to the original disciplinary authority. *Prima facie* it would appear that there is a statutory limitation to a common law right which right has been restricted in its working by the procedure specially laid down for remedying any wrongs which may have been done to the holder of a common law right. It has been further contended on behalf of the respondent that not only is there a clear provision for a machinery for remedying the wrong of which the plaintiff complains but that there is also an express provision in the Act indicating the intention of the Legislature that Civil Courts should not deal with wrongs of the kind now under consideration. Reference is made to the last clause of section 73. Section 73 has obviously been drafted to take the place, so far as temples under the control of the Religious Endowments Board are concerned, of section 92 of the Civil Procedure Code. There is, however, a significant change in the wording of the final clause which restricts the jurisdiction of Civil Courts in suits of this nature in comparison with the corresponding provision of section 92, Civil Procedure Code. Clause (2) of section 92 clearly prohibits the filing of suits other than those instituted in the manner laid down in sub-section (1) only in so far as such suits claim reliefs specified in sub-section (1). Clause (3) of section 73 of the Religious Endowments Act, however, does not restrict the prohibition of suits in Civil Courts to suits claiming those reliefs specified in sub-section (1) of that section but it lays down in much more general language " no suit in respect of such administration or management shall be instituted

RAMANATHA except as provided by this Act." The words "such  
 ARUNACHALAM. administration or management" have been inter-  
 WADSWORTH J. preted by a Bench of this Court as referring back  
 to the previous clause and meaning any suit in respect  
 of the administration or management of a religious  
 endowment; *Singam Aiyangar v. Kasturiranga  
 Aiyangar*(1).

Undoubtedly a simple suit by a hereditary archaka  
 to establish his right to succeed to the office would  
 not be a suit in respect of the administration or manage-  
 ment of a religious endowment. What has happened  
 is that the archaka has been dismissed by the trustee  
 in the exercise of his powers of administration and  
 management conferred upon him under the Act. I am  
 unable to hold that a suit which is in effect a suit to  
 set aside a dismissal by a trustee in the exercise of  
 these powers is not a suit in respect of the administra-  
 tion or management of the religious endowment.  
 I am therefore of opinion that section 73 of the Act  
 is a clear indication that the provisions of section 43  
 setting up a special machinery of appeal and conferring  
 finality on the decisions in appeals by dismissed office-  
 holders was intended to oust the jurisdiction of Civil  
 Courts to question the propriety of an order of dis-  
 missal passed under that section and communicated  
 to the person dismissed. A special remedy is created  
 by the statute for any wrong which may have been  
 caused in the exercise of disciplinary powers conferred  
 by the statute and it is to my mind clearly not in  
 accordance with the scheme of the Act to prosecute  
 a pre-existing remedy provided by the Civil Courts  
 and to ignore the statutory remedy laid down in the  
 Act.

In the result therefore the appeal is dismissed  
 with costs.

V.V.C.

(1) (1937) 2 M.L.J. 931, 934.

## APPELLATE CRIMINAL.

*Before Sir Lionel Leach, Chief Justice, and Mr. Justice  
 Abdur Rahman.*

IN RE SWAMI ARUNAGIRINATHA (PRISONER),  
 APPELLANT.\*

1938,  
 August 30.

*Criminal Law Amendment Act (XXIII of 1932)—Act and  
 section 7 thereof, if in force in Madras Presidency—Crim-  
 inal Law Amendment Act of 1935—Scope and effect of—  
 Repeal of Act of 1935 by Repealing and Amending Act XX  
 of 1937—Effect of, if repeal of Act of 1932—Sec. 4 of Act  
 XX of 1937 and sec. 6-A inserted in General Clauses Act  
 of 1898 by Act XIX of 1936—Effect of—Notification under  
 Act of 1932 extending sec. 7 thereof to Madras Presidency  
 but no re-notification to that effect after Act of 1935—Effect  
 of—Sec. 7, if not in force in Madras Presidency by  
 reason of absence of re-notification—Picketing of house of  
 public servant—Punishable under sec. 7 (1) (a) of Act of  
 1932, if—Abetment of offence under sec. 7 (1) (a) of Act of  
 1932, if there can be—Act of 1932 if a "special law"  
 within meaning of sec. 41 of Indian Penal Code (Act XLV  
 of 1860)—Criminal Law Amendment Act of 1935—Validity  
 of—Failure of Governor-General to take steps contemplated  
 by first clause of sub-sec. 2 of sec. 67-B of Government  
 of India Act of 1915, though there was sufficient time for  
 doing so—Effect.*

The Criminal Law Amendment Act, 1932, as it originally  
 stood, was to remain in force for three years from its commence-  
 ment, viz., 19th December 1932. That Act was amended by  
 the Criminal Law Amendment Act, 1935. By the Act of 1935  
 certain sections of the Act of 1932 were repealed, but section 7  
 thereof was not repealed. Section 1 (3) of the Act of 1932,  
 which limited the duration of that Act to three years, was  
 repealed. The Act of 1935 was repealed by Act XX of 1937,  
 known as the Repealing and Amending Act, 1937, but there  
 was express provision in section 4 of the Act of 1937 conti-  
 nuing the Criminal Law Amendment Act of 1932, as amended  
 by the Act of 1935. On a contention being raised that,

Criminal Appeal No. 319 of 1938.

ARUNAGIRI-  
NATHA,  
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inasmuch as the Act of 1937 repealed the Act of 1935, the whole of the Act of 1932 had disappeared,

*Held* that the Act of 1932 had not been repealed in its entirety. Section 4 of the Repealing and Amending Act XX of 1937 and section 6-A inserted in the General Clauses Act by Act XIX of 1936 leave the Criminal Law Amendment Act of 1932, so far as section 7 is concerned, intact.

A Bill to amend the Criminal Law Amendment Act of 1932 was rejected by the Legislative Assembly but was passed in its entirety by the Council of State on 28th September 1935. On 4th October 1935 it was certified by the Governor-General under the powers conferred upon him by section 67-B of the Government of India Act and became an Act of the Indian Legislature. On 17th December 1935 the Governor-General, in exercise of the powers conferred upon him by the proviso to sub-section 2 of section 67-B of the Government of India Act, directed that the Act should come into operation forthwith. It was contended that the Act was invalid because the Governor-General had not taken the steps contemplated by the first clause of sub-section 2 of section 67-B of the Government of India Act though there was sufficient time for doing so. It was not suggested that His Majesty in Council had disallowed the Act.

*Held* that the Act was not invalid on the ground suggested.

All that was required in the circumstances of the case was that the Governor-General should exercise his powers under the proviso to sub-section 2 of section 67-B of the Government of India Act. The question whether those powers should be exercised was a matter for the Governor-General alone to decide. He did exercise his powers and, having exercised them, the enactment became a lawful Act.

*Bhagat Singh v. The King-Emperor*(1) referred to

*Per* ABDUR RAHMAN J.—Section 67-B of the Government of India Act does not lay down that a declaration by the Governor-General in regard to the state of emergency must necessarily synchronise with the date on which the Act was certified or made by him.

The Criminal Law Amendment Act, 1932, as it originally stood, was to remain in force for three years from its commencement, viz., 19th December 1932. Section 1 (4) of the Act

(1) (1931) I.L.R. 12 Lah. 280 (P.C.).

ARUNAGIRI-  
NATHA,  
In re.

provided that the whole of the Act, except sections 4 and 7, should come into force at once and the Local Government might, by notification in the local official Gazette, direct that section 4 or section 7 should come into force in any area on such date as might be specified in the notification. On 26th December 1932 the Government of Madras issued a notification directing that section 7 should come into force throughout the Presidency as from 27th December 1932, but as an error had crept into the notification the necessary correction was made on 10th January 1933. The Act of 1932 was amended by an Act of 1935 whereby, *inter alia*, section 1 (3) of the Act of 1932 which limited the duration of that Act to three years was repealed, but section 7 of the Act was not repealed. There was no re-notification by the Government of Madras extending section 7 to this Presidency after the Act of 1932 had been amended to give permanent effect to section 7. It was therefore contended that the Act as it now stands had not been validly notified.

*Held*: The notification which was issued by the Government of Madras applied section 7, and the Criminal Law Amendment Act, 1932, so far as section 7 is concerned, is still on the statute book. There was therefore no necessity for re-notification and section 7 applies to this Province.

*Held further*: The Criminal Law Amendment Act, 1932, applies to the picketing of the house of a public servant.

There is no indication within the Act that a public servant whose house is picketed cannot claim the benefit of section 7 of the Act.

*Held also*: The Criminal Law Amendment Act, 1932, is a "special law" within the meaning of section 41 of the Indian Penal Code and there can be an abetment of an offence under section 7 (1) (a) of the Criminal Law Amendment Act, 1932.

The special laws contemplated in sections 40 and 41 of the Indian Penal Code are laws making punishable certain things which are not already punishable under the Penal Code.

**APPEAL against the sentence of the Third Presidency Magistrate of the Court of the Presidency Magistrates, Egmore, Madras, in Calendar Case No. 972 of 1938.**

*S. Muthiah Mudaliar* (with him, *S. G. Rangaramanujam*) for appellant.—The Criminal Law Amendment Act (XXIII of

ARUNAGIRI-  
NATHA,  
*In re.*

1932) was not in force on the dates of the incidents, the subject of the charges in the present case. As it originally stood that Act was to remain in force for three years from its commencement, which was 19th December 1932; see section 1, clause 3, of the Act. In the usual course, therefore, the Act would have expired on 19th December 1935. In September 1935 a Bill to continue the Act of 1932, called the Criminal Law Amendment Bill, was introduced in the Central Legislative Assembly.

[*Advocate-General.*—It is not quite accurate to say that the Bill was to continue the Act of 1932. It was really for the purpose of repealing the three years' limit fixed by the Act of 1932 as the period during which it was to be in force.]

The whole controversy between us is that I say that the Bill was a continuing Bill while the Advocate-General would say that it is a repealing Bill. The Bill was rejected *in toto* by the Assembly. It was, however, passed in its entirety by the Council of State and on 4th October 1935 it was certified by the Governor-General under the powers conferred upon him by section 67-B of the Government of India Act, 1919, and thereupon it became an Act of the Indian Legislature. On 17th December 1935 the Governor-General directed that the Act, called the Criminal Law Amendment Act, 1935, should come into operation forthwith. The Act of 1935 was, however, repealed by Act XX of 1937, known as the Repealing and Amending Act, 1937. The argument on behalf of the appellant is that the Act of 1935 which had continued the Act of 1932 having itself been repealed by the Act of 1937, the original Act, Act XXIII of 1932, remains and its operation being confined by section 1 (3) to three years it was not in force in 1938 on the dates of the occurrences the subject of the charges against the appellant.

[THE CHIEF JUSTICE.—So far as the Act of 1935 is concerned it merely removed the time limit of three years under section 1 (3) of the Act of 1932, with the result that the Act of 1932 was made an Act for all time. Section 4 of the Act of 1937 makes it clear that the Act of 1932 was left intact.]

[*Advocate-General.*—The preamble also makes it clear and section 6-A which has been added to the General clauses Act of 1898 by Act XIX of 1936 makes the position still clearer.]

ARUNAGIRI-  
NATHA,  
*In re.*

The object of the Act of 1935 was to modify the Act of 1932.

[THE CHIEF JUSTICE.—If the Act of 1937 merely repealed the Act of 1935 your argument would have force, viz., that the Act of 1932 remains in force as originally enacted. But the Act of 1937 states expressly that the repeal is not to affect amendments made by the Act of 1935.]

[Section 4 of the Act of 1937 was referred to.] The present case is not a case of application, incorporation or reference contemplated by that section.

[THE CHIEF JUSTICE.—The Act of 1935 was applied to the Act of 1932 by taking away the three years' limit.]

The Act of 1935 has not been applied in the Act of 1932. An Act can be applied only in another later Act. The word "applied" cannot be taken to imply, include or contemplate the alteration of an earlier enactment by the operation of a later one. The distinction is between applied in and applied to. Similarly the word "incorporate" means the insertion in or combining with one enactment of certain provisions of another enactment. There cannot be said to be any incorporation when certain existing provisions of an Act have to be deleted.

The next point is that the Criminal Law Amendment Act of 1935 was invalid because the Governor-General did not take the steps contemplated by the first clause of sub-section 2 of section 67-B of the Government of India Act. The Bill to amend the Criminal Law Amendment Act of 1932 was, as already stated, rejected by the Assembly but passed by the Council of State in September 1935. On 4th October 1935 it was certified by the Governor-General under the powers conferred upon him by section 67-B of the Government of India Act. On 17th December 1935 the Governor-General, in exercise of the powers conferred upon him by the proviso to sub-section 2 of the Government of India Act, directed that the Act should come into operation forthwith. The Governor-General did not apply the proviso for nearly two months. He could in the interval have sent the Bill to be laid before the Houses of Parliament. It follows that in his opinion the emergency did not arise till 17th December 1935.

[THE CHIEF JUSTICE.—The Governor-General had the power of applying the proviso on 17th December 1935. We do not know what the cause of the delay was.]

ARUNAGIRI-  
NATHA,  
In re.

The Act having been passed on 4th October 1935 there was ample interval during which it could have been laid before the Houses of Parliament. The extraordinary power of the Governor-General to act under the proviso can be exercised only in cases where it is impracticable to obtain the assent of the Houses of Parliament.

[*Advocate-General.*—In *Bhagat Singh v. The King-Emperor*(1) the Privy Council has laid down that the question of emergency is one for the Governor-General to decide and he is the sole judge in such matters.]

The next point is that in any event the Criminal Law Amendment Act of 1932 is not in force in this Province. On 26th December 1932 the Government of Madras issued a notification directing that section 7 of the Act of 1932 should come into force throughout the Presidency as from 27th December 1932. As the Act of 1932 was only intended to be in operation for a period of three years at the time of the issue of the said notification the notification could have intended to extend the Act to this Province only for the three years prescribed by section 1 (3) of the Act of 1932. The Act of 1935 removed the time limit and made the Act of 1932 a perpetual Act. From that it does not follow that it was also intended that the Act should be extended to this Province for a further period or for ever. A fresh notification after the Act of 1932 had been amended to give permanent effect to section 7 was necessary. There being no such notification the Act of 1932 was not in force in this Presidency on the dates of the incidents in question.

The next point is that section 7 of the Criminal Law Amendment Act of 1932 is inapplicable to the acts with which the appellant is charged. The section is only concerned with cases of acts done to prevent a private person from carrying on his ordinary avocation in life. The explanation to the section makes this clear.

[THE CHIEF JUSTICE.—The section was intended to prevent what is colloquially known as “picketing”.]

The Premier by himself has no right to do anything.

[ABDUR RAHMAN J.—He has the right to move the Legislature.]

(1) (1931) I.L.R. 12 Lah. 280 (P.C.).

ARUNAGIRI-  
NATHA,  
In re.

The section has in view the private and personal rights of a person and not the rights of a person as a public official or as a member of the Government. In the case of the Premier the right contemplated by the section is his private or personal right and not his right as Premier.

[THE CHIEF JUSTICE.—Has not the Premier a right as a private person to influence the Government to take his view?]

He has. Sections 5, 6, 2, 3, etc., deal with Government servants and Government. Other sections deal with private individuals as such. Section 7 is not to be used with a view to suppress attempts to make Government change its policy. Picketing is an extreme form of persuasion. That is not the offence contemplated by section 7. Private citizens and not public servants are within the protection of that section.

Lastly there can be no abetment of an offence under section 7 (1) (a) of the Criminal Law Amendment Act of 1932. What is described as an offence under section 7 of the Act of 1932 is not an offence under section 40 of the Indian Penal Code which defines an offence. “Offence” under that section denotes a thing made punishable under the Penal Code or under any “special” or “local” law as defined in the Code. Section 42 of the Penal Code defines a “local Law” as a law applicable only to a particular part of British India. The Criminal Law Amendment Act of 1932 is applicable to the whole of British India and is therefore not a “local Law” as defined in section 42 of the Penal Code. Section 41 of the Penal Code defines a “special law” as being a law applicable to a particular subject. The Act of 1932 is not a “special law” because it does not deal with any particular subject. There is no definition of the word “subject” but the word was intended to mean and apply to subjects like those dealt with by the Police Act, the Registration Act and the Excise Act. [Reference was made to *Emperor v. Joti Prasad*(1) and to *Ratnalal’s Law of Crimes*, 14th Edn., page 78.]

[THE CHIEF JUSTICE.—Is the Cattle Trespass Act a special law or not?]

It is not.

[THE CHIEF JUSTICE.—If the Cattle Trespass Act is a special law, then the Criminal Law Amendment Act of 1932 is a special law dealing with a special subject, “picketing.”]

(1) A.I.R. 1932 All. 18.

ARUNAGIRI-  
NATHA,  
In re.

Ratnalal's definition, it is submitted, is not correct.

[THE CHIEF JUSTICE.—If the Criminal Law Amendment Act of 1932 had been headed, "An Act to prevent the offence of picketing", would it have been a special law or not?]

No. There are instances of breaches of law being punishable without their amounting to offences under the Penal Code or under special or local laws. There are also offences the abetment of which is not punishable.

[THE CHIEF JUSTICE.—The whole question is whether the Act of 1932 is a special law or not.]

Counsel addressed arguments also on the merits of the appeal.

*Advocate-General* [Sir A. Krishnaswami Ayyar, with him *Crown Prosecutor* (T. S. Anantaraman)] for the Crown :—

[THE CHIEF JUSTICE.—We do not want to hear you either on the facts or on the law except as to the question of abetment.]

The Criminal Law Amendment Act XIV of 1908 was the first Act which made a special species of unlawful association an offence. Some of those offences are repeated in the Criminal Law Amendment Act of 1932. [Reference was made to the preamble of the Act of 1932.]

[THE CHIEF JUSTICE.—It amends the Act of 1908 and not the Penal Code.]

A special class of offences is created by this Criminal Law Amendment Act.

[ABDUR RAHMAN J.—Section 3 of the Act shows that whenever an abetment is intended to be made punishable under this Act special provision is made therefor.]

Abetment is itself made a substantive offence. The sections of the Penal Code relating to public servants would show that there were a number of acts with reference to public servants which were not made offences. [Reference was made to Chapter X of the Penal Code.] The Act of 1932 provided a special class of offences in such cases. The Legislature made certain acts and omissions, which could not be brought within the Penal Code, offences. The Penal Code is the general criminal law of India. But the Penal Code could not, and did not, foresee certain acts with reference to public servants and make them offences. The Act of 1932 provides for such cases. A special law means a law relating

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to a particular subject. There is no reason why the Criminal Law Amendment Act of 1932 should not be said to be a special law in that sense. The Police Act, etc., dealing with petty offences, the other side concedes, are taken in by the expression special law. There is no reason why the Act of 1932 which creates serious offences should not be regarded as a special law in that sense.

[THE CHIEF JUSTICE.—You say special law means a law dealing with a special subject.]

Yes. If, as the other side concedes, abetment of petty offences under the Police Act, etc., come under section 117 of the Penal Code, there is no reason whatever why abetments of more serious offences created by the Act of 1932 should not come under section 117.

*Cur. adv. vult.*

## JUDGMENT.

LEACH C.J.—The appellant in this case has been convicted on three charges under section 7 (1) (a) of the Criminal Law Amendment Act, 1932, read with section 117 of the Indian Penal Code, and has been sentenced on each charge to one year's rigorous imprisonment, the sentences to run concurrently. Section 7 (1) (a) reads as follows :—

"Whoever with intent to cause any person to abstain from doing or to do any act which such person has a right to do or to abstain from doing, obstructs or uses violence to or intimidates such person or any member of his family or person in his employ, or loiters at or near a place where such person or member or employed person resides or works or carries on business or happens to be, or persistently follows him from place to place, or interferes with any property owned or used by him or deprives him of or hinders him in the use thereof, shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both."

Therefore a person who with intent to cause any person to abstain from doing or to do any act which he has a right to do or to abstain from doing, loiters

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near that person's residence is guilty of an offence and renders himself liable to punishment for a term which may extend to six months or with fine which may extend to five hundred rupees or with both imprisonment and fine. Section 117 of the Indian Penal Code provides that whoever abets the commission of an offence by the public generally or by any number or class of persons exceeding ten, shall be punished with imprisonment for a term which may extend to three years or with fine or with both. The Criminal Law Amendment Act, 1932, added to the list of crimes what is now known as "picketing." It is not necessary to inquire into the circumstances which led to this addition. The addition was made, and that suffices so far as the Court is concerned. Nor is the Court called upon to inquire into the policy of applying this Act. All that the Court has to consider is the section and the facts which the prosecution says constitute the offence described in the section. If the proved facts constitute an offence within the meaning of the section the Court must apply it and it cannot enter upon a discussion whether other means exist of vindicating the law. With these preliminary observations I will turn to certain of the facts which have been proved.

On 21st April 1938 the Government of Madras issued an order in these terms:

"The Government have decided that Hindustani should be taught to all pupils in Forms I to III of secondary schools. They direct that this decision be given effect to in the school year 1938-39 in the one hundred and twenty-five secondary schools mentioned in the list submitted by the Director of Public Instruction with his letter read above.

2. The Director is requested to circularize the schools concerned and address Government separately on the question of the employment of a Hindustani teacher in each of these

schools and also on the payment of provincial grants for the purpose to non-Government schools."

It will be observed that the language referred to in this order is Hindustani, but in the agitation which followed the issue of this order the language has always been referred to as Hindi. It is not necessary to dwell on the points of difference between Hindustani and Hindi. This order aroused a great deal of resentment in parts of the Province and a league called the Anti-Hindi Propaganda League was formed. Public meetings were called, volunteers were enrolled to resist the introduction of Hindi in the schools and appeals were made for subscriptions. The headquarters of the league were established in Madras and arrangements were made for the boarding and lodging of the volunteers within the city. Three public meetings were addressed by the appellant who took a prominent part in the movement. On 11th June 1938 one Sivananda Adigal described as "the dictator" of the league was arrested and his place was taken by the appellant, who led the agitators in Madras until his own arrest on 21st June 1938. When the appellant was in charge of the movement he was also referred to as "the dictator." The appellant addressed three public meetings in Madras, one on 10th June 1938 in the Cathedral Road, another on 13th June 1938 in the Nattu Pillaiyar Kovil Street, George Town, and the third on 14th June 1938 in Vepery. The case for the prosecution is that at these meetings the appellant incited his hearers to picket the house of the Hon'ble Mr. Rajagopalachari, the Premier of Madras, with a view to compelling him to take steps to withdraw the order which the Government had issued with regard to the teaching of Hindi in the schools of the Province. From 1st June to 29th June 1938 extensive picketing

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took place in front of the Premier's house. As soon as one band of picketers was dispersed another took its place and the picketing was certainly more than peaceful.

On the arrest of the appellant charges were framed under section 7 (1) (a) of the Criminal Law Amendment Act, 1932. The first charge was that the appellant in furtherance of the Anti-Hindi Propaganda movement on 10th June 1938 abetted the commission of the offence under section 7 (1) (a) of the Criminal Law Amendment Act, 1932, by Tamilians numbering more than ten persons by inciting them by means of speeches made to volunteer their services to loiter in front of the Premier's house, No. 48, Bazulullah Road, Mambalam, and picket the place and offer satyagraha in order to cause the Premier to cause the cancellation of the order of Government introducing Hindi in schools in this Presidency which the Premier had a right to abstain from doing and thereby committed an offence punishable under section 117 of the Indian Penal Code. The two other charges were similarly worded and had reference to the other two meetings. After a lengthy inquiry by the Third Presidency Magistrate the appellant was found guilty and the sentences already referred to were imposed upon him.

In the Court below and in this Court a number of legal arguments were advanced on behalf of the appellant. In this Court the legal arguments were confined to these:—

(i) The Criminal Law Amendment Act, 1932, was no longer in force, it having been repealed by Act XX of 1937, known as the Repealing and Amending Act, 1937; (ii) the Criminal Law Amendment Act, 1935, was invalid because the Governor-General had not taken the steps contemplated by the first

clause of sub-section (2) of section 67-B of the Government of India Act; (iii) the extension of the Criminal Law Amendment Act, 1932, to the Province of Madras had not been properly notified and even if it had been so notified the notification had lost its validity; (iv) even if section 7 (1) (a) of the Criminal Law Amendment Act, 1932, is in force the Act does not apply to the picketing of the house of a public servant; and (v) there can be no abetment of an offence under section 7 (1) (a) of the Criminal Law Amendment Act, 1932.

The Criminal Law Amendment Act, 1932, was passed by the Indian Legislature and was made to extend to the whole of British India, including British Baluchistan and the Sonthal Parganas. As it originally stood the Act was to remain in force for three years from its commencement, which was 19th December 1932. Section 1 (4) provided that the whole of the Act, except section 4 and section 7, should come into force at once and the Local Government might by notification in the local official Gazette, direct that section 4 or section 7 should come into force in any area on such date as might be specified in the notification. On 26th December 1932 the Government of Madras issued a notification directing that section 7 should come into force throughout the Presidency as from 27th December 1932, but as an error had crept into the notification the necessary correction was made on 10th January 1933. In 1935 a Bill which afterwards was enacted as the Criminal Law Amendment Act, 1935, was introduced into the Indian Legislature. Certain sections of the Criminal Law Amendment Act, 1932, were repealed, but section 7 was not repealed. Section 1 (3) which limited the duration of the Act to three years was repealed. The Bill was introduced into the Assembly on 2nd September 1935 and was

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rejected on 12th September 1935. It was, however, passed in its entirety by the Council of State on 28th September 1935, and on 4th October 1935 it was certified by the Governor-General under the powers conferred upon him by section 67-B of the Government of India Act. By Act XX of 1937, the Act of 1935 was repealed but there was express provision continuing the Criminal Law Amendment Act, 1932, as amended by the Act of 1935. By Act XIX of 1936 the General Clauses Act had been amended and it also expressly continued in force the amendment of the Act of 1932. I will refer to the relevant provisions of the Act of 1937 and the Act of 1936 in more detail in a moment.

With regard to the first contention advanced on behalf of the appellant, the Criminal Law Amendment Act, 1932, was validly amended by the Act of 1935 and this has been accepted, but it is said that inasmuch as the Act of 1937 repealed the Act of 1935 the whole of the Act of 1932 has disappeared. Section 4 of the Act of 1937, however, stated:

"The repeal by this Act of any enactment shall not affect any Act or Regulation in which such enactment has been applied, incorporated or referred to; and this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand or any indemnity already granted, or the proof of any past act or thing; nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised or derived by, in or from any enactment hereby repealed."

Act XIX of 1936 inserted in the General Clauses Act, section 6-A, which reads as follows:

"Where any Act of the Governor-General in Council or Regulation made after the commencement of this Act repeals any enactment by which the text of any Act of the Governor-General in Council or Regulation was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal."

In the face of section 4 of the Act of 1937 and of section 6-A of the Act of 1936 it is not open to the appellant to contend that the Criminal Law Amendment Act, 1932, has been repealed in its entirety. These sections leave the Criminal Law Amendment Act of 1932 so far as section 7 is concerned, intact. This disposes of the first point.

It is said that the Criminal Law Amendment Act, 1935, is nevertheless invalid because the Governor-General did not follow the procedure contemplated by section 67-B (2) of the Government of India Act. By sub-section (1) of that section where either Chamber of the Indian Legislature refuses leave to introduce, or fails to pass in a form recommended by the Governor-General, any Bill, the Governor-General may certify that the passage of the Bill is essential for the safety, tranquillity, or interest of British India or part thereof and thereupon if the Bill has already been passed by the other Chamber, the Bill shall on signature by the Governor-General, notwithstanding that it has not been consented to by both Chambers, forthwith become an Act of the Indian Legislature in the form of the Bill as originally introduced or proposed to be introduced in the Indian Legislature or (as the case may be) in the form recommended by the Governor-General; and if the Bill has not already been so passed, the Bill shall be laid before the other Chamber, and if consented to by

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that Chamber in the form recommended by the Governor-General, shall become an Act on the signification of the Governor-General's assent, or if not so consented to, shall on signature by the Governor-General become an Act. Sub-section (2) provides that every such Act shall be expressed to be made by the Governor-General, and shall, as soon as practicable after being made, be laid before both Houses of Parliament, and shall not have effect until it has received His Majesty's assent, and shall not be presented for His Majesty's assent until copies thereof have been laid before each House of Parliament for not less than eight days on which that House has sat; and upon the signification of such assent by His Majesty in Council, and the notification thereof by the Governor-General, the Act shall have the same force and effect as an Act passed by the Indian Legislature and duly assented to. The learned Advocate for the appellant says that inasmuch as the Governor-General did not cause the Act to be laid before Parliament it was not lawfully passed, but this argument ignores the proviso to sub-section (2). The proviso is to the effect that where in the opinion of the Governor-General a state of emergency exists which justifies such action, the Governor-General may direct that any such Act shall come into operation forthwith, and thereupon the Act shall have force and effect subject, however, to disallowance by His Majesty in Council. Now it is not suggested that His Majesty in Council has disallowed the Act referred to and it is a fact that the Governor-General on 17th December 1935 in exercise of the powers conferred upon him by the proviso directed that the Act should come into operation forthwith. All that is required in such circumstances is that the Governor-General shall exercise his powers. The question whether those powers shall be exercised is a matter for the Governor-General

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alone to decide. In *Bhagat Singh v. The King-Emperor*(1) the Privy Council had to consider an Ordinance made by the Governor-General under the Government of India Act, 1915, section 72, which authorizes him in cases of emergency to promulgate Ordinances for the peace and good Government of British India. The Judicial Committee held that it could not be disputed that an emergency existed and that the Ordinance was one for the peace and good Government of British India. The Governor-General was the sole judge in such matters and was not bound to give any reasons for promulgating such Ordinances. The same principles apply. The Governor-General did exercise his powers and having exercised them the enactment became a lawful Act.

The learned Advocate for the appellant contends that as the Criminal Law Amendment Act, 1932, was only intended to be in operation for a period of three years at the time of the issue of the notification by the Government of Madras extending section 7 to this Presidency it was of a temporary nature and the notification must also be deemed to be of a temporary nature. He says that as there was no re-notification after the Act had been amended to give permanent effect to section 7, the Act as it now stands has not been validly notified. The notification which was issued by the Government of Madras applied section 7, and the Criminal Law Amendment Act, 1932, so far as section 7 is concerned, is still on the statute book. I hold that there was no necessity for re-notification and that section 7 applies to this Province.

This brings me to the fourth contention of the learned Advocate for the appellant. As I have indicated,

(1) (1931) I.L.R. 12 Lah. 280 (P.C.).

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this is to the effect that the Act cannot be deemed to apply to picketing of a public servant, but must be deemed to apply only to picketing of private individuals. It was conceded that for the purposes of deciding the extent of the application of section 7 only the Act itself could be examined. There is no indication within the Act that a public servant whose house is picketed cannot claim the benefit of the section. All that the Act requires before a person is convicted under section 7 is that the offender shall loiter at or near the place where the person resides or works or carries on business or happens to be, with intent to cause that person to abstain from doing or to do any act which he has a right to do or to abstain from doing. There is an explanation to the section which states that encouragement of indigenous industries or advocacy of temperance, without the commission of any of the acts prohibited by the section, is not an offence under the section, but the explanation stops there. Because a person holds a public office the law does not allow him to be molested at will even for political purposes. He is as much entitled to protection as anybody else. I can see no justification whatever for the plea that the offence contemplated by section 7 (1) (a) of the Criminal Law Amendment Act, 1932, when committed in respect of a public official, whether high or low, should go unpunished.

With regard to the contention that there can be no abetment of an offence under section 7 (1) (a), section 109 of the Indian Penal Code provides that whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by the Code for the punishment of such abetment, be punished with the punishment provided for the offence, and, as I have already pointed

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out, section 117 provides for additional punishment where a person abets the commission of an offence by the public generally or by any number or class of persons exceeding ten, which was the case here. Section 40 of the Penal Code provides that the word "offence" denotes a thing made punishable under the Code or under any "special" or "local" law as defined in the Code. Section 41 defines a "special law" as being a law applicable to a particular subject, and section 42 defines a "local law" as a law applicable only to a particular part of British India. It is admitted that if the Criminal Law Amendment Act, 1932, is to be deemed to be a special law within the meaning of section 41 then there can be an abetment of an offence under section 7 (1) (a) of the Criminal Law Amendment Act, 1932. I am in agreement with the opinion expressed by the learned authors of Ratanlal's Law of Crimes, 14th Edition, page 78, that the special laws contemplated in sections 40 and 41 are laws such as the Excise, Opium, and Cattle Trespass Acts creating fresh offences, that is, laws making punishable certain things which are not already punishable under the Penal Code. There, it is pointed out that the Whipping Act is not a special law in this sense, but merely provides a supplementary or alternative form of punishment for offences which are already punishable primarily under the Penal Code. The Act of 1932 deals with picketing and makes picketing in certain circumstances an offence. I hold that the appellant was lawfully charged with abetment.

Coming now to the merits of the case it has been proved that at the public meeting of 10th June 1938 the appellant in the course of his speech observed :

"If you were true heroes, all of you should be prepared to offer Satyagraha in front of the house of the Prime Minister

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from to-morrow. Soon upon your listening to this speech, you should come forward and have your names entered," and later on said:

"Now amongst these, viz., Samam, Bedam, Danam and Dandam (which have been translated as conciliatory measures, sowing dissension, gifts, and punishment) we have come to the stage of Dandam (punishment). If you do not now enlist yourselves in this war (agitation) we will not again turn our eyes towards your face."

At the second meeting, that is, the meeting of 14th June 1938, the appellant said:

"If you are true Tamilians at least 100 of you should come and offer Satyagraha. We are now sending men in batches of two. The suffering which the policeman undergoes in the hot sun for us cannot be described. He asks whether all of us could not come in a body. They said, 'If you do not come in a body to-morrow, we will beat you with this margosa stick.' In this war, you should sacrifice your life, or should give away your property. All mothers should cause their sons to take part in this war and go to jail. We have not now committed any offence. We have not committed murder. Therefore you should all come forward to offer Satyagraha."

At the third meeting the appellant said:

"If you are all true Tamilians young men should come in hundreds to-morrow and offer Satyagraha in front of his house and go to prison . . . You should assist us with your body, wealth and labour. Those who are willing to come as volunteers may raise their hands. You may give your names. You may give money. I finish by saying that by thus assisting us, you may save the honour of the Tamil Nad and the Tamil language . . . My heart burns to see you remaining in this manner. I request you to offer assistance."

These speeches were taken down in shorthand and the shorthand writers were not cross-examined as to their accuracy. No evidence was led with a view to showing that the statements had not been made. In fact the learned Counsel for the appellant made no attempt to dispute the accuracy of this evidence. It has also been proved that these meetings were attended

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by large numbers of people and there can be no doubt that the appellant did incite his hearers to loiter in front of the house of the Premier with a view to compelling him to change an order which the Government had passed. The Premier was entitled to say that he would not move to change the order. Rightly or wrongly the order embodied the policy of the Government and he could not be compelled to change it by the means adopted by the appellant and his supporters. The evidence discloses that for nearly a month picketers in considerable numbers assembled before the Premier's house and loitered there, within the meaning of the section, for the purpose of compelling him to do something which he had the right to abstain from doing. The action of the people who assembled in front of the Premier's house was not confined to loitering, but for purposes of this section we do not require to go beyond loitering. In my opinion the offences with which the appellant has been charged have been fully proved, and he has been rightly convicted by the trial Magistrate. He abetted an offence which falls within the four corners of the section and he has rendered himself liable to punishment.

It is said that the punishment awarded by the trial Magistrate is excessive and should be reduced. Inasmuch as these constitute first offences of the appellant and can collectively be described as a "first" offence and inasmuch as the circumstances are unusual we consider that the sentence of twelve months' rigorous imprisonment is not called for. We consider that the ends of justice will be met if the sentence is reduced from one of twelve months' rigorous imprisonment to one of four months' rigorous imprisonment. This will apply to each charge and the sentences will run concurrently.

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ABDUR RAHMAN J.—I agree with the conclusion arrived at by my Lord the Chief Justice and should like to make a few observations in regard to the legal points raised by the learned Counsel for the appellant.

The Criminal Law Amendment Act (XXIII of 1932) came into operation on 19th December 1932. It was a temporary measure and section 1 (3) of the Act had provided that it would be kept in force for a period of three years. The whole of the Act was extended to British India and was with the exception of sections 4 and 7 brought into force at once; but these sections were to be brought into effect by the various Local Governments separately as and when they decided to apply them to any area within their respective jurisdictions. The Government of Madras directed section 7 to come into force in the whole of this Presidency on 27th December 1932 and a notification to that effect was duly published in the *Fort St. George Gazette* on that date. An error had crept in this notification and this was rectified in the notification, dated 4th January 1933, which was duly published in the Gazette on 10th January 1933.

A Bill proposing a repeal of section 1 (3) of the Act (XXIII of 1932) was introduced in the Central Legislative Assembly in September 1935. The object of that Bill was to place the Criminal Law Amendment Act permanently on the statute book of India. It was rejected by the Legislative Assembly but was passed by the Council of State. Section 67-B of the Government of India Act, 1915, had provided that if either Chamber of the Indian Legislature failed to pass a Bill in a form recommended by the Governor-General, he might certify that the passage of the Bill was essential for the safety, tranquillity or interests of British India and the Bill, if it had already been passed by the other Chamber,

would when signed by him become an Act of the Indian Legislature. Since the Bill was, as stated above, rejected by the Legislative Assembly and passed by the Upper Chamber, the Governor-General exercised his authority and certified the Bill and when signed by him on 4th October 1935 it became an Act of the Indian Legislature.

Section 67-B (2) of the Government of India Act, 1915, had also provided that every such Act should be expressed to have been made by the Governor-General and should, as soon as practicable after it had been so made, be laid before both Houses of Parliament for a period of at least eight days on which each House was sitting and then presented for His Majesty's assent. Upon the signification of such assent by His Majesty in Council and the notification thereof by the Governor-General the Act was to come into operation and was to have the same force and effect as an Act passed by the Indian Legislature.

A proviso to this sub-section authorized the Governor-General to direct that any Act made by him was to come into operation immediately if, in his opinion, a state of emergency existed which justified such an action. Acting under this sub-section His Excellency the Governor-General declared that an emergency existed which justified his action and directed the Act to come into operation immediately. The Governor-General gave his assent on 17th December 1935 and it consequently was brought into force on that day.

It has now been contended by the learned Counsel for the appellant that inasmuch as this Act was made by the Governor-General on 4th October 1935, he could not bring it into operation by his own declaration after a lapse of two months and thirteen days.

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It is urged that the proviso to the sub-section being in the nature of an exception should not have been availed of by the Governor-General, who should have seen that steps were being taken for complying with the requirements of sub-section 2 and for laying the Act before both the Houses of Parliament and receiving His Majesty's assent for which the period between 4th October and 17th December 1935 was sufficient.

A reference to the words used in section 67-B (2) of the Government of India Act would show that it was the opinion of the Governor-General in regard to the existence of a state of emergency which entitled him to act and bring the Act into operation. It is not for this tribunal, or for the matter of that for any other tribunal, to ascertain whether any state of emergency existed at the time. The question whether there was any emergency or not was to be determined by the Governor-General and no other tribunal could or can possibly sit in judgment and decide whether his opinion was correct or otherwise. It was his opinion alone in regard to the existence of the state of emergency that mattered. The words used in the section are absolutely clear and are capable of no other interpretation. In a case which went up to the Judicial Committee of the Privy Council, a similar contention was raised in regard to another section of the Government of India Act. It was summarily rejected by their Lordships; *Bhagat Singh v. The King-Emperor*(1). Section 67-B did not lay down that a declaration by the Governor-General in regard to the state of emergency must necessarily synchronise with the date on which the Act was certified or made by him. In fact it is possible to conceive

(1) (1931) I.L.R. 12 Lah. 280 (P.C.).

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of cases in which no state of emergency might have existed at the time when the Act was made by the Governor-General but it might have come into existence subsequently when he might have been obliged to bring it into operation at once. Can it be seriously argued that as some time had elapsed since the Act was made, the Governor-General had lost his power to declare the existence of a state of emergency although one might have come into existence in the meantime? We do not know what steps were taken by the Government to place this Act before the two Houses of Parliament and whether it was possible or not to comply with the procedure provided in the section and obtain His Majesty's assent within the period that had elapsed between the date on which the Bill was made by the Governor-General and the date on which he directed it to be brought into force. But even if it be assumed that no steps were taken for that purpose, it is impossible to hold that the mere inaction on the part of the Government had taken away the power from the Governor-General to express an opinion that a state of emergency had come into existence and to order the Act to be brought into force immediately. If he had decided to bring the Act into operation on 4th October 1935, the order, it is conceded, would be unassailable. It has also been admitted that if he had done so within a reasonable time after that date, no exception could have been taken to that order. If that be so, and if he were the sole judge of the fact whether a state of emergency existed or not on a particular day, how can his powers be held to have come to an end by the passage of time during which the Act was not in force? He must be presumed to have had sufficient material before him to express an opinion on the subject and as we are only



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concerned with the expression of his opinion, it appears to be futile to argue that the evidence on which he formed his opinion should have now been placed before the Court in order to determine whether his action was justified. This would necessitate an investigation which the Court is not competent to make. It is unnecessary therefore to go into the reasons which must have influenced the Governor-General before expressing an opinion in regard to the existence of the state of emergency and ordering the Act to be brought into operation. One fact, however, is obvious. Had this Act not been brought into force on that day or the next day, the principal Act, i.e., the Criminal Law Amendment Act of 1932, would have expired on 19th December 1935 and this Act of 1935 would have been rendered ineffectual and useless. If the passage of the Bill were essential for the safety, tranquillity or interests of British India and if no exception could be taken to its being certified by the Governor-General, as it has not been taken before us, and if it were not possible to receive His Majesty's assent during the next two days, it was apparent that a state of emergency might have been considered to have come into existence which justified such an action. He must have had sufficient reasons for acting in the manner in which he did and it is entirely unnecessary to indulge in surmises. It must therefore be held that this objection is devoid of any force and must be overruled.

It is then contended that this power had been conferred on the Governor-General under a proviso which should not be taken to be effective until an attempt was proved to have been made to comply with the requirements of the main clause to which

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it must be taken to have been appended as subordinate. It is not possible to accede to this contention either. A perusal of section 67-B (2) of the Government of India Act would show that the proviso was added to the sub-clause with the object of dispensing with the procedure laid down in the sub-clause under certain circumstances. If those circumstances were found to be existing, the Governor-General was authorised to bring the Act into operation at once without waiting for the period which would have elapsed if the Act were to be laid before both the Houses of Parliament for a given number of days when they were in session and then presented to His Majesty for assent. There is nothing in the section which would entitle one to hold that these powers could be exercised by him only at a particular time. On the contrary the language of the section is clear and is to the effect that if he discovered a state of emergency at any time before the Act had come into force, he was authorised to function and bring the Act into operation at once. In that case His Majesty in Council has full authority under the proviso to the sub-clause itself to disallow the Act if it did not meet with his approval. Viewed in this light the proviso must be taken to be in the nature of a condition on the provisions of the sub-clause itself and cannot be held to depend on it for its enforceability. In other words, the Act was required to be submitted to both the Houses of Parliament and then to His Majesty for assent only when the Governor-General did not consider that a state of emergency existed which would authorise him to enforce the Act made by him earlier. There was nothing in section 67-B which could have prevented the Governor-General from applying the Act even if it had been submitted to the

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Houses of Parliament and before it had received His Majesty's assent. That this should have been so is entirely consonant with reason. After all the ultimate duty of governing the country and maintaining law and order was his and it was therefore not only proper but necessary that he should have had the power to bring a particular law into operation if he were satisfied of the existence of a state of emergency in which he considered it necessary to act under the proviso to sub-clause (2) of section 67-B of the Government of India Act. There can thus be no doubt that, as laid down in *Rex v. Diddin*(1),

"the proper way to regard a proviso is as a limitation upon the effect of the principal enactment".

The third point urged on behalf of the appellant was that the Act of 1935 was itself repealed by Act XX of 1937 and the Criminal Law Amendment Act of 1932 should therefore be held to have been restored to its original position and would be of no use in 1938 as it was brought into existence for a period of three years only. If we remember the nature of the Act passed in 1935 the argument advanced by the learned Counsel for the appellant would lose its force. The Act of 1935 was, as stated above, brought into existence with the object of repealing section 1 (3) of the Criminal Law Amendment Act of 1932 and thus doing away with its temporary nature. Once the Act of 1935 came into force, section 1 (3) of the principal Act must be held to have been taken out of that Act and the words regarding the temporary nature of the Act having been thus deleted, the Act of 1932 must be regarded as having been placed on the statute book of India permanently. Having fulfilled its purpose, the Act of 1935 thus remained of no value

(1) [1910] P. 57; 26 T.L.R. 150; 101 L.T. 722.

and any further retention of the same would have led to confusion and would have been in any case useless. It was for that reason that it was repealed by Act XX of 1937. This is not however all. Section 4 of the Act (XX of 1937) provides that the repeal by this Act of any enactment shall not affect any Act in which such enactment has been applied or incorporated. When faced with this provision, the learned Counsel for the appellant contended that it had no application since the word "applied" must be taken to refer to the application of an earlier enactment to a later enactment and cannot be taken to imply, include or contemplate the alteration of the earlier enactment by the operation of the later one. He contended similarly that the word "incorporate" must not be taken to mean anything else except when certain provisions of an enactment have to be inserted in or combined with another and not when certain existing provisions of an Act have to be deleted. First of all, there is no justification for our giving to the words used in the section the narrow meaning which the learned Counsel for the appellant has been trying to do. Not having been defined by the General Clauses Act or by the Act in which they have been used, they should be deemed to have been used in their ordinary sense and there is no reason to hold that the application of an enactment necessarily means the application of an earlier enactment to a later one. Secondly we are concerned just now with the effect of the application of or even of incorporation of a later enactment in the earlier one. It is immaterial for this purpose if, as a result of a subsequent enactment, some provision is either added to or subtracted from an earlier Act. It may have been either, and section 4 of Act XX of 1937 provides that the repeal of any enactment—Act of 1935 being

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the enactment in this case—shall not affect any Act, i.e., Act XXIII of 1932, in which such enactment, (that of 1935) has been applied or incorporated. Our attention has been drawn in this connection to an amendment of the General Clauses Act by the insertion of section 6-A by Act XIX of 1936. This provision in the General Clauses Act makes the position still clearer that the effect of Act XX of 1937 could not have been as argued by the learned Counsel for the appellant.

The next contention urged on behalf of the appellant was to the effect that even if these objections were decided against him, it must be held that, so far as section 7 of the Criminal Law Amendment Act was concerned, it had no force in this province after the expiry of three years for which the principal Act was passed by the Legislature. The argument has been put thus. The Act of 1932 was brought into force for a period of three years. The notification issued by the Government of Madras in 1932 must therefore be taken to have been for three years only. Although the temporary nature of the Act was gone as soon as the Act of 1935 was passed, nothing has been done in this Presidency to continue the operation of section 7 after December 1935. The contention has obviously no force. When the Local Government applied section 7 of the Criminal Law Amendment Act of 1932 to this Presidency no period was fixed by it for which this section was to be in force in this part of the country. If the Criminal Law Amendment Act of 1932 had died by efflux of time a natural death or had not been made permanent, the operation of section 7 in this Presidency would certainly have come to an end in December 1935. But once we find that the statute containing section 7 continued to remain in force even after December 1935, it would

have been superfluous for the Madras Government to issue another notification to bring into operation a section which was already in force in this Presidency.

It was then attempted to be argued that the Criminal Law Amendment Act of 1932 was brought into force in peculiar circumstances which prevailed at the time when the Act was passed and section 7 of the Act must not therefore be applied to circumstances which were not then under contemplation. It was suggested that the Act was brought into operation to prevent boycott, or what has come to be described in ordinary parlance as “picketing” and was never intended to be applicable to the set of circumstances in which these prosecutions have been started. We are thus asked to interpret the statute in accordance with the intention of those who made it. It must be remembered that if the words of the statute are unambiguous, no more is necessary than to interpret them in their ordinary or what is usually known as literal or grammatical sense, bearing in mind that the words employed by the framers can best declare their intention. Moreover we are not really concerned with the intention of the framers but with the intendment of the Act itself which can only be taken to refer to the meaning of the words used therein; and when we find that the language employed in the section, which we have now been called upon to interpret, is clear and admits of only one meaning the task of interpretation can hardly be said to arise. In these circumstances it is unnecessary to speculate on the intention of the framers of the Act. This rule has been laid down by Lord HALSBURY in *Leader v. Duffey*(1) in the following words:

“Whatever the instrument it must receive a construction according to the plain meaning of the words and sentences

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(1) (1888) 13 App. Cas. 294, 301.

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therein contained . . . and it is arguing in a vicious circle to begin by assuming an intention apart from the instrument itself and having made the fallacious assumption to bend the language in favour of the assumption so made."

It is quite true that the Act which we have now been called upon to interpret is penal in its nature and we have therefore been asked to construe the section strictly. The rule of strict construction requires that the language should be construed in such a manner as not to bring cases within the ambit of the section which do not fall within the reasonable meaning of its words or terms. It only means, as held in *London County Council v. Aylesbury Dairy Company*(1), that

"no violence must be done to its language to bring people within it but rather care must be taken that no one is brought within it who is not brought within it in express language."

Bearing these principles of interpretation in mind and applying them to the section which we have now been called upon to construe, the first question is if there are any words employed by the framers of the Act in the section which can be so interpreted as to show that the act imputed to the appellant is not covered by them. I have read and re-read the section with care and find nothing therein which would justify me in putting the construction which we have been asked to place on it. If the Premier were entitled to move the Legislature or the Government to repeal the order which was passed to introduce the compulsory teaching of Hindi and if people were loitering in front of his house with the object of forcing him to move in the matter in order to have the order cancelled, which he had a right to do or abstain from doing, the action imputed to the accused

(1) [1898] 1 Q.B. 106.

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would apparently fall within the mischief the section was designed to prevent. Is it possible for us, sitting as interpreters, to say that the words of the section would not bring such a conduct within its plain meaning? For this purpose it is impossible to read or import words into the section which are not there. It was suggested that the act referred to in section 7 must be that of a private individual which the person is entitled to do or to abstain from doing as distinguished from the act of a Government Officer or that of a public servant. But is there anything in the section which would justify our interpreting the word "right" in the manner suggested by the learned Counsel for the appellant? I find nothing to that effect and would therefore agree in holding that the conduct imputed to the appellant is covered by the language employed in the section.

It was argued in the end that the accused was not being prosecuted for an offence under section 7 of the Criminal Law Amendment Act of 1932 but for the abetment of that offence and since it was not an offence under the Indian Penal Code or under a special law as defined in section 41, Indian Penal Code, the abetment of the same was not punishable. Having heard the learned Counsel for the appellant and the learned Advocate-General on this point, there is no doubt in our minds that the Criminal Law Amendment Act of 1932 falls well within the definition of special law in section 41, Indian Penal Code. A special law has been defined in the Code as being applicable to a particular subject. The Indian Penal Code was passed in 1860 and attempted to define the offences which according to the then prevailing state or conditions of the society were considered to be punishable. After all it presented the minimum

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which could be expected to be observed by the citizens of the State at the time. It is only natural that with the growth of new ideas and development of new conditions, new circumstances would come into being calling for protection and new acts would have to be brought within the list and declared as offences. This could only be done by either amending the Indian Penal Code or passing local or special laws. If it were required to deal with a special class of cases and if it were considered advisable not to amend the Indian Penal Code, but to pass a separate Act for the purpose, the Act would fall within the definition of special law in section 41, Indian Penal Code, and an abetment of the same would be punishable under Chapter V of the Penal Code.

Reliance was placed by the learned Counsel for the appellant on a number of cases and he attempted to show that when certain acts did not fall within the definition of an offence under the Penal Code, their abetment would not be punishable. This is obvious. But as we are holding the Criminal Law Amendment Act of 1932 to be a special law within the meaning of section 41, Indian Penal Code, no useful purpose would be served by examining the cases cited on behalf of the appellant in detail.

A.S.V.

# APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Krishnaswami Ayyangar.

P. L. N. K. M. NAGAPPA CHETTIAR (PLAINTIFF),  
APPELLANT,

v.

O. R. M. O. M. S. P. FIRM AND ANOTHER (DEFENDANTS),  
RESPONDENTS.\*

1938,  
May 9.

*Banker—Customer investing trust moneys with—Customer had right to invest same in his business—Banker adjusting trust moneys in reduction of indebtedness of customer—Customer giving credit to trust moneys in his books—Banker not satisfying himself that the credit entries in favour of trust were going to be supported by cash—Banker—Liability of, to make restitution of trust moneys—One of the trustees taking proceedings in the insolvency of customer without knowledge of breach of trust by customer—Estoppel, if—Limitation—Art. 120 of Indian Limitation Act (IX of 1908)—Six years from knowledge of breach of trust—Suit, if barred by section 92 of Code of Civil Procedure (Act V of 1908).*

N and S were co-trustees. They invested moneys belonging to a trust with P, a banker, who knew, at all material times, that the moneys belonged to the trust. S had a right to invest the said moneys in his business. He had a private overdraft account with P in respect of which the former was indebted to the latter. P transferred moneys standing to the credit of the trust account to the private overdraft account of S and thereby wiped out the indebtedness of S. S immediately opened corresponding account in the name of the trust in his own books, which was argued as amounting to an investment of the trust moneys in his business. The true position was concealed from N. S became an insolvent in 1926. Not being aware of the real position, N applied in February 1929 in the Insolvency Court for a declaration that the trust moneys constituted a first charge on the assets of the insolvent's estate in the hands of the Official Assignee. This

\* Original Side Appeal No. 36 of 1936.

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application was dismissed and it was only then, in 1929, he came to know that P had committed a breach of trust. N filed a suit in 1933 against P and S for the recovery of the trust moneys. It was found: (i) P had knowledge that the moneys were being applied in breach of trust, that by the transaction it was intended and designed that P should derive a benefit and that P did derive a benefit; (ii) P did not satisfy himself that the corresponding entries in S's books were going to be supported by cash and were not mere book entries.

*Held*: (i) A banker is not entitled to apply what he knows to be trust funds in discharge or reduction of a debt of a customer. If a banker does so, he can be compelled to make restitution of the moneys so applied. P was therefore liable.

*Coleman v. Bucks and Oxon Union Bank*(1) followed.

(ii) N was not estopped by the proceedings which he took in the Insolvency Court from suing P for breach of trust.

(iii) The suit filed by N in 1933 was not barred, since he came to know of the breach of trust only in 1929, and, under article 120 of the Indian Limitation Act he had six years time from 1929 to file the suit.

*Ottappurakkal Thazhate Soopi v. Cherichil Pallikkal Uppathumma*(2) and *Venkatachella Reddian v. The Collector of Trichinopoly*(3) dissented from.

(iv) The suit was not barred by section 92 of the Code of Civil Procedure (Act V of 1908).

APPEAL from the judgment and decree of LAKSHMANA RAO J. dated 27th March 1936 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 196 of 1933.

*K. P. Mchadeva Ayyar* for appellant.

*K. V. Krishnaswami Ayyar* and *M. Murugappa Chettiar* for respondents.

*Cur. adv. vult.*

LEACH C.J.—The JUDGMENT of the Court was delivered by LEACH C.J.—The parties to this appeal are Nattukottai Chettians. The appellant was the plaintiff

(1) [1897] 2 Ch. 243.

(2) (1909) I.L.R. 33 Mad. 31.

(3) (1914) I.L.R. 38 Mad. 1064.

in the suit. He is a trustee and he sued in that capacity on the Original Side of this Court to recover from the first respondent, a banker, trust moneys which he alleged the first respondent had wrongly applied in reduction of a debt owed by the second respondent. The first respondent is one Lakshmanan Chettiar, who carries on business in Madras under the style of the O. R. M. O. M. S. P. Firm. The second respondent is the uncle of the appellant and a co-trustee.

The father of the appellant was one Meenakshisundaram Chettiar who did business in Madras with the second respondent, his brother. Meenakshisundaram died in 1914. After his death the joint family consisted of the appellant, his minor brother Lakshmanan, and the second respondent. In 1916 the appellant and his brother separated from the second respondent and a deed of partition was executed. It was decided by the appellant and the second respondent that they should set aside out of the family funds two sums of Rs. 10,000 as endowments of specified religious charities. One sum of Rs. 10,000 was to be devoted chiefly to the maintenance of a water-supply at the Tirukalikundram temple, a famous Hindu temple in the Chingleput District, and the other sum of Rs. 10,000 was to be an endowment to another Hindu temple, known as the Kalayar Koil in the Ramnad district. It is common ground that, out of the Tirukalikundram fund, the temple piper was also to be paid. The appellant and the second respondent were to contribute to these funds in the proportions of five-eighths and three-eighths respectively. These provisions, except the provision with regard to the payment of the piper, were included in the deed of partition, which also provided that the appellant and the second respondent were to

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act as the trustees of the funds. The trust funds were created and it is admitted that the second respondent, being the uncle of the appellant and much older, was given the management of them. It is also admitted that the second respondent was given the right of investing the trust funds in his own business, if he so decided.

On 1st December 1916 the appellant drew, as his contributions to the two trusts, two hundies payable to bearer, one for Rs. 6,250 and the other for Rs. 5,000. Previously a sum of Rs. 2,000 had been set aside for charity and this sum was taken into account in calculating the amounts which the appellant had to provide. The appellant handed the two hundies to the second respondent for investment on behalf of the trusts. At all material times both the appellant and the second respondent had private banking accounts with the first respondent. When the trusts were created the proprietor of the O. R. M. O. M. S. P. Firm was Subramanian Chettiar, the father of the first respondent. He had assisted at the partition of the properties between the appellant and his brother and the first respondent and had signed the partition deed as a witness. The second respondent handed the two hundies drawn by the appellant to Subramanian Chettiar, who realised them by debiting the appellant's personal account, which was in credit, with the amounts. He then opened accounts in his books in the names of the two trusts, allocating to the Tirukalikundram temple trust the hundi for Rs. 6,250 and to the Kalayar Koil temple trust the hundi for Rs. 5,000. The allocations were in accordance with the instructions given to him. The arrangement made by the second respondent with the first respondent was that these moneys were to remain with the first respondent

as *thavanai* loans with interest calculated annually. I should mention that the hundies themselves disclosed that they represented trust funds and an endorsement was made on each hundi by the then agent of the O. R. M. O. M. S. P. Firm acknowledging that the moneys had been received by the firm. Subramanian Chettiar died in 1918 and the business was then taken over by the first respondent, who had knowledge of it before he succeeded to it. It is not disputed that he knew that the moneys in these accounts represented trust moneys. His own books showed this.

For many years the second respondent had a large business in Madras and another business in Penang, but he became financially involved and on 4th January 1926 he was adjudicated an insolvent by this Court on a petition filed on 10th October 1925. On 10th February 1920 the second respondent had overdrawn his account with the first respondent to the extent of Rs. 15,700. The total amount standing to the credit of the two trust funds on this date was Rs. 15,732-15-9. With the consent of the second respondent the first respondent transferred Rs. 15,700 out of the Rs. 15,732-15-9 standing to the credit of the trust accounts to the private account of the second respondent, and paid to him the balance of Rs. 32-15-9 in cash. The result of this arrangement was that the second respondent's liability to the first respondent was discharged. The appellant was unaware of this arrangement and until 1929 he was kept in ignorance of the transaction. In 1924 he had been told by the first respondent's agent that the trust moneys had been withdrawn from the first respondent and had been taken over by the second respondent, but nothing was said to arouse his suspicions. When the second respondent was adjudicated an insolvent, the appellant filed an application

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in the insolvency proceedings asking that it be declared, that the trust moneys constituted a first charge on the assets of the insolvent's estate in the hands of the Official Assignee. This application was filed on 20th February 1929.

When the second respondent arranged with the first respondent that his overdraft should be paid off by the transfer of the trust funds the second respondent opened accounts in his own books in the names of the two trusts, making a credit entry in each corresponding to the amount of the trust fund and debiting the first respondent with the amount. The second respondent set aside no moneys of his own for the purposes of these trusts, but merely made book entries. He did not even debit himself with the amounts. I will return to this part of the case later. The application of the appellant for a declaration that the trusts were entitled to a first charge on the second respondent's assets in the hands of the Official Assignee was heard by WALLER J. on 15th October 1928. The learned Judge dismissed the application on the ground that book adjustments could not be treated as passing trust moneys into the hands of the Official Assignee. An appeal followed, but was dismissed. Stated broadly, the decision of the Appellate Court was that after 10th February 1920 the trust funds consisted of debts owing by the second respondent to the trusts, he having had the right to invest the trust moneys in his own business. It is not necessary to consider whether this decision is open to objection, because in the present case the Court is concerned with the question of the liability of the first respondent as a banker.

The present suit was filed on 29th April 1933 for a decree for Rs. 49,919-0-2, being the amount of the

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two trust funds as they stood on 10th February 1920 with interest at the *thavanai* rate for a period of twelve months. When he instituted the suit the appellant merely claimed a decree against the first respondent, but as the first respondent pleaded that the second respondent was a necessary party, the second respondent was added as a defendant on 24th January 1934. The second respondent, however, did not appear and the contest remained between the appellant and the first respondent. The first respondent denied that the trusts had been duly constituted and pleaded that in any event there had been no breach of trust. He also contended that the suit could not be maintained in view of the provisions of section 92 of the Code of Civil Procedure and of the Madras Hindu Religious Endowments Act, and raised pleas of estoppel and limitation. All these contentions were decided against the first respondent, except the contention that there has been no breach of trust. The learned Judge found that the second defendant had full authority to do what he did on 10th February 1920 and therefore the first respondent was not liable as banker who had knowingly applied trust moneys to his own debt. Accordingly he dismissed the suit with costs. The appellant contends that, as the first respondent took the trust moneys and utilized them in discharging the debt due to him by the second respondent, he is liable to refund them with interest. He also contends that, even if the arrangement between the first and second respondents could in law be regarded as a payment out to the second respondent of the trust moneys, he had no authority to pay them out without the consent of the appellant, the co-trustee of the second respondent. The first respondent had persisted in the pleas raised by him before the learned



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trial Judge, except the plea that the Madras Hindu Religious Endowments Act is a bar to the suit.

It is idle for the first respondent to contend that the trusts were not validly constituted. They were constituted under the terms of the partition deed and moneys were set apart and deposited with the first respondent as *thavunai* loans. Under Hindu law all that is required to constitute a religious or charitable endowment is the intention to endow and the creation of a fund in fulfilment of the intention. Here there was the intention and the creation.

Before proceeding to discuss the question of the validity of the arrangement of 10th February 1920 I will state what I conceive to be the law. A banker is not entitled to apply what he knows to be trust funds in discharge or reduction of a debt of a customer. If a banker does so he can be compelled to make restitution of the moneys so applied. There are many authorities dealing with this question, but it is not necessary to consider them in detail. The most important cases were considered by BYRNE J. in *Coleman v. Bucks and Oxon Union Bank*(1) where he held that reasonable suspicion puts a banker on inquiry when a benefit to himself is concerned. At page 254 of the report of the judgment there is this passage :

"If bankers have the slightest knowledge or reasonable suspicion that the money is being applied in breach of a trust, and if they are going to derive a benefit from the transfer and intend and design that they should derive a benefit from it, then I think the bankers would not be entitled to honour the cheque drawn upon the trust amount without some further inquiry into the matter."

If further inquiry revealed a breach of trust the banker would be doing wrong if he honoured the cheque, and would render himself liable.

(1) [1897] 2 Ch. 243.

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In this case it is admitted that the first respondent had full knowledge that the Rs. 15,700 which he transferred to the second respondent's account in discharge of his debt on 10th February 1920 constituted trust moneys, but stress has been laid on the fact that the second respondent had the right to invest the trust moneys in his own business and it is said that inasmuch as the second respondent immediately opened corresponding accounts in his own books, this amounted to an investment in his business. If the transaction did not amount to an investment of the trust funds in this way the first respondent is liable.

I will here pause to consider a finding of the learned trial Judge that when this transaction was carried through the second respondent was in affluent circumstances, much having been made of this point. That he was dealing in large sums of money cannot be doubted, and the evidence does not disclose that at the time he was actually insolvent, but it does not follow that he was in affluent circumstances or that his position was a sound one. The learned Advocate for the first respondent confessed that he was unable to say what the financial position of the second respondent was at the time. The fact that his banker deliberately applied trust funds in payment of the overdraft which then existed does, however, in itself indicate that he had no confidence in the financial stability of his customer. But there are other indications that all was not well with the second respondent's position and that the first respondent knew this. At this time the first respondent was living at Devakottah and his banking business in Madras was being carried on by his agent. On 7th February 1920 the agent wrote a letter to his principal which would

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appear to have had reference to the second respondent's indebtedness to the first respondent. This letter has not been produced nor was the press copy book kept by the Madras agent, although all the other letters and press copy books have been produced. It would appear that in this letter of 7th February 1920 adverse reference was made to the second defendant's financial position. In addition to the non-production of the letter and the press copy, there is the fact that on 17th February 1920 the first respondent wrote to his agent in Madras saying: "You must not have credit and debit dealings in the current account for large amounts with P. L. N. K. S. P. generally." P. L. N. K. S. P. is the second respondent.

It has been argued that in spite of these facts it must be accepted that the second respondent was in affluent circumstances at the time, because later he was allowed to overdraw his account to a much larger extent, and that his books show that in that year he paid a large amount to Government by way of income-tax. The fact that the first respondent allowed the second respondent to overdraw later does not necessarily indicate that he had confidence in his financial stability. At the most it shows that after 10th February 1920 he regained confidence, but a banker may let a customer whose credit is shaken have advances in respect of particular transactions if he is certain that the business will result in the money coming back to him. With regard to the payment of income-tax an examination of the books indicates that the second respondent was not able to pay at once what was due to Government. The payments made in 1920 comprised ten instalments. In these circumstances we are unable to agree with the learned Judge that it has been established that the second

respondent was in affluent circumstances when the first respondent utilised the amounts standing in the trust accounts to discharge the second respondent's overdraft. The evidence points the other way.

Now, what was the effect of the transaction? It resulted in the disappearance of both the trust funds and the second respondent never replaced these moneys. In answer to a direct question put by the Court to the learned Advocate for the first respondent in the course of his argument he frankly acknowledged that the first respondent knew when he transferred the trust moneys to the private account of the second respondent that the second respondent intended merely to constitute himself a debtor to the two trusts by making entries in his own books. In other words, the first respondent knew that the trust moneys were not to be replaced by cash and that the second respondent was merely intending to acknowledge liability to the trusts, and this at a time when the second respondent was unable to pay off his overdraft out of his own moneys. The contention that this was legitimate because the second respondent had the right to invest the trust moneys in his own business is, it seems to me, fallacious. There could be no investment of the trust moneys in the second respondent's business unless they were replaced. They were not replaced and therefore there was no investment. The first respondent was not entitled to do what he did without being satisfied that the entries in the second respondent's books were going to be supported by cash. He took no steps to satisfy himself that this would be done. On the other hand he applied the trust moneys for his own benefit knowing full well that the second respondent was merely intending to constitute himself a debtor to the trusts.

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Moreover the first respondent was guilty of concealment of the transaction from the appellant, who was also his own customer and to his knowledge the co-trustee of the second respondent. It is admitted that the appellant did not know of the disappearance of the trust fund until he filed the application for a declaration of a charge in the insolvency proceedings. Until 1924 he thought the moneys were still invested with the first respondent and it was only when the application to which I have referred came before the Insolvency Judge that he realised that the funds had disappeared altogether.

In these circumstances it must be held that the first respondent had knowledge that the moneys were being applied in breach of trust, and as the first respondent derived benefit from the transfer and intended and designed that he should derive a benefit from the transfer the case falls within the rule stated by BYRNE J. in *Coleman v. Bucks and Oxon Union Bank*(1). Even if he had not got the knowledge, he knew sufficient to be put on enquiry, which would also bring him within the rule. Holding this view the second contention advanced on behalf of the appellant, namely, that the first respondent could not deal with the trust funds without the consent of the appellant, does not require to be decided, but in passing I may observe that it is difficult to see how the first respondent could be held liable on this ground. The second respondent was admittedly the managing trustee and he had invested the trust funds with the first respondent.

It only remains to consider the contentions of the first respondent that the suit fails by reason of the doctrine of estoppel, the law of limitation and the

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provisions of section 92 of the Code of Civil Procedure. The contention with regard to estoppel is based on the doctrine of election and it is this. It is said that inasmuch as the appellant filed an application for a declaration of a charge in the Insolvency Court and there failed, he cannot now turn round and seek to make the first respondent liable. There is here a misconception of the position and the law. When that application was filed, the appellant was under the impression that the first respondent had paid out the trust moneys to the second respondent and that they had been invested in the second respondent's business. This was not the case, and the appellant, having realised as the result of the proceedings in the Insolvency Court that the trust funds had been applied by the first respondent for his own purpose, filed the present suit. The doctrine of election can have no application here. The cause of action was different and the suit was filed in order to establish the liability of the first respondent. It is true that the second respondent was added as a party as the result of the attitude of the first respondent, but again the cause of action against the second respondent in this suit is a different one. It is now sought to make him liable for a breach of trust. There was no question of breach of trust in the previous proceedings.

In view of the Full Bench decision of this Court in *Subbiah Thevar v. Samiappa Mudaliar*(1) it is accepted that the article of the Limitation Act which applies is article 120. That article states that limitation shall start to run when the right to sue accrues, and as the cause of action arose when the trust funds were transferred to the first respondent on 10th

(1) I.L.R. [1938] Mad. 586 (F.B.).

(1) [1897] 2 Ch .243.

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February 1920, the right to sue accrued on that date. It has been held by this Court and other High Courts in India that, where a trustee is kept in ignorance of a breach of trust, the right to sue does not accrue until the trustee becomes aware of the fact; *Basavayya v. Bapanna Rao Sowcar*(1), *Tirumal Rao v. Tungamma Shettithi*(2), *Muruga Chetty v. Rajaswamy*(3), *Venka-teswara Aiyar v. Somasundaram Chettiar*(4), *Peruri Viswanadham v. Pendela Narayana Doss*(5), *Lal Singh v. Jai Chand*(6) and *Mathura Singh v. Rama Rudra Prasad Sinha*(7). There are two decisions of this Court which tend the other way, *Ottappurakkal Thazhate Soopi v. Cherichil Pallikkal Uppathumma*(8) and *Venkatachella Reddiar v. The Collector of Trichinopoly*(9), but the weight of authority is in favour of the view that knowledge is a factor. The appellant had no knowledge of this breach of trust until 1929 and this is not disputed. There can be no doubt that the true position was concealed from him until 1929 and as the suit was filed in 1933 it was filed in time.

The argument which is based on the provisions of section 92 of the Code of Civil Procedure is that, as the appellant asked the first respondent to account for the trust moneys in his hands, it was a suit for the taking of accounts of a trust and therefore falls within the purview of section 92. It is clear that this suit was not a suit for an account in that sense. It was a suit against a banker to recover trust moneys which he had misapplied. In *Shanmukham Chetty v. Govinda Chetty*(10) a Bench of this Court of which I was a member held that a suit by trustees against co-trustees for

(1) (1929) 58 M.L.J. 349.

(3) (1915) 2 L.W. 813.

(5) (1928) 28 L.W. 224.

(7) (1935) I.L.R. 14 Pat. 824.

(9) (1914) I.L.R. 38 Mad. 1064.

(2) (1914) 1 L.W. 134.

(4) (1917) 7 L.W. 280.

(6) (1930) I.L.R. 12 Lah. 262.

(8) (1909) I.L.R. 33 Mad. 31.

(10) I.L.R. [1938] Mad. 39.

accounts does not fall within the provisions of section 92 and may be instituted without the sanction of the Advocate-General. This contention must also be overruled.

My learned brother concurs in this judgment and the appeal will, therefore, be allowed with costs in both the Courts. There will be a decree against the first respondent for the sum of Rs. 15,700 with interest from 10th February 1920 to the date of this judgment at the *thavanai* rates and annual rests which was agreed upon when the moneys were deposited by the second respondent with the first respondent and interest at six per cent will be payable on the decretal amount from the date of judgment. The Advocate's costs will be on the higher scale of one and one-third of the regulation fee both here and below.

G.R.

## APPELLATE CIVIL.

*Before Mr. Madhavan Nair, Officiating Chief Justice, and  
Mr. Justice Krishnaswami Ayyangar.*

RAMANATHAN CHETTIAR (PETITIONER), PETITIONER,

v.

M.A.R.R.M. VISWANATHAN CHETTIAR (RESPONDENT),  
RESPONDENT.\*

*Code of Civil Procedure (Act V of 1908), O. XLV, r. 13, cl. (2) (d)—Appeal pending before Privy Council from preliminary decree—No appeal filed against final decree—Application for stay of execution of final decree in High Court—Power of High Court to pass orders to safeguard rights of applicant.*

Under Order XLV, rule 13, cl. (2) (d), Civil Procedure Code, the High Court has power, in a proper case, even though

\* Civil Miscellaneous Petition No. 2066 of 1938.

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no appeal has been filed against the final decree and the appeal pending before the Privy Council is only with respect to the preliminary decree, to pass necessary orders in order to safeguard the rights of an applicant when he asks for stay of execution of the final decree.

PETITION praying for stay of execution of the decree of the Court of the Subordinate Judge of Devakottai in Original Suit No. 29 of 1927, so far as the petitioner is concerned, pending disposal of the appeal to His Majesty in Council against the judgment and decree of the High Court in Appeal No. 190 of 1931 (Privy Council Civil Miscellaneous Petition No. 5000 of 1937 on the file of the High Court).

*M. Patanjali Sastri* for petitioner.

*T. M. Krishnasami Ayyar* for *T. V. Ramiah* for respondent.

MADHAVAN  
NAIR OFFG.  
C.J.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR Offg. C.J.—This is an application for stay of execution of the final decree in a mortgage suit passed by the Subordinate Judge of Devakottai in Original Suit No. 29 of 1927.

The second defendant in the suit is the petitioner before us. The mortgage bond was executed by the first defendant, the adopted son of one Chockalingam Chettiar. Defendants 3 and 4 are the children of the first defendant. The second defendant—the petitioner—is the natural son of the said Chockalingam Chettiar by his second wife whom he married after the death of his first wife who was the adoptive mother of the first defendant. The application is made under Order XLV, rule 13, of the Code of Civil Procedure. The first Court passed a preliminary mortgage decree dismissing the suit as against defendants 2 to 4. On appeal, the High Court reversed the decree of the trial Court and passed a mortgage decree against the second defendant and defendants 3 and 4 as well.

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An appeal to the Privy Council against this decree has been filed by the second defendant and it has been admitted. Subsequent to the filing of the appeal, the trial Court has passed the final decree and now the decree-holder, it is alleged, is seeking to execute the final decree; and the petitioner asks us to stay the execution of the decree pending disposal of the appeal to His Majesty in Council.

The respondent takes a preliminary objection that this Court has no jurisdiction to stay execution of the final decree as no appeal has been filed by the petitioner against that decree. His objection is based upon the wording of Order XLV, rule 13, clause (1), of the Code which says:

“Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed unless the Court otherwise directs.”

It is said that under this clause as well as under clause (2) which we will presently refer to in detail a stay of execution can be ordered by this Court only in execution of a decree which has been appealed against, which, in this case, would be the preliminary decree; and since no appeal has been filed against the final decree, it is argued, proceedings in connection with the final decree should not be stayed by this Court under the provisions of these clauses. It is clear that, if the appellant succeeds in the appeal before the Privy Council which he has filed against the preliminary decree, the result will render the final decree passed by the Court ineffective. But it is argued that though it may be so, with respect to a stay of execution of the decree, such stay can be granted only as against the decree that has been appealed against.

In support of the above argument no decision directly bearing on the question has been brought

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before us and we have to depend upon the wording of the section. We find that under clause (2) of Order XLV, rule 13, the Court may, on special cause shown by any party interested in the suit or otherwise appearing to the Court, pass certain specific orders with reference to the decree which has been appealed from. Under sub-clause (a) it may impound any movable property in dispute or any part thereof. Under sub-clause (b) the Court may allow the decree appealed from to be executed, taking such security from the respondent as it thinks fit for the due performance of any order which His Majesty in Council may make on the appeal. Under sub-clause (c) it may stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal. We may pause here for a moment and point out that the relief to be granted by the High Court under sub-clauses (b) and (c) is in respect of "the decree appealed from". Coming to sub-clause (d), the last clause, we find the Court has power to

"place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise".

It is noticeable that under this clause the Court has power to give whatever direction it thinks necessary respecting *the subject-matter of the appeal* as it thinks fit by the appointment of a receiver or otherwise, whereas clauses (b) and (c) contemplate action by the Court with reference to the *decree appealed from*. Under sub-clause (d) action may be taken by the Court and directions may be issued with reference to the subject-matter of the appeal. The subject-matter of the appeal in this case is the property involved in

the suit. It is not stated that the direction is with reference to the decree that is appealed from but it is with reference to the subject-matter of the appeal. If the Court has power to pass orders which it thinks should be passed in a particular case with respect to the subject-matter of the appeal, then we think that this Court has power to pass orders with respect to the property involved in the suit, if we think on the merits such order should be passed. In our opinion, Order XLV, rule 13, clause (2) (d), enables the High Court in a proper case, even though no appeal has been filed against the final decree and the appeal pending before the Privy Council is only with respect to the preliminary decree, to pass necessary orders in order to safeguard the rights of the applicant when he asks for stay of execution of the final decree, as in this case. If the property which is the subject-matter of the appeal is now sold, unless the decree-holder purchases the property himself, it will be difficult for the petitioner to get his portion of it back in case he succeeds in the Privy Council appeal. It is therefore necessary that we should pass orders with a view to safeguard his interests in the case. At the same time, in spite of the fact that the respondent has obtained a final decree for the sale of the petitioner's share of the property, we think the interests of the respective parties may be safeguarded by passing the following order :

The lower Court will find out the value of the property and the petitioner will give security for the difference, if any, between his share of the value of the property and his share of the liability under the decree. The lower Court will ascertain the value of the property within three weeks from the receipt of this order and the petitioner will, when he is called upon to give

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RAMANATHAN security, give the same within two weeks thereafter.  
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 VISWANATHAN. On such security being furnished, the execution of the decree will be stayed but only with respect to the petitioner's share in the hypotheca.

G.R.

## APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Lakshmana Rao.

1938,  
 July 27.

SOMASUNDARA EDANGAPURANDAR *alias* SOMASUNDARA ERATHA BAKISH PACKIRI SAHIB AND TWO OTHERS (DEFENDANTS), APPELLANTS,

v.

K. P. NARASIMHACHARIAR (PLAINTIFF), RESPONDENT.\*

*Indian Limitation Act (IX of 1908), sec. 20—Hindu father deceased—Debt of—Payment by one of his sons towards—Debt if kept alive by, as against another son converted to Islam after father's death and before such payment.*

Under section 20 of the Indian Limitation Act, a payment made by a person liable to pay a debt would keep alive the debt even as against other persons, provided those other persons are liable whether or not the former was joint with the latter or possessed a representative character at the time of the payment.

A promissory note executed in 1918 by R, a Hindu, was kept alive by him until he endorsed on it on 6th August 1921 the payment of Rs. 82. R died leaving defendants 1 to 3, his sons, surviving him. On 5th August 1924, the second defendant paid Rs. 25 towards the debt and endorsed the payment. Six months before that, in February 1924, the first defendant was converted to Islam. In a suit brought on the promissory note against defendants 1 to 3,

\* Second Appeal No. 1064 of 1933.

held that the payment made by the second defendant on 5th August 1924 kept the note alive as against all the defendants.

At the time of R's death his sons were liable to pay the amount of the promissory note. The payment on 5th August 1924 was made therefore by a person liable to pay the debt and under section 20 of the Limitation Act a fresh period of limitation began from that date. The conversion of the first defendant to Islam in February 1924 cannot operate to rid him of his liability for the debt due under the promissory note.

*Pangudaya v. Uthandiya*(1) distinguished.

APPEAL against the decree of the Court of the Subordinate Judge of Kumbakonam in Appeal Suit No. 122 of 1931—Appeal Suit No. 256 of 1931, District Court of Tanjore West at Tanjore—preferred against the decree of the Court of the District Munsif of Kumbakonam in Original Suit No. 225 of 1930.

R, a Hindu, executed a promissory note on 9th August 1918 and became a convert to Islam in February 1921. On 6th August 1921 he paid a sum of Rs. 82 towards the amount due under the promissory note and endorsed the payment on the note. He died in 1922 leaving defendants 1 to 3, his sons, surviving him. The first defendant became a convert to Islam in February 1924. On 5th August 1924, the second defendant made a payment of Rs. 25 and endorsed it on the note. On 4th August 1927, defendants 2 and 3 paid a sum of Rs. 10 and endorsed the payment on the note. On 4th August 1930 the suit out of which the second appeal arose was filed on the promissory note. Defendants 1 to 3 contended (i) that, as conversion to Islam created a division in status between the converted and the unconverted members and the converted members could not in law represent the unconverted

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(1) I.L.R. [1938] Mad. 968.

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members and *vice versa*, the endorsement made by R on 6th August 1921 after his conversion would not be valid as against his sons, the defendants, and similarly the endorsements made on 5th August 1924 by the second defendant and on 4th August 1927 by defendants 2 and 3 after the first defendant's conversion would not be valid as against the first defendant; and (ii) that, even apart from the question of conversion, no payment or endorsement made by one only or two only of the defendants would be valid so as to keep the debt alive as against the rest. The lower appellate Court (Subordinate Judge) overruled the said contentions and, in doing so, made the observations contained in the passage from its judgment extracted in the judgment in the second appeal.

*K. V. Ramachandra Ayyar* for appellants.

*R. Ramamurthi* for *K. Narasimha Ayyangar* and *N. Rajagopala Ayyangar* for respondent.

BURN J.

The JUDGMENT of the Court was delivered by BURN J.—We are of opinion that this appeal must fail. The promissory note was executed by the father of defendants 1 to 3 in 1918 and it was kept alive by him until he endorsed on it on 6th August 1921 the payment of Rs. 82. That would keep the note alive until 5th August 1924. In the meantime the father, Ramaswami, died leaving the three defendants, his sons, surviving him. On 5th August 1924, the second defendant paid Rs. 25 towards the debt and endorsed the payment. Six months before that, on the 6th February, the first defendant was converted to Islam. Now it is clear that at the time of Ramaswami's death his sons were liable to pay the amount of this promissory note. The payment on 5th August 1924 was made therefore by a person who was liable to pay the debt and under section 20 of the Limitation Act a fresh

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period of limitation began from that date. On 4th August 1927, the second and third defendants paid Rs. 10 towards the debt and endorsed that payment. Therefore, if the payment of 5th August 1924 kept it alive until 4th August 1927, the note was still alive on 4th August 1930 when the suit was filed. We agree with the learned District Munsif and the learned Subordinate Judge in holding that the conversion of the first defendant to Islam in February 1924 cannot operate to rid him of his liability for the debt due under the promissory note. We have been referred to the case of *Pangudaya v. Uthandiya*(1). But we find we cannot derive any help from that case. That was a case in which the promissory note was executed by the eldest of the three brothers and it was held that after partition the endorsement of payment by the eldest brother would not bind the younger brothers. It is clear that the principle of pious obligation cannot enter into a case like that. In this case, we are in agreement with the learned Subordinate Judge and the learned District Munsif. In paragraph 11 of his judgment, the learned Subordinate Judge observes :

“Under section 20, if the person making a payment is one liable to pay the debt, the payment would keep alive the debt even as against other persons, provided those other persons are liable whether or not the former was joint with the latter or possessed a representative character at the time of payment. Here in the present case, Ramaswami, the maker of the note, was one liable to pay the debt, and his liability continued till his death even after his conversion. On the theory of pious obligation, the sons also became liable as soon as the note was executed, and each one of them is a person liable to pay the debt within the meaning of section 20. Further, on the death of Ramaswami, each one of his sons as his heir or representative became liable to pay the debt

(1) I.L.R. [1938] Mad. 968.



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to the extent of his interest in his (Ramaswami's) separate properties."

This we think is a correct statement of the law. It follows that this appeal must be dismissed with costs.

We have been asked to say that this decision will not prejudice any application which the defendants may be advised to make under section 19 of the Madras Agriculturists Relief Act IV of 1938.

A.S.V.

### APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Abdur Rahman.

S. RM. RM. CHOCKALINGAM CHETTIAR (THIRD COUNTER-PETITIONER), PETITIONER,

v.

A. R. P. L. S. P. MUTHIAH CHETTIAR AND NINE OTHERS (PETITIONER, COUNTER-PETITIONERS 1 AND 2 AND NIL), RESPONDENTS.\*

*Provincial Insolvency Act (V of 1920)—Amendment of insolvency petition—Power of Court to allow—Inchoate right in debt on which petition founded—Petitioner having on date of petition only an, his right becoming perfected a few days later—Amendment in case of—Permissibility—Nature of amendment required in such a case.*

Alleging that a sum of Rs. 16,000 odd was due by A to a firm of which the petitioner claimed to be the sole proprietor, the petitioner presented a petition on 24th November 1930 for adjudicating A an insolvent. On that date an arbitration enquiry was pending in regard to a dispute between the petitioner and a third party who claimed an interest in the partnership. By an award made on 28th November 1930 the petitioner became solely entitled to the debt on which the insolvency

\* Civil Revision Petition No. 1177 of 1933.

petition was founded. The lower Court allowed the petition to be amended by changing the date from the 24th into the 28th. CHOCKALINGAM v. MUTHIAH.

*Held* that the Court below was right in granting leave to amend the petition but the particular amendment indicated by it was wrong and the only way in which the petition required to be amended was by the addition of a statement that the inchoate right which the petitioner had previous to the petition became perfected in virtue of the award delivered four days later.

In the present case there was "a good petitioning creditor's debt" and the only defect was the non-joinder of the other partner.

*Vaithinatha Aiyar v. Vaithinatha Aiyar*(1) disapproved.

PETITION under section 75, clause 1, proviso, of the Provincial Insolvency Act, praying the High Court to revise the order of the District Court of Ramnad at Madura in Civil Miscellaneous Appeal No. 55 of 1932 (Insolvency Petition No. 10 of 1930, Sub-Court, Sivaganga).

*Advocate-General* (Sir A. Krishnaswami Ayyar) for M. Patanjali Sastri and P. S. Narayanaswami Ayyar for petitioner.

V. Ramaswami Ayyar and K. S. Rajagopala Ayyangar for K. Rajah Ayyar for respondents.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—This case raises an important question bearing upon the power of the Court to allow an insolvency petition to be amended. The petition in the lower Court was presented by a person who described himself as a creditor of the insolvent. He alleged that Rs. 16,000 odd was due by the insolvent to a certain firm of which he claimed to be the sole proprietor; it was upon this assertion that he founded his claim to be solely entitled to the debt. The

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—  
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RAO J.

petition was filed on 24th November 1930, but on that date, an arbitration enquiry was pending in regard to a dispute between the petitioner and a certain third party who claimed an interest in the partnership. By an award made on 28th November 1930 the petitioner became solely entitled to the debt on which the insolvency petition was founded. It being assumed that the petition as originally filed is incompetent (it is unnecessary in the view we have taken to discuss this point), the question arises whether the petitioner can be allowed to amend his petition and proceed with it. On the facts stated, the petition would require to be amended by the petitioner being allowed to state that four days after the presentation of the petition, the entire right to the debt vested in him by reason of the award. The learned District Judge allowed the petition to be amended, but according to him the amendment that was needed was to change the date from the 24th into the 28th. In our opinion the lower appellate Court's view, that the petition could be amended, is right, although the particular amendment indicated by the learned Judge is wrong.

The petition was founded on alleged acts of bankruptcy that occurred on 17th September 1930 and 13th October 1930, i.e., within three months of the petition. Even should the date of its filing be taken as 28th November, the petition would still be within time.

In *Ex parte Dearle*. In *re Hastings*(1) a bankruptcy petition was filed by a person who was a mere trustee of the debt for his sister, and the Registrar dismissed it, holding that the *cestui que trust* was a necessary

(1) (1884) 14 Q.B.D. 184

party. The Court of Appeal agreed with the Registrar that the petition as filed was incompetent, but long after the three months period, gave leave to amend the petition. The debtor's Counsel is reported to have contended :

"The amendment would be equivalent to the presentation of a new petition founded on an act of bankruptcy more than three months old."

That the trustee had no right to present the bankruptcy petition is, as already stated, declared by the Court of Appeal. BRETT M.R. observes that the trustee was not a good petitioning creditor alone but that the *cestui que trust* ought to have joined in the petition. Similarly, LINDLEY L.J. says that it has been the settled rule in bankruptcy that in order to maintain a bankruptcy petition in respect of a debt due to a trustee, the *cestui que trust* must join in the petition. In spite of this, however, leave to amend was granted, Lord COLERIDGE C.J. observing :

"A blunder by no means unnatural has been made in the construction of the Act ; it is a mere slip."

The Court of Appeal in a yet later decision reaffirmed this principle and allowed a similar amendment [*In re Ellis*. *Ex parte Hinshelwood*(1).] *Ex parte Owen*(2), though not directly in point, throws some light upon the matter in hand. There, the petition as originally filed was properly constituted, but before the hearing, the interest of one of the partners of the creditor firm (petitioners) became vested in a trustee. The Registrar, even in the absence of the trustee, made a receiving order. The Court of Appeal held that the trustee was a necessary party and that the proper course was to correct the irregularity by joining him as a petitioner. Leave

(1) (1887) 4 M.B. Rep. 283.

(2) (1884) 13 Q.B.D. 113.

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was accordingly given to amend the petition. The appellant, however, strongly relies upon *In re Maund*. *Ex parte Maund*(1), which of course is an authority to the extent to which it goes; but surely it cannot be suggested that it has the effect of impairing the value of the decisions of the Court of Appeal. In the case of *In re Maund*. *Ex parte Maund*(1), certain creditors, the aggregate of whose debts was of the requisite amount, filed the bankruptcy petition. Some of the alleged debts, it was found, had in fact no existence. The Registrar allowed the petition to be amended by the names being added of two other persons as petitioning creditors. At the time the application for amendment was made, more than three months had elapsed from the date of the committal of the act of bankruptcy on which the petition was founded. The learned Judges of the Queen's Bench Division held that the Registrar's order was wrong. The point of distinction between the Court of Appeal decisions and this case is most clearly brought out in the very terse judgment of WRIGHT J. The learned Judge observes:

"As I understand the matter, every debt sought to be added, as ground of the petition, after three months from the date of the act of bankruptcy, is unavailable for that purpose; but if within that period a debt has been made ground of the petition, and it afterwards becomes desirable to add another party to the petition in respect of that debt, leave may be given to join that other party as a petitioner where it will not lead to any injustice."

VAUGHAN WILLIAMS J. puts the test in words very similar. Is the effect of the amendment to introduce creditors as petitioning creditors who could not themselves present a petition after the three months have elapsed? To express the same idea

(1) [1895] 1 Q.B. 194.

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differently, is its effect to introduce a debt which, after the same period has elapsed, would not be a debt upon which the petition could be founded? If that is what is sought to be done, the Court will not grant leave to amend. But if, on the contrary, as WRIGHT J. in the passage quoted above observes, within that period a debt has been made a ground of the petition and it afterwards becomes desirable to add another party, the case stands on an entirely different footing. In the case before the learned Judges it was sought to introduce new creditors and new debts, and leave, on the principle mentioned above, was refused. The facts here bring the case directly within the principle of the two cases, already cited, of the Court of Appeal. Here there is, as in those cases, a "good petitioning creditor's debt" [per BRETT M.R. in *Ex parte Dearle*. *In re Hastings*(1) referred to above]. The petitions there were not properly constituted owing to the *cestui que trust* not having been joined; the defect in the present case is the non-joinder of the other partner. The parallel seems to be complete and we must respectfully dissent from *Vaithinatha Aiyar v. Vaithinatha Aiyar*(2), a decision of CORNISH J. The learned Judge's attention was not called to the crucial cases on the point—the decisions of the Court of Appeal. The lower Court has thus acted rightly in granting leave to amend; but, as already stated, all that need be done is to allow the petitioning creditor to amend his petition by adding that the inchoate right which he had previous to the petition became perfected in virtue of the award delivered four days later. As observed by Lord COLERIDGE C.J. in *Ex Parte Dearle*. *In re Hastings*(1), the person who has made the

(1) (1884) 14 Q.B.D. 184.

(2) (1931) 61 M.L.J. 544.

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blunder must pay for it and the lower Court has very properly directed the petitioning creditor to pay the costs that have been thrown away. The contention of the petitioner therefore fails.

Next it has been argued for him that in regard to the merits, the lower appellate Court's order of remand is wrong. There can be no doubt, as the District Judge suggests, that in the trial Court the petitioning creditor thought, not unreasonably, that the contest was in regard to the preliminary question alone. The various entries in the B Diary support the lower appellate Court's inference and the Subordinate Judge, it seems to us, dealt with the merits, not because they were gone into, but because he imagined that to make his judgment complete he had to touch on them.

The petition will be amended in the lower Court within one month from the re-opening of the Sub-Court.

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

A.S.V.

# APPELLATE CIVIL—FULL BENCH.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice Wadsworth and Mr. Justice Krishnaswami Ayyangar.*

MADA NAGARATNAM, PLAINTIFF,

v.

PUVVADA SESHAYYA AND ANOTHER, DEFENDANTS.\*

*Madras Agriculturists Relief Act (IV of 1938)—If ultra vires the Provincial Legislature.*

*Held by the Full Bench.*—The provisions of the Madras Agriculturists Relief Act, 1938, relating to scaling down of debts and interest are within the powers of the Provincial Legislature.

(i) In deciding whether a particular Act is *ultra vires* a Legislature, a Court has to have regard to the "true nature and character of the legislation in the particular instance in order to ascertain the class of subject to which it really belongs". The fact that an Act of a Provincial Legislature may in some respects trench upon a Federal subject is not the deciding factor. In one aspect and for one purpose a subject may be within the powers of a Federal Legislature, while in another aspect and for another purpose it may fall within the powers of a Provincial Legislature. In such cases the nature and scope of the legislative attempt have to be examined with reference to the actual facts to determine under which set of powers it falls in substance and reality.

The Madras Agriculturists Relief Act relates to agriculture and to money lending to agriculturists which are topics reserved for the Provincial Legislature under List II of the Seventh Schedule to the Government of India Act, 1935, and does not really affect the principles embodied in the Negotiable Instruments Act relating to negotiable instruments, which is a Federal Subject under List I. In reducing the liability of the maker or indorser of a negotiable instrument when he happens to be an agriculturist the Provincial Legislature was acting in the interests of agriculture and regulating money lending to agriculturists.

\* Referred Cases Nos. 7, 8 and 9 of 1938.

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Even if the matters dealt with in the Madras Agriculturists Relief Act do not come within the exclusive powers of the Provincial Legislature the Act can be supported on the ground that it relates to contracts falling within the Concurrent Legislative List (List III) because it was reserved for the consideration of the Governor-General under section 107 (2) of the Government of India Act and received his assent.

The fact that the Act affects, so far as agriculturists are concerned, the discretion given to the Court by the Usurious Loans Act can make no difference to its validity.

(ii) The argument that the Government of India Act does not authorise either the Federal Legislature or the Provincial Legislature to legislate on matters relating to Hindu law and that, therefore, until the Governor-General under the powers conferred upon him under section 104 of the Act has assigned to the Federal Legislature or the Provincial Legislature power to enact laws with regard to Hindu law, neither Legislature can pass an Act which alters the personal law of the Hindus, has no force, since the Provincial Legislature has powers to legislate with regard to contracts under List III and no exception is made in respect of contracts entered into by Hindus. The same remarks apply in the case of the manager of a Hindu joint family contracting a debt for family necessity. The manager is in the position of an agent and the Provincial Legislature has under the Concurrent Legislative List (List III) power to legislate with regard to agency as well as with regard to contracts.

Case-law reviewed and discussed.

CASES STATED under Order XLVI, rule 1, of the Code of Civil Procedure (Act V of 1908) by the District Munsif of Guntur in Small Cause Suit No. 505 of 1938, by the Additional District Munsif of Cuddalore in Small Cause Suit No. 464 of 1938 and by the Subordinate Judge of Cocanada in Small Cause Suit No. 182 of 1938.

#### ON THE REFERENCE:

*T. R. Venkatarama Sastri* (with him, *K. S. Sankara Iyer*, *B. V. Rama Narasu* and *D. Narasuraju*) for plaintiffs.—Under the Seventh Schedule to the Government of India Act, 1935,

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three lists are given. List I gives a list of topics within the competence of the Federal Legislature, List II a list of topics within the competence of the Provincial Legislature and List III a list of concurrent topics. Under the Government of India Act, 1915, there were no separate lists. Under the 1919 Act two separate lists were given, one for the Central Legislature and the other for the Local Legislature. The underlying scheme of the Act of 1919 was unitary legislation. The Local Legislature had power to encroach on the sphere of the Central Legislature if previous sanction of the Governor-General had been obtained or subsequent assent was given by the Governor-General. [Counsel read the relevant portions of the Government of India Acts 1915 and 1919 and the rules framed thereunder and proceeded:] This scheme was given up in the 1935 Act which, in some respects, was an improvement on the Federal Constitutions of Canada and Australia. If the 1919 Act had been in force in 1938 when the Madras Agriculturists Relief Act was passed, the present question would not have arisen because the subsequent assent of the Governor-General would have cured the incompetence of the Local Legislature to interfere with negotiable instruments. [Counsel read sections 99, 100, 104, 107, 292, 293, 311 and 316 of the Act of 1935, Adaptation Order dated 8th March 1937 and the relevant items in Lists I, II and III in the Seventh Schedule to the Act of 1935 and proceeded:] Negotiable instruments are mentioned as item No. 28 of List I which is the exclusive Federal field. The Provincial Legislature is incompetent to deal with any topic mentioned in List I whether directly or indirectly. Agriculture and money-lending find a place in List II which is the exclusive Provincial field. Contracts and agency find a place in List III which is the Concurrent field. Subsequent assent of the Governor-General to an Act of the Provincial Legislature on a topic mentioned in List I could not make it *intra vires*, though it would if it legislated on a topic mentioned in List III.

[THE CHIEF JUSTICE.—The point that would be put against you is that the Provincial Legislature in enacting the Madras Agriculturists Relief Act, 1938, did not legislate on negotiable instruments or interfere with them.]

[Counsel read sections 4, 32, 35, 37, 78, 79, 80, 81 and 82 of the Indian Negotiable Instruments Act and sections 7, 8, 9, 10 and 13 of the Madras Agriculturists Relief Act and the definition

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of an "agriculturist" in the same and proceeded:] If the Madras Agriculturists Relief Act is to have full scope, the rights and liabilities between maker, indorser and indorsee will be altered according as one or more of them are agriculturists. The rights of a holder in due course, rights flowing from negotiation, and rights of recourse given under the Negotiable Instruments Act in favour of subsequent parties to a negotiable instrument will become altered. To that extent the Madras Agriculturists Relief Act interferes with negotiable instruments and rights flowing from them. It is because of the international character of a negotiable instrument that it is taken out of Lists II and III and put into List I. Item 28 of List I is wide enough to cover all kinds of persons who become parties to negotiable instruments, including "agriculturists". So the power of the Provincial Legislature to legislate as regards "agriculture" and "money-lending and money-lenders" is diminished to the extent that it affects negotiable instruments. Moreover, a money-lender is one who carries on the profession of money-lending. Every man who lends money is not a money-lender. It is a question of fact in each case; see *Litchfield v. Dreyfus*(1), section 6, and Halsbury's Laws of England, Hailsham Edn., Vol. 23, page 121, paragraph 266. Under the guise of legislating on "money-lending" and "money-lenders" the Provincial Legislature cannot intrude into the Federal field, which alone comprises within it negotiable instruments, and give relief to agriculturists in respect of their obligations arising from negotiable instruments. In *Great West Saddlery Co. v. The King*(2) it was held that a Legislature cannot do impliedly that which it cannot do expressly. The Usurious Loans Act, 1918, is an Act of the Imperial Legislature. So it could interfere with the incidents flowing from negotiable instruments. The amendment by the Provincial Legislature of the Usurious Loans Act, 1918, by Act VIII of 1937 was within its competence because, before the coming into force of the Government of India Act, 1935, it had power to legislate on central subjects with the previous sanction of the Governor-General or because its Acts might be validated by his subsequent assent. In the Canadian Constitution there is a Dominion list containing twenty-nine items and a Provincial list containing sixteen items. There is no Concurrent list and the residuary power is vested in the Dominion Parliament. Under the Government

(1) [1906] 1 K.B. 584, 589.

(2) [1921] 2 A.C. 91.

of India Act, 1935, the residuary power is vested in the Governor-General. [Counsel read sections 91, 92, 93 and 95 of 30 and 31 Vic. c. III and proceeded:] The leading case which lays down the way in which statutes relating to constitutions should be construed is *Citizens Insurance Company of Canada v. Parsons*(1). The Court has first to find out if the Provincial enactment is in respect of one of the items mentioned in the Provincial list. If it is not found therein, no further question need be considered by the Court and the Provincial enactment is *ultra vires* the Provincial Legislature. If it is found therein, then the Court has to see if it falls in the Federal list also. If it does, then two principles have to be borne in mind by the Courts. If there is conflict between the items in the two lists as regards a particular topic, the Federal Legislature has overriding powers. Terms of particular import are to be taken away from terms of general import and are to be treated as exceptions; for example, "solemnization of marriage" is considered as a special topic and "marriage" as a general topic. See Lefroi's Constitutional Law of Canada, pages 488 and 489; *In re Marriage Legislation in Canada*(2), *John Deere Plow Company, Limited v. Wharton*(3) and *Great West Saddlery Co. v. The King*(4). In *Attorney-General for Ontario v. Reciprocal Insurers*(5) it was held that the true nature and character of the Act, its pith and substance, has to be looked into and not its mere form. See also *Attorney-General for Manitoba v. Attorney-General for Canada*(6). *Attorney-General for Canada v. Attorney-General for British Columbia*(7) lays down four propositions for the guidance of Courts which are approved in *In re Regulation and Control of Aeronautics in Canada*(8). If the two topics overlap, then the fourth proposition should guide the Courts in the correct interpretation of the same. In *Attorney-General for Canada v. Attorney-General for Ontario*(9) and *Attorney-General for British Columbia v. Attorney-General for Canada*(10) it was held that, if a topic seems to be a Provincial topic in part and also a Dominion topic in part, unless the two Legislatures come together a comprehensive legislation could not be achieved.

(1) (1881) 7 App. Cas. 98, 107, 109, 113.

(2) [1912] A.C. 880.

(3) [1915] A.C. 330, 337, 340, 341.

(4) [1921] 2 A.C. 91, 99, 100, 116.

(5) [1924] A.C. 328, 339, 342.

(6) [1929] A.C. 260, 267.

(7) [1930] A.C. 111, 118.

(8) [1932] A.C. 54, 70, 71.

(9) [1937] A.C. 327.

(10) [1937] A.C. 377.

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Under the Government of India Act, 1935, existing Indian laws are preserved. The Negotiable Instruments Act and the Usurious Loans Act are existing Indian laws. So the rights flowing from them cannot be altered by the Provincial Legislature. The discretion given to Courts by the Negotiable Instruments Act and the Usurious Loans Act cannot be interfered with by the Provincial Legislature. Even after the rights flowing from them become merged in a decree they could not be interfered with by the Provincial Legislature. Under item No. 4 in List III, the Provincial Legislature is competent to deal with the Civil Procedure Code. Under the guise of dealing with matters in execution the Provincial Legislature is not competent to deal even indirectly with the Federal topics or the rights flowing from enactments of the Federal Legislature or "existing Indian laws".

In *Maruthamuthu Naicker v. Kadir Badsha Rowther*(1) it was held that the liability of the junior members of a joint Hindu family who have not joined with their father or manager in the execution of a negotiable instrument is not on the negotiable instrument but only on the debt under their personal law. It dealt with the rights of an indorsee. The earlier Full Bench case of *Krishna Ayyar v. Krishnasami Ayyar*(2) is still good law. The promisee can even now file a suit against the maker of a promissory note and in the same suit join his non-executing sons as parties. The extent of the liability of the junior members is measured by the liability of the manager and is co-extensive with the same. Where the primary liability of the father is not reduced the ancillary liability could not be reduced. This aspect has been ignored by the Madras Agriculturists Relief Act. There is no item in List II or List III from which one can spell out a right in the Provincial Legislature to cut down the liability of the junior members under their personal law. Item No. 10 in List III deals with contracts. When the junior members do not join in the execution of a negotiable instrument there is no contract with or by them. Item No. 27 of List II deals with money-lending. In terms no item in either List II or List III enables the Provincial Legislature to interfere with personal law. If it is contended that the same argument would apply to List I also

(1) I.L.R. [1938] Mad. 568 (F.B.). (2) (1900) I.L.R. 23 Mad. 597.

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until the Governor-General under section 104 of the Government of India Act, 1935, assigns the power to either the Federal Legislature or the Provincial Legislature, no Legislature can legislate on personal law.

[Counsel read sections 3, 5, 6, 7, 8, 9 and 14 of the Madras Agriculturists Relief Act and pointed out the anomalies that would result in the treatment between the agricultural and non-agricultural portions of a joint Hindu family and proceeded:] If the father who executed a promissory note is an agriculturist and his sons are non-agriculturists, it may happen that the share of the father in the joint family property will be liable only to the extent of the scaled debt, while the share of the non-executing members will be liable for the whole debt. [Counsel stated the facts of each of the cases and concluded.]

*Advocate-General*, (Sir A. Krishnaswami Ayyar), with him, N. Rajagopalan, for Government.—The matter has to be approached from the proper angle. Before the passing of the Government of India Act, 1935, India had unitary legislation. There was no competition between the Local Legislature and the Central Legislature. Under the 1935 Act each Province is a unit possessing sovereign or semi-sovereign powers. Agriculture in all its aspects has been confided to the Provincial Legislature under item No. 20 of List II. The phrase "that is to say" which appears in items Nos. 19 and 20 of List II is advisedly not used in item 20. Under item No. 21 land is confided to the Provincial Legislature. The topic of money-lending and money-lender has been assigned to the Provincial Legislature in order that it might relieve the indebtedness of persons like agriculturists, in conformity with the conditions prevailing in the various Provinces. Further the normal and usual way of raising loans in India is by executing promissory notes. In the majority of cases, debts secured by mortgages of immovable properties have their beginnings in promissory notes. Their law merchant character is not thought of. Again the Courts should try as far as possible to reconcile all the lists. The lists are *prima facie* mutually exclusive and must be given effect to. It is only if reconciliation is impossible recourse is to be had to section 100 of the Government of India Act, 1935. In *In re C.P. Motor Spirit Taxation Act*(1)

(1) [1938] 2 Fed. L.J. 6.

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the apparent conflict between item No. 45 in List I and item No. 48 in List II was considered. The point of approach is dealt with by the CHIEF JUSTICE at page 15, by SULAIMAN J. at pages 47, 48, 58 and 59 and by JAYAKAR J. at pages 66, 82 and 83. Prior to the Act of 1935 Local Legislatures were legislating in respect of debt conciliation and other allied topics. Lending of money is synonymous with money-lending within the meaning of item No. 27 of List II. The course of legislation in all the Provinces in India prior to the Act of 1935 adopted that meaning. The earlier Acts are all collected in the Madras Law Journal Edition of the Madras Agriculturists Relief Act. [The relevant portions of the earlier Indian Acts were referred to in support of the contention.] The Parliament must have intended to use the words money-lending and money-lenders only in that sense.

[KRISHNASWAMI AYYANGAR J.—You suggest that the word money-lending has acquired a definite meaning apart from the definition given in dictionaries.]

Yes. The case of *In re C.P. Motor Spirit Taxation Act*(1) recognises that the legislation which preceded the Act of 1935 is a guide in interpreting the meaning of the expressions in the Act.

[Counsel read the relevant sections of the Madras Agriculturists Relief Act, pointed out that (i) the dominant feature of the Act is the protection of agriculture, (ii) a person who is not an agriculturist within the definition given in the Act is not entitled to the benefit of the Act and (iii) debts in general are intended to be scaled down, and referred to the passages at page 491 of Clemant on Canadian Constitution, Third Edition, and proceeded:]

The presumption is in favour of an Act being *intra vires* the Legislature which passed it. Before the Madras Agriculturists Relief Act is declared to be *ultra vires* the Court has to come to the conclusion that the Act is in pith and substance one in respect of negotiable instruments and not one "with respect to" or "in respect of" agriculture and "money-lending and money-lenders". See *Shannon v. Lower Mainland Dairy Products Board*(2) which follows *Gallagher v. Lynn*(3). The principle of the latter case is held applicable to cases

(1) [1938] 2 Fed. L.J. 6.

(2) [1938] A.C. 708.

(3) [1937] A.C. 863.

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arising in connexion with the Federal constitution. In *Russell v. The Queen*(1) and *Hodge v. The Queen*(2) it was held that in deciding whether a particular Act is *ultra vires* a Legislature the Court must have regard to "the true nature and character of the legislation in the particular instance in order to ascertain the class of subject to which it really belongs". In other words, in one aspect and for one purpose a subject may be within the power of the Federal Legislature while in another aspect and for another purpose it may fall within the powers of a Provincial Legislature. So the matter has to be viewed from a proper angle. The pith and substance of the enactment has to be found out. See also *John Deere Plow Company, Limited v. Wharton*(3), *Gallagher v. Lynn*(4), and *Shannon v. Lower Mainland Dairy Products Board*(5).

The Indian constitution resembles the Canadian constitution more than the Australian constitution. An exclusive Federal list and the dominance of the same over the Provincial list are features common to the two constitutions. There is no counterpart to section 107 of the Government of India Act, 1935, in the Canadian constitution. The Negotiable Instruments Act is only an "existing Indian law" and not a Federal law.

The first question that has to be considered is, is the Madras Agriculturists Relief Act, 1938, within the competence of the Provincial Legislature? If it is not, no further question arises. If it is, then the question arises, what is the section of the Government of India Act, 1935, which makes it repugnant? If it is section 107 (2), then the repugnancy is cured by the assent of the Governor-General. If it is said that it offends against section 107 (1), the answer to it is that the Negotiable Instruments Act is not a Federal law but only an existing Indian law. No section of the Government of India Act, 1935, says that a Provincial enactment should give way before "an existing Indian law". If the Federal Legislature passes a Negotiable Instruments Act, then, under section 107 (1) the Madras Agriculturists Relief Act, which is only an Act of the Provincial Legislature, has to yield.

[WADSWORTH J.—Your argument is that mere repugnancy to Federal powers will not do. The Madras Agriculturists

(1) (1882) 7 App. Cas. 829, 839.

(2) (1883) 9 App. Cas. 117.

(3) [1915] A.C. 330, 339.

(4) [1937] A.C. 863.

(5) [1938] A.C. 708, 719, 720.



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Relief Act will be bad under section 107 (1) if it is repugnant to a Federal law. There is no Federal law at present and the Negotiable Instruments Act is only an "existing Indian law".]

Yes. The possibility of overlapping between the Provincial sphere and the Federal sphere is not enough. Until the Federal field is occupied by a Federal law, the Provincial enactment will be good. This is made clear in *Attorney-General for Canada v. Attorney-General for British Columbia*(1). The field was clear for the Provincial Legislature. It passed an enactment in connection with "agriculture" and "money-lending" and "money-lenders". Incidentally it can trespass on the overlapping field. The existence of a potential power in the Federal Legislature to pass measures in the overlapping field does not take away the powers of the Provincial Legislature. See also *L'Union St. Jacques de Montreal v. Belisle*(2). It is only as a last resort, when it becomes impossible to reconcile the lists, that a Court of construction is driven to section 107. Moreover, the use of the affirmative words in section 107 implying that an Act is invalid only to the extent of the offending portion suggests that it is valid if it is not against any Federal law. It is not suggested that the Madras Agriculturists Relief Act is a colourable legislation on the part of the Provincial Legislature. Item No. 4 of List III relates to Civil Procedure Code and all matters included in the Code of Civil Procedure on the date of the passing of the Government of India Act. Substantive law is also included in the Code of Civil Procedure. Section 60 of the Code can be so amended by the Provincial Legislature, with the previous consent of the Governor-General or his subsequent assent as to make agricultural land not liable to attachment in execution of a decree obtained on a negotiable instrument over and above the scaled debt. That is what in effect the Provincial Legislature has done. Land is mentioned as item No. 21 in List II. Land Alienation Restraint Acts are within the competence of the Provincial Legislature.

In any event, since the liability of junior members of a joint Hindu family is not on the negotiable instrument but on the debt, the scaling down of their liability will not be an interference with the rights flowing from negotiable instruments. The argument that the right to legislate as

(1) [1930] A.C. 111.

(2) (1874) L.R. 6 P.C. 31, 36.

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regards personal laws is unprovided for has no force since the three lists are intended to be exhaustive; see *In re C. P. Motor Taxation Act*(1). Under section 104 it is only the residuary power that is sought to be vested in the Governor-General to give completeness to the legislative structure. It is only if a particular topic could not be brought under any of the items in the three lists that a Court has to look to section 104.

Item No. 10 of List III deals with contracts and agency. By those words are meant all kinds of contracts and agency. The manager of a joint Hindu family is the accredited agent of the family; see Mayne's Hindu Law, Tenth Edn. page 380. The statement by the Privy Council in *Annamalai Chetty v. Murugasa Chetty*(2) that the manager is more a trustee than an agent was made with reference to the point of jurisdiction of the Court and not as regards determining the legal conception of the relationship between him and the other members *inter se*.

*T. R. Venkatarama Sastri* in reply:—In order to find out whether the Madras Agriculturists Relief Act is *ultra vires* or *intra vires* the Provincial Legislature the Court should look at it in the way in which *Citizens Insurance Company of Canada v. Parsons* (3) has decided that it should be looked at.

[KRISHNASWAMI AYYANGAR J.—The aspect theory was not visualized in that case. It was developed only in *Hodge v. The Queen*(4).]

A money-lending legislation has a special meaning and the Madras Agriculturists Relief Act is not a money-lending legislation. So item No. 27 of List II could not be invoked. The character of the lender is completely put out of the question. [Counsel referred to *Toronto Electric Commissioners v. Snider*(5), *The Citizens Insurance Company of Canada v. Parsons* (3), *Russell v. The Queen*(6) and *Hodge v. The Queen* (4).] The aspect theory was intended to separate the spheres and not to create overlapping fields; see *John Deere Plow Company, Limited v. Wharton* (7), *Attorney-General for Canada v. Attorney-General for Alberta* (8), *Paquet v. Pilots'*

(1) [1938] 2 Fed. L.J. 6, 16.

(3) (1881) 7 App. Cas. 96, 103.

(5) [1925] A.C. 396, 410.

(7) [1915] A.C. 330, 339.

(2) (1903) I.L.R. 26 Mad. 544 (P.C.)

(4) (1883) 9 App. Cas. 117.

(6) (1882) 7 App. Cas. 829.

(8) [1916] A.C. 588, 596.

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SESHAYYA. *Corporation (Quebec)*(1), *Great West Saddlery Co. v. The King*(2), *L' Union St. Jacques de Montreal v. Belisle*(3) and *Shannon v. Lower Mainland Dairy Products Board*(4). The field of negotiable instruments cannot be occupied by an enactment of the Provincial Legislature. Under section 292 "existing Indian laws" have the force of Federal laws and hold the field in respect of Federal topics. The Legislature that is competent to repeal the same is pointed out in *Dobie v. The Temporalities Board* (5). See also *Attorney-General for Ontario v. Attorney-General for the Dominion*(6) where the converse case is dealt with. [*Sadanand v. Anur Khan*(7) was referred to.]

Relationship in the nature of agency does not come under item 10 of List III but only strict cases of agency arising out of contracts.

The plaintiff in Small Cause Suit No. 464 of 1938 and the defendants in all the suits were unrepresented.

*Cur. adv. vult.*

LEACH C.J.—The JUDGMENT of the Court was delivered by LEACH C.J.—Under the provisions of Order XLVI, rule 1, of the Code of Civil Procedure, the District Munsif of Guntur, the District Munsif of Cuddalore, and the Subordinate Judge of Cocanada have referred to this Court for decision questions with regard to the validity of the Madras Agriculturists Relief Act, 1938, an Act passed by the Madras Legislature to provide for the relief of indebted agriculturists in the Province. The Act provides for the scaling down of debts and interest and for remission of arrears of rent. All the references raise the question whether the provisions of the Act relating to the scaling down of debts and interest are *ultra vires* the Provincial Legislature in that these provisions are repugnant to the

(1) [1920] A.C. 1029, 1031.

(3) (1874) L.R. 6 P.C. 31.

(5) 1882) 7 App. Cas. 136, 147.

(2) [1921] 2 A.C. 91, 94, 100, 101, 116.

(4) [1938] A.C. 708, 719.

(6) [1896] A.C. 348, 367.

(7) (1938) P. W.N. 913 (F.B.).

provisions of the Negotiable Instruments Act, 1881. The reference by the District Munsif of Guntur couples the Usurious Loans Act, 1918, with the Negotiable Instruments Act, and the reference by the District Munsif of Cuddalore raises the further question whether the Act is *ultra vires* because its provisions conflict with the provisions of Hindu law which impose upon a son the pious obligation to discharge his father's debts lawfully contracted, and the liability on a member of a joint family to pay out of his share of the family property a debt incurred by the manager of the family for a family necessity. The references have been heard together and it will be convenient to answer them in one judgment.

The objections to the Madras Agriculturists Relief Act are based on the provisions of the Government of India Act, 1935, and the questions referred will be more readily understood if the relevant sections of the latter enactment are first stated. Section 99 of the Government of India Act provides that, subject to the provisions of the Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Provincial Legislature may make laws for the Province or for any part thereof. Section 100, sub-section 1, confers upon the Federal Legislature exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to the Act (the "Federal Legislative List"). Sub-section 2 provides that, notwithstanding anything in sub-section 3, the Federal Legislature, and, subject to sub-section 1, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the Schedule (the "Concurrent Legislature List"). Sub-section 3 states that subject to the two preceding

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LEACH C.J. sub-sections the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II (the "Provincial Legislative List"). The Provincial Legislature is therefore given exclusive power to legislate with regard to the matters specified in List II. Section 107 deals with the position when there is inconsistency between a Federal law and a Provincial law, or between an "existing Indian law" and a Provincial law. Sub-section 1 of this section reads as follows:—

"If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void."

An "existing Indian law" is defined in section 311. It is not necessary to set out the whole of the definition. Stated shortly, it means any law which was lawfully passed before the commencement of Part III of the Act. Part III relates to Governors' Provinces and deals *inter alia* with the constitution of Provincial Legislatures. It came into force on 1st April 1937.

Sub-section 2 of section 107 states:

"Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may

at any time enact further legislation with respect to the same matter."

Reading sub-sections 1 and 2 of section 107 together the effect is this. A Federal law always overrides a Provincial law unless the Provincial law is in respect of one of the matters enumerated in the Concurrent Legislative List and has been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure and has received the assent of the Governor-General or of His Majesty, in which case the Provincial law prevails in the Province until the Federal Legislature chooses to legislate further. The position is the same in respect of an "existing Indian law". An existing Indian law with respect to a matter enumerated in the Concurrent Legislative List overrides a Provincial law unless the Provincial law has been reserved and has received the assent under sub-section 2. The power of the Federal Legislature to legislate further when a Provincial law has been reserved and has received the assent is subject to the proviso that no Bill or amendment shall be introduced without the previous sanction of the Governor-General. The respective legislative lists are comprehensive, but section 104 empowers the Governor-General to assign to the Federal Legislature or to a Provincial Legislature a matter which has not been enumerated.

To the Federal Legislature is given the power of legislating with regard to "cheques, bills of exchange, promissory notes and other like instruments". This is paragraph 28 of the Federal Legislative List. To the Provincial Legislature is given the power of legislating with regard to "agriculture" (paragraph 20). The word "agriculture" is used in a wide sense and it is expressly stated that it includes agricultural

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education and research, protection against pests and prevention of plant diseases, improvement of stock and prevention of animal diseases, veterinary training and practice, pounds and the prevention of cattle trespass. The Provincial Legislature's powers also relate to "land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land, land improvement and agricultural loans" (paragraph 21) and "money-lending and money-lenders" (paragraph 27). Included in the Concurrent Legislative List are "contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land" (paragraph 10).

I will now turn to the provisions of the Madras Agriculturists Relief Act. Section 7 of the Act provides that, notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of the Act shall be scaled down in accordance with the provisions of Chapter II of the Act. No sum in excess of the amount as so scaled down shall be recoverable from him or from any land or interest in land belonging to him; nor shall his property be liable to be attached and sold or proceeded against in the execution of any decree against him in so far as such decree is for an amount in excess of the sum as scaled down under Chapter II. Section 8 makes provision for the scaling down of debts incurred before 1st October 1932. The section states that all interest outstanding on 1st October 1937, in favour of any creditor of an agriculturist, whether the same be payable under law, custom or contract or under a decree of Court and whether the debt or other obligation has ripened into

a decree or not, shall be deemed to be discharged, and only the principal or such portion thereof as may be outstanding shall be deemed to be the amount repayable by the agriculturist on that date. Where an agriculturist has paid to any creditor twice the amount of the principal, whether by way of principal or interest or both, such debt including the principal shall be deemed to be wholly discharged. Where the sums repaid by way of principal or interest or both fall short of twice the amount of the principal, such amount only as would make up this shortage, or the principal amount or such portion of the principal amount as is outstanding, whichever is smaller, shall be repayable. Where a debt has been renewed or included in a fresh document in favour of the same creditor, the principal originally advanced by the creditor, together with such sums, if any, as have been subsequently advanced as principal shall alone be treated as the principal sum repayable by the agriculturist under the section. Section 9 makes provision for scaling down of debts incurred on or after 1st October 1932. In such cases interest shall be calculated up to the commencement of the Act at the rate applicable to the debt under the law, custom, contract or decree of the Court under which it arises or at five per cent per annum simple interest, whichever is less, and credit shall be given for all sums paid towards interest and only such amount as is found outstanding for interest thus calculated shall be deemed payable together with the principal amount or such portion of it as is due. Any part of the debt which is found to be renewal of a prior debt shall be deemed to be a debt contracted on the date on which such prior debt was incurred, and if such debt had been contracted prior to 1st October 1932 it shall be

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dealt with under the provisions of section 8. Section 12 states that all debts which have been scaled down under the provisions of the Act shall, so far as any sum remains payable thereunder, carry from the date up to which they have been scaled down interest on the principal amount due on that date at the rate previously applicable under law, custom, contract or otherwise; provided that it shall not in any case exceed six and one-fourth per cent per annum simple interest. Under section 13, in any proceeding for recovery of a debt, the Court shall scale down all interest on any debt incurred by an agriculturist after the commencement of the Act, so as not to exceed a sum calculated at six and one-fourth per cent per annum simple interest, but power is reserved for the Provincial Government to alter and fix any other rate of interest from time to time.

The Madras Agriculturists Relief Act makes no difference between a simple contract debt and a debt due on a promissory note or other negotiable instrument. Therefore, debts arising on negotiable instruments are within the purview of the Act. If debts and promissory notes were excluded, the Act would to a very large extent be rendered nugatory, the practice of lending money on promissory notes being so widespread. It is said that, as the Negotiable Instruments Act contemplates the payment of the full amount due on a negotiable instrument, the Provincial Legislature has no power to enact a measure which cuts down the amount payable on the negotiable instrument. In this connection, our attention has been drawn to the provisions of sections 32, 78, 79 and 80 of the Negotiable Instruments Act. Section 32 states that in the absence of a contract to the contrary, the maker of

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a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of the bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand. Section 78 says that subject to the provisions of section 82, which relates to the discharge from liability, payment of the amount due on a promissory note, bill of exchange or cheque, must, in order to discharge the maker or acceptor, be made to the holder of the instrument. Section 79 requires that, when interest at a specified rate is expressly made payable on a promissory note or bill of exchange, interest shall be calculated at the rate specified, on the amount of the principal money due thereon, from the date of the instrument, until tender or realisation of such amount, or until such date after the institution of a suit to recover such amount as the Court directs, and section 80 states that interest shall be calculated at six per cent per annum where no interest is specified in the instrument.

The first question which falls for decision is whether the Madras Agriculturists Relief Act is a measure which is directly within the exclusive powers conferred upon the Provincial Legislature. The Government of India Act, 1935, has been drafted in the light of the experience gained by the working of the Canadian and Australian constitutions, particularly by the working of the Canadian constitution, which is governed by the British North America Act, 1867. The British North America Act differs in an important respect from the Government of India Act in that it contains no Concurrent Legislative List, apart from the two subjects mentioned in section 95. The powers of the Federal Parliament in Canada are

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defined in section 91 of the Act and the powers of the Provincial Legislatures in section 92. But the fact that there is a Concurrent Legislative List in the Indian Act does not affect the principles which apply in deciding what is within the exclusive power of the Federal Legislature and what is within the exclusive power of a Provincial Legislature. There have been numerous cases before the Privy Council relating to the British North America Act and the principles stated by the Judicial Committee in those cases have direct application when the Court has to consider whether a particular Act is or is not *ultra vires* a Provincial Legislature. However carefully an Act is drawn it is not possible to avoid questions arising with regard to the powers of the respective Legislatures, but, as was stated in *Citizens Insurance Company of Canada v. Parsons*(1), it could not have been the intention that conflict should exist and in order to prevent such a result the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way, as was further pointed out, it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. The fact that an Act of a Provincial Legislature may in some respect trench upon a Federal subject is not the deciding factor. In deciding whether a particular Act is *ultra vires* the Legislature the Court has to have regard to

“the true nature and character of the legislation in the particular instance in order to ascertain the class of subject to which it really belongs”; *Russell v. The Queen*(2).

(1) (1881) 7 App. Cas. 96.

(2) (1882) 7 App. Cas. 829, 839.

In *Hodge v. The Queen*(1) the Privy Council in deciding whether an Act passed by the Legislature of the Province of Ontario and known as “The Liquor License Act of 1877” was within the powers of the Provincial Legislature said that subjects which in one aspect and for one purpose fall within section 92 of the British North America Act may in another aspect and for another purpose fall within section 91. In other words, in one aspect and for one purpose a subject may be within the powers of the Federal Parliament while in another aspect and for another purpose it may fall within the powers of a Provincial Legislature. This statement of the law was emphasized in *John Deere Plow Company, Limited v. Wharton*(2) where Lord HALDANE in delivering the judgment of the Board observed :

“It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and reality.”

The House of Lords expressed the same opinion in *Gallagher v. Lynn*(3), a case under the Government of Ireland Act, 1920. That Act conferred upon the Parliament of Northern Ireland the power to make laws for the peace, order and good government of Northern Ireland, with certain limitations. The Act expressly provided that the Parliament of Northern Ireland should not have power to make laws in respect of

“trade with any place out of that part of Ireland within their jurisdiction, except so far as trade may be affected by

(1) (1883) 9 App. Cas. 117.

(2) [1915] A.C. 330, 339.

(3) [1937] A.C. 863.

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the exercise of the powers of taxation given to the said Parliaments, or by regulations made for the sole purpose of preventing contagious disease, or by steps taken by means of inquiries or agencies out of that part of Ireland within their jurisdiction for the improvement of the trade of that part or for the protection of traders of that part from fraud".

The Parliament of Northern Ireland passed an Act called the Milk and Milk Products Act (Northern Ireland), 1934, which had the effect of putting an end to the milk trade between the farmers of Donegal which is in the Free State and customers in Derry which is in Northern Ireland. It was said that the Act was an Act in respect of trade outside Northern Ireland. The House of Lords refused to accept this contention, holding that it was a law for the peace, order and good government of Northern Ireland in respect of precautions taken to secure the health of the inhabitants of Northern Ireland by protecting them from the dangers of an unregulated supply of milk. Lord ATKIN observed :

" It is well established that you are to look at the ' true nature and character of the legislation ', *Russell v. The Queen*(1), ' the pith and substance of the legislation '. If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object, e.g., to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, e.g., a direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed ' in respect of ' the forbidden subject. In the present case any suggestion of an indirect attack upon trade is disclaimed by the appellant. There could be no foundation for it. The true nature and character of the Act,

(1) (1882) 7 App. Cas. 829.

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its pith and substance, is that it is an Act to protect the health of the inhabitants of Northern Ireland; and in those circumstances, though it may incidentally affect trade with County Donegal, it is not passed ' in respect of ' trade, and is therefore not subject to attack on that ground".

The passage which I have quoted from the judgment of Lord ATKIN (which was concurred in by Lord THANKERTON, Lord MACMILLAN and Lord WRIGHT) was quoted *in extenso* in the judgment of the Privy Council in *Shannon v. Lower Mainland Dairy Products Board*(1), a case which related to the powers of the British Columbia Legislature to set up a central marketing board, to establish or approve schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of natural products, to constitute marketing boards, to administer such schemes and to vest in them powers considered necessary or advisable to exercise those functions, including the power to fix and collect license fees. It was held that the Act did not encroach upon the powers of the Federal Legislature to deal with the regulation of trade and commerce and the raising of money by taxation. The Court has, therefore, to look at the Madras Agriculturists Relief Act to see whether it is in substance within the express powers of the Provincial Legislature. If it is, it is not invalidated because incidentally it may affect matters which are within the Federal field.

The Madras Agriculturists Relief Act was placed on the statute book because the Madras Legislature considered that it was expedient to provide relief to indebted agriculturists in the Province and the provisions of the Act are all directed to the attainment of this object. The Court is not concerned with the policy of the Act, but with the effect of its provisions. That

(1) [1938] A.C. 708.

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agriculturists in the Province are heavily indebted is a matter of common knowledge and the Legislature decided that the situation demanded that relief should be given to them in the form of the scaling down of their debts. Agriculturists who are overburdened with debt cannot cultivate their lands to the best advantage. They have not the means, and there is a risk of their lands passing into the hands of non-agriculturists to the detriment of agriculture. Therefore the Act is one which does relate to agriculture and consequently relates to a subject reserved for the Provincial Legislature. But the matter does not rest there. The Act is certainly one which relates to money-lending to agriculturists and money-lending is another subject which is reserved for the Provincial Legislature. The power to deal with money-lending must carry with it a power to limit the amount to be recovered by the money-lender. This has not been seriously challenged. The main attack on the Act has been based on the fact that its scaling down provisions are repugnant to the Negotiable Instruments Act in that they do not allow the full amount due on a promissory note to be recovered from an agriculturist. But we do not regard the Agriculturists Relief Act as really affecting the principles embodied in the Negotiable Instruments Act. Negotiation of a promissory note is not prohibited, nor is it said that a maker or an indorser shall not be liable. The only effect of the Madras Agriculturists Relief Act so far as negotiable instruments are concerned is to reduce liability where the maker or indorser is an agriculturist. In providing for this the Provincial Legislature was acting in the interests of agriculture and regulating money-lending to agriculturists. It could never have been the intention of Parliament in conferring a general power on the Federal Legislature to legislate

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with regard to negotiable instruments to reduce the power of a Provincial Legislature to deal with subjects within its exclusive control. When examined the Madras Agriculturists Relief Act is in substance within the express powers of the Madras Legislature and the fact that in particular cases it may operate to reduce liability on contracts evidenced by negotiable instruments cannot affect its validity. The authorities which I have quoted are definite on the point.

Even if the matters dealt with in the Madras Agriculturists Relief Act do not come within the exclusive powers of the Provincial Legislature, the Act can be supported on the ground that it relates to contracts falling within the Concurrent Legislative List. The indebtedness of the agriculturists arises out of contract and contract of the nature contemplated by the Concurrent Legislative List. Regarding the Act as an Act dealing with a matter falling within the Concurrent Legislative List, section 107 of the Government of India Act comes into operation. The Negotiable Instruments Act is an "existing Indian law" within the meaning of section 107. The Madras Agriculturists Relief Act was reserved for the consideration of the Governor-General under the provisions of section 107 (2) and received his assent. Therefore, even if the Act does not come within the exclusive powers of the Legislature its provisions must prevail in the Province by virtue of the provisions of section 107 of the Government of India Act, unless and until the Federal Legislature thinks fit to legislate in respect of the same matter. But by virtue of the proviso to the section this cannot happen without the previous sanction of the Governor-General.

The argument based on the Usurious Loans Act stands or falls with the argument based on the



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Negotiable Instruments Act. If the Provincial Legislature had the power to pass the Madras Agriculturists Relief Act as being an Act dealing with matters in the Provincial Legislative List and we hold that it had—the fact that it affects, so far as agriculturists are concerned, the discretion given to the Court by the Usurious Loans Act can make no difference to its validity. But in any event the Madras Agriculturists Relief Act here again finds support from the provisions of section 107 of the Government of India Act. In the course of the argument our attention was drawn to the decision of the Patna High Court in *Sudanand v. Amar Khan* (1). We have been given to understand that this decision is being made the subject-matter of an appeal to the Federal Court, and in these circumstances we do not consider it fitting that we should discuss the views expressed in the judgments delivered by the learned Judges who decided that case. It is sufficient to say that in deciding the references now before us we have considered the Patna decision.

The only question which remains to be considered is whether the Madras Agriculturists Relief Act is *ultra vires* because it conflicts with the provisions of the Hindu law imposing on a son pious obligation to discharge his father's debts and liability on a member of a joint family to pay out of his share of the family property debts incurred by the manager of the family for family necessity. The argument here is that the Government of India Act does not authorise either the Federal Legislature or the Provincial Legislature to legislate on matters relating to Hindu law and that therefore until the Governor-General under the powers conferred upon him under section 104 of the Act has assigned to the Federal Legislature or the Provincial

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Legislature power to enact laws with regard to Hindu law, neither Legislature can pass an Act which alters the personal law of the Hindus. The Provincial Legislature has power to legislate with regard to contracts and no exception is made in respect of contracts entered into by Hindus. There is no Federal or "existing Indian law" which stands in the way, and even if there were, the sanction of the Governor-General given under section 107 (2) of the Government of India Act would remove it. The Provincial Legislature has, therefore, full power to legislate with regard to contracts entered into by Hindus and to reduce their contractual obligations. A Hindu son cannot be made liable for more than what his father is liable for, and in cutting down the father's liability, the Legislature is not interfering with any principle of Hindu law. The same remarks apply in the case of the manager of a family contracting a debt for family necessity. The members of the family are liable to the extent of their interests in the family property for so much of the debt as is lawfully recoverable. The manager is in the position of an agent and the Provincial Legislature has under the Concurrent Legislative List power to legislate with regard to agency as well as with regard to contract. There is no substance in the argument that the Act operates to change the principles of Hindu law.

For the reasons indicated we hold that the Madras Agriculturists Relief Act is within the powers of the Provincial Legislature and the references will be answered in the sense indicated in this judgment. The costs of the reference will in each case be made costs in the cause. We grant a certificate in each case under section 205 of the Government of India Act, 1935.

Solicitor for Government: *H. M. Small.*

G.R.

(1) (1938) P. W.N. 913.

## PRIVY COUNCIL.

J.C.\*  
1938,  
November 18.

THE COMMISSIONER OF INCOME-TAX, MADRAS,  
APPELLANT,

v.

S. L. MATHIAS, RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

*Indian Income-tax Act (XI of 1922), sec. 4 (1) and (2) (as amended by Acts XXVII of 1923 and XII of 1933) and sec. 10—Coffee grown by assessee in Mysore and cured and sold in British India—Assessee resident in, and directing operations from, British India—Assessee, whether carrying on business within ss. 2 (4) and 10—Income, where received—Profits, whether income exempt under second proviso to sec. 4 (2).*

The assessee resided at Mangalore in British India and owned and worked coffee estates in the Mysore State. The green coffee was brought to Mangalore and was cured and sold by the assessee's agents there. All operations were directed by the assessee from Mangalore. He was assessed on the proceeds of the sales after deducting all expenses incurred both within and outside British India. On a claim by the assessee to exemption under the second proviso to section 4 (2) of the Indian Income-tax Act of 1922,

*held*, that he was carrying on a business within the definition in section 2 (4) and within the meaning of section 10 of the Act, that he received the income from the produce of his coffee estates in British India and that no part of such income was exempt from taxation under the second proviso to section 4 (2).

*Commissioners of Taxation v. Kirk*(1), *Pondicherry Railway Company v. Commissioner of Income-tax, Madras*(2), *In the*

\* *Present* :—LORD ATKIN, LORD MACMILLAN, LORD PORTER, SIR LANCELOT SANDERSON and SIR GEORGE RANKIN.

† (1) [1900] A.C. 588.

(2) (1931) L.R. 58 I.A. 239; I.L.R. 54 Mad. 691.

*matter of Mohanpur Tea Company, Limited*(1), *Sundar Das v. Collector of Gujrat*(2), *Board of Revenue v. Ripon Press*(3), *Sir Saiyid Ali Imam v. The Crown*(4) and *Commissioner of Income-tax, Bihar and Orissa v. Maharajadhiraj of Darbhanga*(5) referred to.

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APPEAL (No. 16 of 1938) from a judgment and order of the High Court (April 29, 1937) upon a reference by the Commissioner of Income-tax, Madras, under section 66 (2) of the Indian Income-tax Act, 1922 (July 24, 1936).

The Judgment of the High Court is reported as *Commissioner of Income-tax v. Mathias*(6).

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

*Millard Tucker K.C.* and *Hull* for appellant.—The coffee here was not grown in British India and so the income from it does not fall within the definition of agricultural income in section 2 of the Indian Income-tax Act. But, admitting that the income here comes from agriculture, it is profits from a business and is not agricultural income which is exempted by the Act. The short point in the case is whether section 4 (1) applies or the second proviso to section 4 (2).

[*Hills* intervening : The Commissioner's case was that the profits accrued and arose in British India. My learned friend is putting forward a case that it was received in British India. That was a subsidiary point taken in the High Court. I do not say it is not open to my learned friend to take it, but I think I should point out that it was not the case of the Commissioner.]

*Tucker K.C.* continuing : In *In the matter of Mohanpur Tea Company, Limited*(1) the view for which I contend is taken. That view is dissented from in the High Court in this case.

[Reference was made to *Commissioners of Taxation v. Kirk*(7) and to the Indian Income-tax Act of 1918, section 3 (1),

(1) I.L.R. [1937] 2 Cal. 201. (2) (1922) I.L.R. 3 Lah. 349 (F.B.).

(3) (1923) I.L.R. 46 Mad. 706 (S.B.).

(4) (1924) 1 I.T.C. 402; I.L.R. 4 Pat. 210.

(5) (1935) L.R. 62 I.A. 215; I.L.R. 14 Pat. 623.

(6) I.L.R. [1938] Mad. 25.

(7) [1900] A.C. 588.

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and the amendments made by subsequent Acts.] In the Act of 1933 there was clearly an extension of liability and in making that extension agricultural income was exempted. Income received in British India means received as profits in British India and would not include profits received as such outside and remitted to British India. [Reference was made to *Pondicherry Railway Company v. Commissioner of Income-tax, Madras*(1), *Sundar Das v. Collector of Gujrat*(2) and *Board of Revenue v. Ripon Press*(3).]

That profits may consist, as the High Court has found, not only of money but of money's worth, cannot be disputed. That question does not arise here.

The production and sale of the coffee by the assessee here was a business carried on by him within section 2 (4) of the Act. The business is not divisible into one of producing and another of selling. The profits of the business is the difference between the price received on the sale of the coffee and the costs incurred in producing it, making it ready for the market and marketing it. The price of the coffee sold was in fact received in Mangalore and so much of the price as represented profit was income received in British India and assessable as such. It is immaterial to consider where the profits accrued or arose if they were received in British India. To come within the second proviso to section 4 (2), the land from which it arises must be in the State and the profits must accrue in the State. Here the profits first came into existence when the coffee was sold in Mangalore—*Kirk's* case (supra) is distinguishable.

[Reference was made to *In re Port Said Salt Association, Ltd.*(4) and *Commissioner of Income-tax, Bombay v. Chunilal B. Mehta*(5).]

*Hull* followed.

*Hills* for respondent.—Section 4 of the Act is the main charging section. Sub-section 2 supplements and explains sub-section 1. The second proviso to sub-section 2 is an exempting proviso. It does not merely shift the charge from one limb of the charging section to another. If the respondent comes within the proviso, he is exempt altogether.

(1) (1931) L.R. 58 I.A. 239; I.L.R. 54 Mad. 691.  
(2) (1922) I.L.R. 3 Lah. 349 (F.B.). (3) (1923) I.L.R. 46 Mad. 706 (S.B.).  
(4) (1932) I.L.R. 59 Cal. 1226. (5) (1935) I.L.R. 59 Bom. 719.

The case the respondent came to meet was whether he was within the second proviso. The question whether the profits were received in British India was not raised by the Commissioner. Receiving is now relied on.

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In *In the matter of Mohanpur Tea Company, Limited*(1), there is nothing about receiving. The finding was that the profits arose and accrued in Calcutta. Receipt was not relied on. The case is of no assistance here.

Under section 4 (2) the charge is as accruing or arising, not as received. The income here is agricultural income which arose out of British India. The income which arose is the value of the coffee berries. The fact that the money paid for this produce was paid elsewhere is immaterial. Sub-section 1 of section 4 as now modified by the Act of 1933 must be read together with sub-section 2 and any income comprehended in sub-section 2 but exempted from taxation by the provisos does not thereby become the subject-matter of taxation under sub-section 1.

[The following cases were referred to: *Commissioners of Taxation v. Kirk*(2), *Commissioner of Income-tax, Bihar and Orissa v. Maharajadhiraj of Darbhanga*(3) and *The Commissioner of Income-tax, Burma v. Messrs. Steel Brothers & Co., Ltd.*(4)]

*Tucker K.C.* in reply, referred to *Jiwan Das v. Income-tax Commissioner, Lahore*(5).

The JUDGMENT of the Judicial Committee was delivered by Sir GEORGE RANKIN.—This appeal is brought by the Commissioner of Income-tax, Madras, from a judgment of the High Court at Madras upon a reference made under the provisions of section 66 of the Indian Income-tax Act, 1922. The year of assessment in respect of which the dispute arises is 1934–35 and the year of account or “previous year” is that which ended on 30th April 1933. The assessee respondent resides at Mangalore in British India and owns coffee estates in the Mysore State, which is no part of

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(1) I.L.R. [1937] 2 Cal. 201. (2) [1900] A.C. 588.  
(3) (1935) L.R. 62 I.A. 215; I.L.R. 14 Pat. 623.  
(4) (1925) 2 I.T.C. 119; I.L.R. 3 Ran. 614 (F.B.).  
(5) (1929) 4 I.T.C. 40; I.L.R. 10 Lah. 657 (F.B.).

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British India. The Income-tax Officer at Mangalore assessed him to tax on a "total income" of Rs. 29,160, of which Rs. 25,963 was computed as the assessee's profits of a "business" of growing, curing and selling coffee for profit. By appeal to the Assistant Commissioner the assessee disputed his liability in respect of any part of the sum of Rs. 25,963 and on his appeal being dismissed required the Commissioner to make a reference to the High Court. An agreed question having been stated and referred (24th July 1936), in terms to be presently mentioned, the High Court decided in favour of the assessee, holding that the whole income derived by the assessee by the sale of the produce of his coffee estates was exempt from taxation. From the joint judgment (dated 29th April 1937) of BEASLEY C.J., VARADACHARIAR and KING J.J. this appeal has been brought pursuant to a certificate granted by the High Court on 13th October 1937.

There is no dispute as regards the material facts, and the figure (Rs. 25,963) determined by the Income-tax Officer as the amount of net profit is not in itself in dispute as a question of amount. In arriving at this figure deduction has been made from the proceeds of sale for all expenses incurred whether in or outside British India.

The Commissioner's statement of the facts is as follows :—

"The petitioner owns two coffee estates in the Mysore State for which he pays land tax to that State. These estates are worked by the petitioner. He employs the labour required for the purpose and maintains an office in the estate in order to supervise them. The labour is recruited mainly at Mangalore and the manure, spray materials, tools, crop-bags, etc., required for the estate are purchased by the petitioner at Mangalore and are sent to the estate. The crops are harvested by the labour employed by the petitioner and are then brought to Mangalore in their raw state. There is no ready market for

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raw coffee. The petitioner gets the green coffee cured at Mangalore by persons owning curing factories, on payment of a commission to them. The cured coffee is insured against fire till sale and the petitioner pays the insurance charges. It is then sold at Mangalore by the petitioner's selling agents, Messrs. Pierce Leslie & Co., Ltd., and the sale-proceeds are realized and retained there. A separate staff is maintained at Karkal in the Mangalore district for the various operations conducted in Mangalore. The accounts are written up by the estate staff in Mysore in respect of the expenses incurred in Mysore and by the Karkal staff in respect of the expenses incurred in Mangalore and in respect of the receipts. All the operations connected with the cultivation of the coffee plants and the collection, transport and sale of produce are controlled by the petitioner from Mangalore. The result of the accounts in Mysore is incorporated in the books maintained at Karkal and a consolidated profit and loss account is made there. The income from this source was assessed under the head 'business' in the past."

On these facts the assessee's liability depends upon section 4 of the Act (XI of 1922), its true construction and the manner in which it is to be applied to his case. As it stood at the time of this assessment (1934) and still stands, it reads as follows :—

"Section 4.—(1) Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing or arising, or received in British India or deemed under the provisions of this Act to accrue, or arise, or to be received in British India.

"(2) Income, profits and gains accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be income, profits and gains of the year in which they are so received or brought notwithstanding the fact that they did not so accrue or arise in that year :

"Provided that nothing contained in this sub-section shall apply to any income, profits or gains so accruing or arising prior to the 1st day of April, 1933, unless they are income,

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profits or gains of a business and are received in or brought into British India within three years of the end of the year in which they accrued or arose :

“ Provided further that nothing in this sub-section shall apply to income from agriculture arising or accruing in a State in India from land for which any annual payment in money or in kind is made to the State.

“ Explanation. — Income, profits or gains accruing or arising without British India shall not be deemed to be received or brought into British India within the meaning of this sub-section by reason only of the fact that they are taken into account in the balance sheet prepared in British India.

“ (3) This Act shall not apply to the following classes of income :—

“ (viii) Agricultural income.”

Upon this section the assessee contended (i) that his income from coffee was not assessable as profits of a business ; (ii) that it was within the second proviso to sub-section 2 ; (iii) that if any income was assessable under sub-section 1 it was only the residue left out of the sale proceeds after deducting the market value of the green coffee and the curing and other charges. The question of law upon which the parties were at issue was ultimately stated to the High Court in an agreed form as follows :—

“ Whether any part of the income derived by the petitioner from the produce of his coffee estates in Mysore is exempt from taxation under the second proviso to section 4 (2) of the Indian Income-tax Act as being income that has accrued or arisen outside British India ? ”

The High Court was of opinion that the income in question was “ income from agriculture ” and that it arose or accrued in Mysore. “ 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).” The learned Judges speak of that decision as recognising

“ that as a matter both of language and of business receipt of produce *in kind* may well be spoken of as receipt or accrual of income at the place where the produce is received.”

To the contention that even so the money income had been “ received in British India ” within the meaning of sub-section 1 as in the *Pondicherry Railway Company* case, *Pondicherry Railway Company v. Commissioner of Income-tax, Madras*(2), the learned Judges replied that sub-section 1 comprises receipts falling under sub-section 2 as well, and that it was not necessary or reasonable to read the two sub-sections as mutually exclusive. Hence on the footing that the income was received within the meaning of sub-section 1 they considered that the second proviso to sub-section 2 applied to exempt it. Finally, they held that the exemption to which the assessee was entitled under this proviso was of the same scope as the exemption of “ agricultural income ” as defined in section 2 (1) of the Act. Finding that the process applied to the coffee beans after they are picked was only a process “ ordinarily employed by the cultivator to render the produce fit to be taken to the market ” [as described in the definition of “ agricultural income ” given by section 2, sub-section (1) (b) (ii), of the Act] they held that the assessee was entitled to exemption “ in respect of the whole price realized by the sale of his coffee.”

Having regard to the assessee’s contention that he was not conducting any business in coffee and to certain observations made by the learned Judges of the

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

(2) (1931) L.R. 58 I.A. 239 ; I.L.R. 54 Mad. 691.

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High Court, it is necessary to state expressly their Lordships' opinion that the assessee is carrying on a "business" within the definition of the word given by section 2, sub-section 4, and within the meaning of section 10 of the Act. The observations of the Commissioner in his letter of reference are justified :

"Such profit as the petitioner in this case derives from his possession of land in Mysore is derived by means of a business : and the fact that agricultural operations form an element in the business does not render it any the less a business."

On the other hand the mere circumstance that income is to be placed under the head "business" has no effect to negative its being "agricultural income" as defined by section 2 (1) or "income from agriculture" under the second proviso to section 4 (2). But the green coffee itself cannot be regarded as income, profits or gains within the meaning of the Act : it is grown for purposes of sale and in order that profit may be earned. The business operations cannot be arbitrarily cut into two portions but must be regarded as a whole. Thus if the coffee market may be assumed to have its ups and downs, the assessee if he delayed his sales in expectation of a rise but found that prices fell, would not expect to be charged to tax on the profits that he would have made had he sold without delay. On the other hand, upon the question whether the profits and gains accrued or arose in British India, it may be that the fact that the coffee was grown in Mysore is by no means to be disregarded notwithstanding that it was sold in British India, especially if it be true that it was sold without further process of a manufacturing character. For the moment it is enough to say that it may be so, without examining the matter and without prejudice to either view. The High Court, in holding that the assessee's business

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income arose in Mysore, placed much reliance upon *Kirk's* case(1) and considerable argument was addressed to the Board upon the matter. But it appears to their Lordships that other considerations decide this appeal, and that it is unnecessary to determine whether the income in question accrued or arose within or without British India. Accordingly they express no opinion as to the light, if any, thrown upon the phrase "accruing or arising in (a country)" by the decision in *Kirk's* case(1) upon the phrases "earned in (a country)" and "arising or accruing from (a trade, land, a source)" —a matter upon which the High Court in the present case differed in opinion from the High Court at Calcutta ; *Mohanpur Tea Company's* case, *In the matter of Mohanpur Tea Company, Limited*(2).

The contention of the Income-tax authorities has been throughout that the income assessed to tax was not within sub-section 2 of section 4 because it did not accrue or arise outside British India. But in the High Court it was pointed out that the income was received in British India as the proceeds of all sales were paid to the assessee in Mangalore and so much of the price as represented profit was there received for the first time. It was contended, therefore, that the assessee was liable under sub-section 1 of section 4 and that sub-section 2 and its proviso did not affect the assessee's liability. The answer given by the High Court has been stated and is now to be examined. But as the section has from time to time been altered by the Legislature in view of rulings of the Courts, it is legitimate and it will be convenient to consider its history : though its present wording will *prima facie* determine its meaning completely, being intended to state with exactness the test of liability.

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

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

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The Indian Income-tax Act of 1918 contained no clause corresponding to the second sub-section of the present section 4, but section 3 (1) of 1918 was similar to the present section 4 (1) as hereinbefore set out. It was as follows :—

“ 3 (1) Save as hereinafter provided, this Act shall apply to all income from whatever source it is derived if it accrues or arises or is received in British India, or is, under the provisions of this Act, deemed to accrue or arise or to be received in British India.”

When the Act of 1922 was passed the section was revised and expanded a new sub-section being introduced together with an explanation thereof. This new sub-section applied only to the profits or gains of a business and had no effect upon income under any of the other “ heads of income ” (cf. section 6). It read :—

“ 4 (1) Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing, or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India.

“ (2) Profits and gains of a business accruing or arising without British India to a person resident in British India shall be deemed to be profits and gains of the year in which they are received or brought into British India notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they accrued or arose.

“ Explanation.—Profits or gains accruing or arising without British India shall not be deemed to be received or brought into British India within the meaning of this sub-section by reason only of the fact that they are taken into account in the balance sheet prepared in British India.”

In the following year, however, 1923, the second sub-section was amended to read as follows :—

“ 4 (2) Profits and gains of a business accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British

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India, be deemed to have accrued or arisen in British India and to be profits and gains of the year in which they are so received or brought, notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they accrued or arose.”

In 1933 the second sub-section was again revised and put into the form already set forth as governing the present case. In its new form it applies to all income, profits and gains and not merely to those of a business, and the provision limiting its effect to income received in or brought into British India within three years of accrual was omitted with a conditional saving in this respect for past income (that is, income accrued before 1st April 1933), which retained its previous immunity unless it was business income within the three years' limit. At the same time the second proviso was introduced upon which the assessee is now relying.

The occasion for and to some extent the explanation of the second sub-section in its original form is to be seen in decisions of the Courts upon the word “ received ” as it appeared in the first sub-section of section 3 of 1918. These decisions were to the effect that if income had been received by the assessee outside British India it could not be again received by him within the meaning of the first sub-section. [*Sundar Das v. Collector of Gujrat*(1); *Board of Revenue v. Ripon Press*(2) (cases under the Act of 1918) and *Sir Ali Imam's case, Sir Saiyid Ali Imam v. The Crown*(3) (under the Act of 1922 but not a case of “ business ” profits).] The view taken was that the same sum could not be received a second time as income. There was a further difficulty or discrepancy under the earlier forms of the

(1) (1922) I.L.R. 3 Lah. 349 (F.B.).

(2) (1923) I.L.R. 46 Mad. 706 (S.B.).

(3) (1924) 1 I.T.C. 402; I.L.R. 4 Pat. 210.

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section if the income of one year was brought into British India in a later year. The result was that under sub-section 1 income could only be taxed on the ground of having been received in British India if it was income of the year of account originally received in British India. It will be observed that the various amendments leave the principle of the decisions above mentioned untouched so far as concerns non-residents. Their general effect is to widen the liability of residents in respect of what they receive in British India by extending it to sums not received for the first time. But non-residents do not become chargeable by reason of monies having been brought into the country if originally received abroad.

The question to be answered is whether the second proviso to sub-section 2, assuming it to apply and the assessee's income to have accrued to him in Mysore, is any answer to an assessment made on him under sub-section 1 by reason of the fact that the income was received by him originally and as income in British India in the year of account.

If the central words of sub-section 1 be considered first—income accruing or arising or received in British India—it is clear that all three expressions must be applicable to the great bulk of the incomes of inhabitants of British India. It may be taken that all three expressions would not have been used unless it was thought that they exhibited some variation in meaning and that a case might possibly arise which would come under one only of the three. If on a question as to the exact meaning of “accruing” it were to be suggested that this only means “received” it would be reasonable to object that this can hardly be correct even though the difficulty of distinguishing between “accruing” and “arising” may be great.

In this sense, perhaps not a very important sense, the expressions are antithetical. But it is very plain that there is here no question of a complete disjunction or of the presentation of three mutually exclusive qualifications. No one would go about to prove that income was not received in British India by establishing that it arose or accrued there. When in sub-section 2 income “received in or brought into” British India is put into the class of “income accruing or arising” this does not at first sight suggest that such income if within the word “received” is thereby excluded from it in sub-section 1. The circumstances and context do not assist to carry any such negative implication. For that, there would seem to be required some words to the effect that it “shall be charged to tax as such and not otherwise.” Still, no doubt, a draughtsman even at his fourth attempt may not succeed in saying quite as much as he means. Other indications must be carefully considered. If the exact language of the second proviso be examined with any care, it must appear that if nothing in sub-section 2 is to apply to the income of the assessee he can hardly rely upon sub-section 2 to take his case out of sub-section 1. No doubt, had it been expressly stated, or if it be held or assumed, that in the case of a resident, income received in British India is never to be charged as such but only as having “accrued or arisen”, it might become necessary to read the second proviso as meaning only that sub-section 2 should not apply to charge it. Even so, however, the language of the proviso is a second difficulty in the assessee's contention, which involves both that in the main clause of the sub-section the Legislature has said less than it meant and that in the proviso it must be taken to have meant less than it said—if not, indeed,

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something different in kind. A third consideration must be allowed effect as a matter of construction. The question is entirely concerned with the result for purposes of tax of income having been "received in or brought into" British India. Had the assessee not been a resident he would have had no answer whatever to the present claim. But it is said that he escapes because he is a resident and comes as such within sub-section 2. This is to invert the intention of the sub-section which is to make receipt impose liability on the resident in some cases where the non-resident would go free. There is nothing whatever in sub-section 2 as it now stands or as it stood in 1922 and 1923 to relieve the resident from any liability which the non-resident is under. Hence the correct meaning of the proviso may well be the meaning which is intended, viz., that the widening of liability shall not attach to the incomes therein mentioned.

It is right to consider whether section 4 can be interpreted more favourably to the assessee on the footing that his income is of a class which is assimilated to "agricultural income" in British India. But unless it can be assumed as plain (despite much argument in the present case) that income from cultivating land in an Indian State can never accrue or arise in British India, it is at least clear that in some cases the agriculturist is not exempt at all. Again the agriculturist in an Indian State whose income in the narrow sense of sub-section 1 is received in British India is not the ordinary agriculturist of his State. Nor does the typical agriculturist of Mysore reside in British India. The Legislature may or may not have thought it to be advisable and sufficient that such a person should be relieved of the extended liability attached by sub-section 2 to the fact of receipt in British India without

relieving him of the same liability under sub-section 1 as non-residents undoubtedly incur.

It is said, however, that the second proviso gives the assessee exemption; hence no other provision of the Act can be construed to render him liable. But what is the exemption given? There can be no general presumption that exemption from the provisions of a sub-section is intended as complete exemption from the tax. The distinction is between exempting a class of income in some events and exempting it in all events. The case of *Commissioner of Income-tax, Bihar and Orissa v. Maharajadhiraj of Darbhanga*(1) was a case of "agricultural income" to which the Act does not apply [section 4 (3) (viii)]. "The exemption is conferred, and conferred indelibly, on a particular kind of income and does not depend on the character of the recipient" [*per* Lord MACMILLAN at page 223]. The proviso now in question is not rendered otiose or even unimportant by the assumption that its opening words are a correct expression of its intention.

Their Lordships have reached the conclusion that upon this question the meaning and intention of the Legislature is yielded by a strict construction of section 4 according to its language, and that any departure therefrom which can be suggested in favour of the assessee appears upon a full consideration to be unjustified. The assessee must be held liable to tax under sub-section 1 of section 4.

The answer proper to be given to the question stated by the Commissioner is that no part of the income therein mentioned is exempt from taxation under the second proviso to section 4 (2) of the Indian Income-tax Act.

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(1) (1935) L.R. 62 I.A. 215; I.L.R. 14 Pat. 623.

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Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the question referred to the High Court should be answered as above-mentioned.

As the contention upon which the appeal has succeeded was not formally raised in the letter of reference, though it was mooted in argument before the High Court and dealt with by the judgment, there will be no order as to the costs of this appeal, but the High Court's order as to costs will be set aside and each party will bear its own costs in the High Court.

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

Solicitors for respondent : *Lambert and White.*

C.S.S.

#### APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and Mr. Justice Krishnaswami Ayyangar.*

1938,  
November 22.

GOPU CHINA JOGAYYA, GOPU SESHAVATHARAM  
AND COMPANY (FIRST RESPONDENT), PETITIONER,

v.

MANEPAILI BAPANAYYA AND TWO OTHERS  
(APPELLANTS), RESPONDENTS.\*

*Provincial Insolvency Act (V of 1920), ss. 56 and 57—Special Receiver—Appointment of—Power of Insolvency Court.*

During the pendency of an appeal in the High Court, the first appellant was adjudicated an insolvent in the District Court and the Official Receiver of that Court was authorized under an order to continue the appeal in the place of the first appellant. The insolvent was not able to furnish the necessary

\* Civil Miscellaneous Petitions Nos. 2992, 450 and 3619 of 1938.

security, but one V was prepared to furnish it himself if he were appointed a Special Receiver for the purpose of conducting the appeal. On this being brought to the notice of the District Judge in a formal application later in the day, he cancelled his previous order and appointed V as Receiver for the purpose of the appeal. The first respondent in the appeal filed a petition asking the Court to declare that the appeal had abated so far as the first appellant was concerned, the contention being that the District Court had no power to appoint any one but the Official Receiver to take the place of the insolvent.

*Held* that the District Court had power to appoint an additional Receiver, that as it had passed an order appointing a Special Receiver to represent the estate in the appeal, the appeal had not abated, and that as V had applied to be added as an appellant in the appeal, he should be brought on the record in the place of the insolvent.

Section 56 of the Provincial Insolvency Act does not operate to prohibit the Court appointing an additional Receiver for a special purpose. Section 57 of the Act contemplates the appointment of some one other than the Official Receiver in special circumstances and the Court has power to appoint an additional Receiver when the case demands it. All that the law requires is that the estate shall be represented by a Receiver appointed in the insolvency proceedings.

PETITIONS praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased (i) to post Appeal No. 331 of 1936 preferred to the High Court against the decree of the Court of the Subordinate Judge of Bezwada in Original Suit No. 79 of 1932 for dismissal under Order XXII, rule 8, Civil Procedure Code, declaring that it had abated, so far as the first appellant (first respondent herein) is concerned, (ii) to direct the respondents herein to furnish security in a sum of Rs. 2,235 towards the costs of the suit in the lower Court, and costs of Appeal No. 331 of 1936 preferred to the High Court against the decree of the Court of the Subordinate Judge of Bezwada in Original Suit No. 79 of 1932 and (iii) to

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cause the petitioner herein to be added as supplemental appellant in Appeal No. 331 of 1936 preferred to the High Court against the decree of the Court of the Subordinate Judge of Bezwada in Original Suit No. 79 of 1932 and permit him to prosecute the appeal.

*N. Vasudeva Rao* and *K. Rajah Ayyar* for petitioners.

*K. V. Gopalaswami* and *V. Parthasarathi* for respondents.

LEACH C.J. The ORDER of the Court was pronounced by LEACH C.J. After this appeal had been instituted, the first appellant was adjudicated an insolvent in the District Court of Kistna at Masulipatam and Mr. V. Rama Rao, the Official Receiver of that Court, was authorized under an order, dated 25th August 1938, to continue the appeal in the place of the first appellant. The insolvent was not able to furnish the necessary security, but his brother-in-law, Mr. Venkata Krishniah, was prepared to furnish it himself if he were appointed a Special Receiver for the purpose of conducting the appeal. This was brought to the notice of the learned District Judge in a formal application later in the day, whereupon the learned District Judge cancelled his previous order and appointed Mr. Venkata Krishniah as Receiver for the purpose of the appeal. The first respondent in the appeal has filed a petition (No. 2992 of 1938) asking the Court to declare that the appeal has abated so far as the first appellant is concerned, the contention being that the District Court had no power to appoint any one but the Official Receiver to take the place of the insolvent.

Section 56 of the Provincial Insolvency Act states that the Court may, at the time of the order of adjudication, or at any time afterwards, appoint a

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Receiver for the property of the insolvent, and such property shall thereupon vest in the Receiver. It is conceded that under this section the Court, if it wished, could appoint two or more persons as Receivers, but it is said that, when a Receiver or Receivers have been appointed under the section, only he or they can act on behalf of the insolvent. In our opinion, the section does not operate to prohibit the Court appointing an additional Receiver for a special purpose. Section 57 of the Act confers upon the Local Government the power to appoint Official Receivers to act within such local limits as it may prescribe and states that, where any Official Receiver has been so appointed for the local limits of the jurisdiction of any Court having jurisdiction under the Act, he shall be the Receiver for the purpose of every order appointing a Receiver or an interim Receiver issued by any such Court, unless the Court for special reasons otherwise directs. Therefore the Act clearly contemplates the appointment of some one other than the Official Receiver in special circumstances and we consider that the Court has power to appoint an additional Receiver when the case demands it. The Court has passed an order appointing a Special Receiver to represent the estate in the present appeal. All that the law requires is that the estate shall be represented by a Receiver appointed in the insolvency proceedings and the appointment has been made. In these circumstances, we refuse the application filed by the first respondent for an order declaring the abatement of the appeal. The appeal has not abated and as there is before us a petition by Mr. Venkata Krishniah, the Special Receiver, asking that he be added as an appellant, we direct that his name be

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brought on the record in the place of the name of the insolvent.

There is also before us an application by the first respondent for an order directing the new appellant to furnish security for costs. This application is unopposed. The first respondent asks that security be ordered in the sum of Rs. 2,235 of which Rs. 1,735 represents the costs awarded to him in the trial Court and the balance of Rs. 500 the estimated costs of the appeal. By an order of the trial Court the costs awarded to the first respondent were made a charge on certain properties of the insolvent. The first respondent asks for a further order in respect of the trial Court costs as he states that a petition for the revision of that order has been filed in this Court. We are informed by the learned Advocate for the insolvent that that application has been returned to him by the Court and that it is not intended to re-file it. In these circumstances, we consider that the proper order to make now is that the Special Receiver shall deposit in this Court a sum of Rs. 500 as security for the costs in the appeal of the first respondent. Ten days time will be allowed for the payment of the money.

The Special Receiver is entitled to his costs in the application by the first respondent for an order declaring that the appeal has abated and the first respondent will get his costs as against the Special Receiver in the application for an order directing him to furnish security for costs. There will be no order as to costs on the formal application made by the Special Receiver for an order directing that his name be brought on the record.

A.S.V.

## APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and Mr. Justice Madhavan Nair.*

TENNETI VISWANADHAM, DEBENTURE-HOLDER,  
(RESPONDENT), APPELLANT,

v.

M. S. MENON, OFFICIAL LIQUIDATOR OF THE SWARAJYA  
PRINTING AND PUBLISHING CO., LIMITED, AND  
ANOTHER (PETITIONERS), RESPONDENTS.\*

*Indian Registration Act (XVI of 1908), sec. 17—Transfer of Property Act (IV of 1882), ss. 59 and 100 (as amended)—Company registered under Indian Companies Act (VII of 1913)—Issue of debentures by—Debenture certificate stating that loan was secured on specified immovable property—Debentures registered with Registrar of Joint Stock Companies under sec. 108 of the Indian Companies Act but not registered under sec. 17 of the Indian Registration Act—Invalidity of.*

A company incorporated under the Indian Companies Act, 1913, issued debentures. There was no debenture trust deed but on each certificate the conditions of issue were printed and the loan was stated to be on the security of specified immovable property. The debentures were registered with the Registrar of Joint Stock Companies pursuant to section 108 of the Indian Companies Act but they were not registered under the Indian Registration Act. The company went into liquidation and the Official Liquidator contended that the debentures were invalid for want of registration under the Indian Registration Act.

*Held:* Section 100 of the Transfer of Property Act (as amended) read with section 59 made registration of the debentures compulsory under section 17 of the Indian Registration

1938,  
October 18.

\* Original Side Appeal No. 3 of 1938.

VISWANADHAM v. MENON. Act and as such the debentures were invalid for want of registration.

*Kuppuswamy v. Rasappa Chettiar*(1) distinguished.

APPEAL from the judgment of GENTLE J., dated 3rd December 1937 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2297 of 1937 in Original Petition No. 208 of 1936.

*D. Suryaprakasa Rao* for appellant.

*K. S. Narayana Ayyangar* for first respondent.

*S. Parthasarathy* and *V. K. Thiruvankatachari* for second respondent.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—By a resolution dated 7th July 1935 the Swarajya Printing and Publishing Company, Limited, Madras, a company incorporated under the Indian Companies Act, 1913, resolved to issue 1,000 debentures of Rs. 50 each and 922 of these debentures were issued. There was no debenture trust deed, but on each certificate the conditions of issue were printed and the loan was stated to be on the security of specified immovable property. The debentures were registered with the Registrar of Joint Stock Companies pursuant to section 108 of the Indian Companies Act, but they were not registered under the Indian Registration Act. The company is now in liquidation, and the question is whether the holders of these debentures are entitled to rank as secured creditors. The question was considered by GENTLE J. on an application by the Official Liquidator, who is the first respondent in this appeal. The Official Liquidator contended that the debentures were invalid for two reasons. In the first place, he said that the wording of the debentures operated to

create a mortgage and not merely a charge and therefore by reason of section 59 of the Transfer of Property Act, registration was compulsory. The second reason was that, even if there was a mere charge and not a mortgage, section 100 of the Act still made registration necessary. The learned Judge accepted the contention that a mortgage had been created and he consequently held that the debentures were invalid. In the circumstances it was not necessary for the learned Judge to consider the second point. The debenture-holders have appealed.

We agree that the debentures are invalid for want of registration, but we prefer to base our decision on the provisions of section 100 of the Transfer of Property Act read with section 59. We do not suggest that the case was not rightly decided on the first point taken by the Official Liquidator, but the question is not free from difficulty and it seems to us that by reason of the sections I have just mentioned registration was necessary even if only a charge was created.

Section 59 of the Transfer of Property Act admittedly requires a simple mortgage to be registered, even when the mortgage debt is less than Rs. 50. The section reads as follows :—

“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.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.”

As a simple mortgage cannot be effected by delivery of the property it can only be effected by a registered instrument, and section 4 of the Transfer of Property Act directs that section 59 shall be read as supplemental

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to the Registration Act. The first clause of section 100 as amended by Act XX of 1929 provides :

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property ; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

Before the amendment this clause read as follows :—

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property ; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections 81 and 82 shall, so far as may be, apply to the person having such charge."

By the amendment, all the provisions of the Transfer of Property Act which precede section 100 have been made applicable "so far as may be" to a charge. Therefore, unless the words "so far as may be" operate to sever section 59 from section 100, registration of a charge is necessary. We do not consider that these words have the effect of taking section 59 out of the purview of section 100. Section 100 applies all the provisions of the Act with regard to a simple mortgage to a charge, unless a particular provision is incompatible with a charge. Registration is surely not incompatible. Section 17 of the Registration Act requires a charge, if for Rs. 100 or upwards, to be registered, and, by virtue of section 4 of the Transfer of Property Act, section 59 has now to be read as being supplemental to section 17 of the Registration Act. If the words in section 100 of the Transfer of Property Act are to be given their plain and ordinary meaning, we are of the opinion that section 59 cannot be excluded.

In the course of the arguments our attention was drawn to the decision of VARADACHARIAR and MOCKETT JJ. in *Kuppuswamy v. Rasappa Chettiar*(1). The learned Judges there were considering whether there could be an oral charge and the case was one which was instituted before the amendment of the Transfer of Property Act in 1929. The learned Judges were not considering the question now before us and their decision has no application here.

For the reasons indicated we hold the debentures in question are invalid by reason of non-registration, and the appeal must be dismissed with taxed costs in favour of the Official Liquidator.

G.R.

#### APPELLATE CIVIL.

*Before Mr. Madhavan Nair, Officiating Chief Justice,  
and Mr. Justice Krishnaswami Ayyangar.*

BHATTIPROLE HANUMANTHA RAO (PLAINTIFF),  
APPELLANT,

v.

KONDRAKOTA SITHARAMAYYA AND FOURTEEN OTHERS  
(DEFENDANTS 2 TO 11 AND NIL), RESPONDENTS.\*

*Specific Relief Act (I of 1877), sec. 41—Minor suing to set aside sale deeds executed by him during his minority and for recovery of possession of the properties—Possession decreed to be given on condition of his returning consideration received by him—Validity of condition—Discretion of Courts in India.*

In a suit by a person to set aside a number of sale deeds executed by him during his minority and to recover the properties sold together with mesne profits, a decree for possession

(1) (1936) 44 L.W. 438  
\* Appeal No. 412 of 1931.

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August 9.

HANUMANTHA RAO v. SITHARAMAYYA. was made conditional on his refunding to the several purchasers the amounts of the consideration received from them. In appeal, on behalf of the plaintiff, objection was taken to the condition imposed on him to repay the purchase moneys.

*Held*: The statutory discretion vested in the Courts of this country by section 41 of the Specific Relief Act is of wider amplitude than the corresponding rule of equity administered in England where there is no statutory counterpart. Once it is found that the requirements of the section are satisfied and there exist circumstances which call for the exercise of the discretion, the Court is bound to afford relief without being hampered by reference to the limitations which surround the corresponding rule of equity as administered elsewhere. As such the condition was validly imposed on the plaintiff.

*Mohori Bibee v. Dharmodas Ghose*(1) relied on.

*Mallacheruvu Raghavayya v. Mallacheruvu Subbayya*(2) followed.

*Vaikuntarama Pillai v. Authimoolam Chettiar*(3) distinguished.

APPEAL against the decree of the Court of the Subordinate Judge of Bapatla, dated 31st December 1929 and passed in Original Suit No. 143 of 1925.

*Ch. Raghava Rao* for appellant.

*V. Govindarajachari* for first respondent.

*J. Krishnamurthi* for *S. Vepa* for eighth respondent.

Other respondents were not represented.

KRISHNASWAMI AYYANGAR J.—The JUDGMENT of the Court was delivered by KRISHNASWAMI AYYANGAR J.—This appeal arises out of a suit by the appellant to set aside a number of sale deeds executed by him during his minority and to recover the properties sold together with mesne profits. Defendants 1, 2, 4 and 5 were the purchasers under different sale deeds, all of which have been set aside by the trial Court. But the decree for possession has been made conditional on the appellant

refunding to the several purchasers the amounts of the consideration received from them. The first defendant died after the institution of the suit and his legal representatives are defendants 10 and 11. The main object of the appeal is to get rid of the condition imposed on the appellant to repay the purchase moneys.

The Subordinate Judge has found that the appellant was a minor when he executed the several deeds of sale and that he did not make any misrepresentation as to his age. He has not found that any of the purchasers except the fourth defendant had knowledge that the appellant was a minor when the sales were made. As regards the fourth defendant, however, he came to the conclusion that he must have known of the appellant's minority at the time of the sale in his favour. These findings of fact have not been challenged in appeal.

The learned Judge has held that the appellant was not estopped from pleading that the sales were void, a point concluded by authority and very properly not questioned before us. It was however urged on behalf of the appellant that the learned Judge was in error in imposing the condition referred to above, as neither section 65 of the Indian Contract Act nor section 41 of the Specific Relief Act justifies it. It is unnecessary for us in this appeal to consider the scope of section 65 of the Contract Act, as the first respondent's Advocate has not chosen to support the judgment by reference to that section but took his stand on section 41 of the Specific Relief Act, which according to him is sufficient to justify the conclusion of the trial Court. This argument has found favour with the Subordinate Judge, and we also are of opinion that it is sound.

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(1) (1903) I.L.R. 30 Cal. 539 (P.C.).

(2) (1917) 7 L.W. 124.

(3) (1914) I.L.R. 38 Mad. 1071.

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Section 41 runs as follows :—

“ On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.”

Read in the light of section 39, which authorizes the cancellation of a written instrument, whether void or voidable, section 41 cannot be understood as limited in its operation to void instruments only, and accordingly it was conceded before us that that section is applicable to both classes of instruments. What is however urged is that, though such may be the effect of the section, it must be deemed merely to embody the familiar rule of equity that he who seeks equity must do equity but limited and circumscribed by the qualification laid down in *Thurstan v. Nottingham Permanent Benefit Building Society*(1), viz.,

“ that a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void.”

So qualified, the rule would seem to preclude Courts from granting compensation in all cases of void transactions, for we cannot see any difference in principle or reason between transactions void by statute and those void under the general law. An argument of the kind proves too much, runs counter to the concession made earlier by the appellant's Counsel and is, in our opinion, against the plain intentment of the section, and must accordingly be rejected. In our judgment, the statutory discretion vested in the Courts of this country by section 41 is of wider amplitude than the corresponding rule of equity administered in England, where there is no such statutory counterpart. That discretion is of course

(1) [1902] 1 Ch. 1, 13.

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to be not arbitrary but sound and reasonable and guided by well-settled judicial principles. But, once it is found that the requirements of the section are satisfied and there exist circumstances which call for the exercise of the discretion, the Court is bound to afford relief without being hampered by reference to the limitations which surround the corresponding rule of equity as administered elsewhere. We think we are bound to give effect to the plain words of the section and are not at liberty to import into it considerations derived from the English or any other system of jurisprudence. It is scarcely necessary to add that the exercise of such a power is not to invent a new head of equity, but merely to act in obedience to a statutory injunction. The view here expressed is, we think, supported by a decision of a Bench of this Court in *Mallacheruvu Raghavayya v. Mallacheruvu Subbayya*(1) where the facts were almost on all fours with those found in the present case. COUTTS TROTTER J., as he then was, expressed himself in favour of a wider interpretation of the section. After referring to the English decisions, he said :

“ But it is clear that in this country we have a statutory right to impose conditions by section 41 of the Specific Relief Act and that right is clearly recognized in *Mohori Bibee v. Dharmodas Ghose*(2). I regard this as a proper case for exercising that discretion and make it a condition that the plaintiff shall repay before recovering possession of the property.”

The passage in the judgment of the Privy Council in the above case, to which the learned Judge apparently alluded, is obviously the one at the top of page 549 :

“ Another enactment relied upon as a reason why the mortgage money should be returned is section 41 of the Specific Relief Act (I of 1877) which is as follows :—”

(1) (1917) 7 L.W. 124.

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



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After setting out the terms of the section, their Lordships proceed ;

"Section 38 provides in similar terms for a case of rescission of a contract. *These sections no doubt do give a discretion to the Court*, but the Court of first instance and subsequently the appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised."

The italics are ours and the italicised portion points unmistakably to the correctness of the wider interpretation of the section. The appellant's Counsel repeated before us an argument presented before the learned Judges who decided the case, *Mallacheruvu Raghavayya v. Mallacheruvu Subbayya*(1), and rejected by them after full consideration. That argument is that in the very next passage their Lordships equated the principle enacted in the section to the rule of equity in England to which reference has been made. The passage is this :

"It was also contended that one who seeks equity must do equity. But this is the last point over again and does not require further notice, except by referring to a recent decision of the Court of Appeal in *Thurstan v. Nottingham Permanent Benefit Building Society*(2) since affirmed by the House of Lords(3)."

To appeal to the limited rule of equity after the refusal of remedy under the ampler rule of the statute may not inappropriately perhaps be described as an attempt to argue the same point over again. However that may be, we find that the point has been directly dealt with and answered in the judgment of SESHAGIRI AYYAR J. in the same case. He said at page 129 :

"The learned Vakil for the appellant contended that this succeeding paragraph "

(1) (1917) 7 L.W. 124.

(3) [1903] A.C. 6.

(2) [1902] 1 Ch. 1.

(the reference is to the second paragraph at page 549 in *Mohori Bibee v. Dharmodas Ghose*(1) referred to above)

"must be taken to have given the final answer to the contention as to compensation. I do not think so. In my opinion, the two paragraphs are consistent with each other. In the second paragraph their Lordships must be taken to have held that if the matter rested purely on principles of equity, they would not be prepared to order compensation as that claim was negatived under similar circumstances by the House of Lords in *Nottingham Permanent Benefit Building Society v. Thurstan*(2). Their Lordships should not be taken to have held that the statutory rule contained in section 41 of the Specific Relief Act should not be given effect to as it only contained a rule of equity. The net import of the two paragraphs is to declare that the statutory discretion as to compensation does exist and can be exercised by the Courts, but that if relief is claimed on general equitable grounds apart from Statute, such a claim is inadmissible as that would be opposed to the principles laid down by the House of Lords."

We are in substantial agreement with this view of the judgment of the Privy Council, the more so as we find that it is in consonance with our understanding of what we regard as the plain language of the section. The decision in *Mallacheruvu Raghavayya v. Mallacheruvu Subbayya*(3) has not only not been challenged since, but has been cited in several subsequent cases without dissent ; see *Rahima Bee v. Mannan Bee*(4), *Abdul Majid v. Ramiza Bibi*(5) and *Guruswamy Pantulu v. Lall Khajanchee*(6). We must therefore repel the plea for the narrower interpretation of the section contended for by the appellant. Before finally leaving this subject, we must also notice a further submission on behalf of the appellant that the decision in *Mallacheruvu Raghavayya v. Mallacheruvu Subbayya*(3) is in conflict with an earlier Bench decision

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(1) (1903) I.L.R. 30 Cal. 539 (P.C.).

(3) (1917) 7 L.W. 124.

(5) A.I.R. 1931 Mad. 468.

(2) (1903) A.C. 6.

(4) A.I.R. 1936 Mad. 140.

(6) (1919) 10 L.W. 225.

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of this Court in *Vaikuntarama Pillai v. Authimoolam Chettiar*(1) and that the latter must be followed in preference to the former or that the conflict must be resolved by a reference to a Full Bench. It is to be observed that the ruling in *Vaikuntarama Pillai v. Authimoolam Chettiar*(1) was cited and relied upon in *Mallacheruvu Raghavayya v. Mallacheruvu Subbayya*(2) but was held to be either inapplicable, distinguishable or untenable. It is enough to point out that the question of repayment did not arise for direct decision in *Vaikuntarama Pillai v. Authimoolam Chettiar*(1), but arose only incidentally for the purpose of deciding whether the plaintiff as assignee of a mortgage by a minor could be regarded as fulfilling the character of a creditor so that he might sue under section 53 of the Transfer of Property Act to set aside a subsequent settlement by the mortgagor. Secondly, section 41 is not referred to at all in the judgment, much less is its language considered for a comparison of the statutory rule with the pure rule of equity of the English Law. We do not therefore feel obliged to follow the one course or the other suggested by the appellant.

Holding as we do that the learned Subordinate Judge had power under section 41 of the Specific Relief Act to order a refund of the consideration received by the appellant, it still remains for us to consider whether the power was properly exercised on the facts found in the present case. It is settled law that where an alienee chose to advance money to a minor with knowledge of the minority, it would be improper to order a refund. It is equally settled that where an innocent purchaser or alienee was induced to part with money to a minor by a misrepresentation as to his age, an order for refund would be made almost as a matter of course.

(1) (1914) I.L.R. 38 Mad. 1071.

(2) (1917) 7 L.W. 124.

Where, however, there is neither knowledge of minority on the part of the alienee, nor misrepresentation on the part of the minor, the answer is not quite so easy. Cases of this type have been somewhat rare, for our attention has not been drawn to any decisions other than those in *Mallacheruvu Raghavayya v. Mallacheruvu Subbayya*(1) and *Vaikuntarama Pillai v. Authimoolam Chettiar*(2). The appellant's argument is that no order for refund could be made against a minor except when the money was paid to him as result of a fraud practised upon, or a fraudulent misrepresentation made to, the person who was thereby induced to part with the money. There are no doubt dicta in *Vaikuntarama Pillai v. Authimoolam Chettiar*(2) which seem to lend colour to such an argument, but we must on this point again be guided by the clear pronouncement contained in the later case.

Reference may finally be made to an argument of the respondent's Advocate that the observations in *Vaikuntarama Pillai v. Authimoolam Chettiar*(2) are explicable on the footing that the minor in that case was a defendant. According to him, section 41 is framed so as to afford relief only in a case where the minor himself as plaintiff seeks the assistance of the Court and the section is inapplicable if he happens to be merely a defendant in a suit by the person who dealt with him when he was a minor. On the soundness of this argument it is unnecessary to express a final opinion as in this case the minor has come into Court as plaintiff seeking the assistance of the Court as such. When the question arises, it would be a matter for consideration whether such a marked difference in the substantive rights of parties could have been intended to be based on the accident of the claimant being a plaintiff or defendant and whether there is not

(1) (1917) 7 L.W. 124.

(2) (1914) I.L.R. 38 Mad 1071.

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implicit in the language of the section a rule of wider significance affording under proper circumstances relief to a purchaser or alienee irrespective of his being a plaintiff or defendant.

We are therefore of opinion that the learned Judge in the Court below was right in invoking the provisions of section 41 of the Specific Relief Act for imposing the condition inserted in the decree, except as against the fourth defendant who is the third respondent in the appeal. The Subordinate Judge has found that he must have known of the appellant's minority when he took the sale. Nobody has appeared on his behalf to challenge the correctness of this finding which we must therefore accept. By reason of this finding he is disentitled to claim a refund and we do not understand why, in spite of it, the Subordinate Judge has directed a refund to him also, along with the other defendants mentioned in the decree. The decree must be modified by omitting the fourth defendant from among the persons for whose benefit the condition for repayment has been inserted. As against him, there will be a decree for recovery of possession together with mesne profits from the date when he took possession till the date of recovery of possession. The appeal is dismissed with the costs of the first respondent and as against all other respondents except the third. As against the third respondent the appeal is allowed and the condition for repayment so far as he is concerned will be deleted. He will pay the costs of the appellant here and in the Court below on the value of the claim against him and bear his own costs throughout. The Subordinate Judge will now make an enquiry regarding the mesne profits payable by the fourth defendant who is the third respondent here.

G.R.

## APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Stodart.

S. P. PERUMAL CHETTIAR (RESPONDENT),  
APPELLANT,

v.

M. K. KONDAL CHETTY AND ANOTHER  
(PETITIONERS), RESPONDENTS.\*

*Madras City Tenants' Protection Act (III of 1922), sec. 7—  
Order passed by City Civil Court under—Appeal from—  
Competency of—Code of Civil Procedure (Act V of 1908),  
ss. 105 and 96—Effect of.*

No appeal lies from an order passed by the City Civil Court under section 7 of the Madras City Tenants' Protection Act (III of 1922).

The Madras City Tenants' Protection Act does not allow an appeal from an order passed under section 7 of that Act, and under section 105 of the Civil Procedure Code, save as otherwise expressly provided, no appeal lies from an order made by a Court in the exercise of its original jurisdiction. An order passed under section 7 of the Madras City Tenants' Protection Act is not a decree from which an appeal will lie under section 96 of the Code of Civil Procedure. The provision in section 8 of the City Tenants' Protection Act that such an order "shall have effect as a decree in a suit" shows that it is not a decree.

APPEAL against the order of the Court of the City Civil Judge, Madras, dated 12th March 1937 and made in Original Petition No. 115 of 1936.

*P. V. Vallabhacharyulu* for appellant.

*P. Somasundaram* for second respondent.

First respondent was not represented.

The JUDGMENT of the Court was delivered by  
BURN J.—The appellant is the owner of 1/34, Selva

BURN J.

\* Appeal Against Order No. 27 of 1938.

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Vinayagar Koil Street, Old Washermanpet, Madras. This house is the superstructure upon a site belonging to the respondents, and the appellant pays ground rent to the respondents. The respondents applied by a petition under section 7 of the Madras City Tenants' Protection Act (Madras Act III of 1922) to the City Civil Court to fix a reasonable rent for the occupation of the land on which the appellant's house is built. The ground rent previously paid was Rs. 7 per mensem. The learned Principal Judge of the City Civil Court heard the application, came to the conclusion that a reasonable rent would be Rs. 7-12-0 and fixed the rent at that figure. This is within the limit fixed by the proviso to section 7 of the Act. The proviso is

"that the rent previously payable for the land shall not be enhanced by more than two annas in the rupee."

The appellant has filed this appeal purporting to be under section 15 of the City Civil Court Act read with section 96 of the Civil Procedure Code.

Learned Counsel for the respondents has taken a preliminary objection that the order passed by the learned Principal Judge of the City Civil Court in this case is not subject to appeal. He has pointed out that section 7 enables the Court to fix a reasonable rent "by its order". In the Madras City Tenants' Protection Act, no appeal is given from an order passed under section 7. On general principles, it is laid down in section 105 of the Civil Procedure Code :

"Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction."

Learned Counsel for the appellant relies upon section 8 of the Act which runs as follows :

"An order passed by a Court under section 6, section 7, or section 7-A shall have effect as a decree in a suit and the rent

so fixed shall not be revised nor shall a tenant be liable to be evicted, for a period of five years."

The appellant's learned Counsel refers to section 96 of the Civil Procedure Code by which it is provided :

"Save where otherwise expressly provided in the body of this Code or any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court."

Learned Counsel says that, since the order passed in this case is to have effect as a decree in a suit, therefore it must be treated as a decree for all purposes and therefore it is appealable. We are not able to accept this contention. As already noticed, section 7 of the Act says that the Court shall by its *order* fix such rent as it deems reasonable. Section 8 shows that the decision of the Court is expressed in an order and the direction that this order shall have effect as a decree in a suit shows that it is not a decree. If it were a decree, the provision that it "shall have effect as a decree in a suit" would be superfluous and otiose. We think the scheme of the Act is to make these orders not appealable. In the first place the Court is authorized to fix "such rent as it deems reasonable." It would obviously be very difficult for an appellate Court to deal in appeal with a matter decided under this section by a Judge. Further section 8 gives a kind of compensation to the tenant by which the tenant is not liable to be evicted for a period of five years after the determination of the rent under section 7. Agreeing with the learned Counsel for the respondents, we uphold the preliminary objection and find that no appeal lies. This appeal is therefore dismissed with costs.

A.S.V.

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## APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Stodart.

PALACHERLA JALAMANNA (RESPONDENT),  
APPELLANT,

v.

MARINA RAMA RAO (PETITIONER), RESPONDENT.\*

*Code of Civil Procedure (Act V of 1908), O. XXI, r. 90—Material irregularity—Items of property—Sale of, in different order from that shown in the proclamation—Material irregularity, if and when.*

The practice in this Presidency is to sell the lots directed to be sold in execution of a decree in the order in which they appear in the proclamation, and a departure from that order may amount to a material irregularity.

*Inamullah Khan v. Shambhu Dayal*(1) and *Chhuttan Lal v. Muhammad Ikram Khan*(2) distinguished.

APPEALS against the orders of the District Court of East Godavari at Rajahmundry, dated 17th September 1937, and made in Interlocutory Applications Nos. 29, 38 and 41 of 1937 respectively in Interlocutory Petition No. 12 of 1935 and in Execution Applications Nos. 91 and 98 of 1937 in Execution Petition No. 64 of 1935 in Original Suit No. 56 of 1933.

*P. Somasundaram* for *P. Panini Rao* for appellant.

*P. V. Vallabhacharyulu* for respondent.

The JUDGMENT of the Court was delivered by BURN J.—We consider that the learned District Judge was right in holding that the sale of lot 2 before lot 1 was in the circumstances of this case an irregularity, and since that irregularity precluded the

respondent in Appeal Against Order No. 429 of 1937 from bidding for the property, it was a material irregularity. We have been referred to two cases in which learned Judges of the Allahabad High Court have held that the sale of items in a different order from that shown in the proclamation is not an irregularity, *Inamullah Khan v. Shambhu Dayal*(1) and *Chhuttan Lal v. Muhammad Ikram Khan*(2). We observe however that in both those cases the selling officer had followed his usual practice of selling non-ancestral items first and ancestral items later. So far as we are aware, the practice in this Presidency is to sell the lots in the order in which they appear in the proclamation, and a departure from that order *may* (we do not say that in all cases it must) amount to a material irregularity.

That there has been substantial injury occasioned by the irregularity is clear since property worth not less than Rs. 5,000 has been sold for Rs. 3,000.

These appeals are accordingly dismissed. The appellant will pay the respondent's costs in Appeal Against Order No. 429 of 1937. We make no order as to costs in the other appeals.

In the resale we suggest to the lower Court that proper prices are more likely to be realized by sale in smaller parcels.

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(1) A.I.R. 1931 All. 159.

(2) (1933) I.L.R. 55 All. 519.

\* Appeals Against Orders Nos. 429 to 433 of 1937.  
(1) A.I.R. 1931 All. 159.

(2) (1933) I.L.R. 55 All. 519.

## APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice  
Abdur Rahman.

1938,  
tober 20.

PERIANNA GOUNDAN (EIGHTH RESPONDENT—NINTH  
DEFENDANT), PETITIONER,

v.

SELLAPPA GOUNDAN AND SEVEN OTHERS (APPELLANT  
AND RESPONDENTS 1 TO 7—PLAINTIFF AND DEFEN-  
DANTS 2 TO 8), RESPONDENTS.\*

*Madras Agriculturists Relief Act (IV of 1938), sec. 3 (iii)—  
“Debt”—Liability for mortgage amount of purchaser of  
equity of redemption in portion of hypotheca—Relief  
under the Act—Right to, of heir-at-law, legal representative  
or assign of debtor—Mortgage of 1929—Purchaser in 1933  
of equity of redemption in portion of hypotheca—Relief under  
the Act—Right of purchaser to—Application by him for  
relief—Nature and extent of relief to be granted on—Sec. 8  
of the Act—Effect of.*

In a suit for the recovery of money due under a mortgage deed, dated 27th July 1929, the High Court on appeal held that the mortgagee (plaintiff) was entitled to a decree for almost the full amount due under the mortgage deed. The eighth defendant in the suit had in 1930 purchased the equity of redemption in a portion of the hypotheca in execution of a money decree against the mortgagor and he sold the same to the ninth defendant (eighth respondent in the appeal) on 11th August 1933. The plaintiff claimed to bring to sale the properties purchased by the ninth defendant as part of the mortgage security. The ninth defendant applied for relief under Madras Act IV of 1938. The ninth defendant was admittedly an agriculturist within the meaning of that Act and so also was the mortgagor.

*Held*: (i) The liability of the petitioner (ninth defendant) was a “debt” within the meaning of section 3 (iii) of the Act.

\* Civil Miscellaneous Petition No. 4192 of 1938 in Appeal No. 152 of 1934.

It was not the intention of the Legislature to limit the relief under the Act to cases where a person was personally liable.

(ii) The right to claim relief under the Act was not confined to the person who actually contracted the debt but was available to his heir-at-law, legal representative or assign.

(iii) Though the petitioner purchased the property only in 1933, yet, as his liability arose out of the mortgage of 1929, the case fell under section 8 of the Act.

(iv) Relief under the Act was not limited to the extent of the proportion attributable to the property in the possession of the petitioner, the plaintiff being at liberty to recover his full claim against the properties in the hands of the mortgagor.

The relief under section 8 is not confined to the applicant. The applicant has only to move the Court and bring certain facts to its notice and the quantum of relief is indicated by section 8.

(v) The debt must therefore be scaled down in the manner indicated in section 8.

PETITION praying that in the circumstances stated therein the High Court will be pleased to scale down the debt forming the subject-matter of Original Suit No. 9 of 1934 on the file of the Court of the Subordinate Judge of Coimbatore (Appeal No. 152 of 1934 on the file of the High Court) under the provisions of the Madras Act IV of 1938.

*K. V. Ramachandra Ayyar* for petitioner.

*N. Somasundaram* for first respondent.

Respondents 2 to 6 and 8 were not represented.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This is an application filed by the ninth defendant in the Court below (eighth respondent here) for relief under Madras Act IV of 1938.

The suit out of which the appeal arose was instituted for the recovery of money due under a mortgage deed, dated 27th July 1929, executed by the first defendant in favour of the plaintiff. In execution of

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a money decree obtained against the mortgagor, the eighth defendant purchased the equity of redemption in a portion of the hypotheca in 1930 and he sold the same to the ninth defendant on 11th August 1933. The plaintiff claimed to bring to sale the properties purchased by the ninth defendant as part of the mortgage security. The ninth defendant in turn contended that the mortgage in favour of the plaintiff was nominal and not supported by consideration. The lower Court substantially upheld this contention of the ninth defendant and gave a decree in the plaintiff's favour for a small amount. On appeal by the plaintiff, we reversed the decree of the lower Court and held that the mortgage was true and fully supported by consideration and that the plaintiff was entitled to a decree for almost the full amount due under the mortgage deed. As the ninth defendant stated that he was applying for relief under Madras Act IV of 1938, we allowed the matter to lie over and the question has now been argued before us.

It has not been denied by the plaintiff that the ninth defendant is an agriculturist within the meaning of the Act nor has it been denied that the mortgagor is an agriculturist. The only ground on which the petitioner's right to relief under the Act is challenged is that the liability of the petitioner is not a "debt" within the meaning of section 3 (iii) of the Act. The learned Counsel for the plaintiff contends that this definition should be understood as limited to cases where a person is *personally* liable. We are unable to read the definition in this limited sense. There are no words in the definition clause justifying any such restriction; the clause speaks of "any liability" and the word "due" does not necessarily imply that it must be recoverable by imprisonment of the debtor.

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The inappropriateness of restricting it in the sense contended for will be realized when it is remembered that even by the time this Act was contemplated, imprisonment for debt had, to a great extent, been abolished by Act XXI of 1936. It could not therefore have been the intention of the Legislature to limit the relief under the Act to cases where a person was personally liable. Its avowed purpose was to enable agriculturists to retain their property and prevent such property passing into the hands of creditors or execution purchasers.

Again, according to the contention of the plaintiff's learned Counsel, it will only be the person who actually contracts the debt that will be entitled to claim relief under the Act and not his heir-at-law or legal representative because the latter will ordinarily be under no personal liability. Similarly, in the case of joint families, relief under the Act will have to be limited only to the actual borrower or to those special cases in which other members of the family might on some special grounds have become personally liable. But the provisions of the Act relating to joint families clearly indicate that even members who are under no personal liability are entitled to invoke the protection of the Act for the preservation of the property of the family. It was next pointed out that while clause (v) which defines "creditor" takes care to include his heirs, legal representatives and assigns, there is no corresponding definition in the case of a "debtor". This omission is obviously due to the fact that the reference to liability in clause (iii) is wide enough to cover every person who is in any manner liable, either because he is personally liable or because he is liable on account of the possession of property. There was no necessity to refer to any heir, legal representative

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or assign except in cases in which such person was liable within the meaning of clause (iii).

It was next contended that the liability of the petitioner was not one falling within section 8 of the Act, because he purchased the property only in 1933 and his liability was not therefore one subsisting prior to 1st October 1932. This proceeds upon a misapprehension of the nature of the petitioner's liability. His liability is traceable to the original mortgage and his purchase was not the basis of any new liability. The liability that is now sought to be enforced is the liability arising out of the mortgage of 1929. The case therefore falls under section 8.

It was finally contended that relief under the Act should be limited to the extent of the proportion attributable to the property in the possession of the petitioner and that the plaintiff must be at liberty to recover his full claim against the properties in the hands of the mortgagors. We do not think we can accede to this contention either. The relief under section 8 is not confined to the applicant. The applicant has only to move the Court and bring certain facts to its notice and the quantum of relief is indicated by section 8. Difficult questions may arise where some of the persons liable are agriculturists and some are not. One such case has been specifically dealt with in section 14 of the Act. The principle to be applied in cases not so specifically dealt with need not be discussed in the present case because it has not been suggested that the other persons liable here are not agriculturists.

We accordingly hold that the debt must be scaled down in the manner indicated in section 8. It is agreed that on this basis the amount due to the plaintiff will be Rs. 3,300 on 1st October 1937. To this

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will be added interest at six and one-fourth per cent per annum as per the directions in our judgment. The plaintiff will also be entitled to his costs as directed in the judgment in the main appeal. The appropriate figures calculated on the above basis will be inserted in the decree to be passed in the appeal.

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### APPELLATE CIVIL.

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

NILAKANTA PRABHU (PETITIONER—PLAINTIFF),  
APPELLANT,

1938,  
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v.

APPU NAIKA AND THREE OTHERS (RESPONDENTS 2 TO 5—  
DEFENDANTS 2 TO 5), RESPONDENTS.\*

*Code of Civil Procedure (Act V of 1908), O. XXXIV, r. 6—  
Personal remedy against mortgagor—Omission to consider,  
or to provide for it in preliminary decree—If operates as  
res judicata as regards application under O. XXXIV, r. 6.*

Though the practice in mortgage suits is to consider even at the preliminary stage the question whether the personal remedy against the mortgagor is barred or not, the omission to consider it or the omission to provide for it in the preliminary decree will not operate as *res judicata*, because the proper stage for dealing with the question of personal liability arises only after the mortgaged property has been sold and the proceeds are found insufficient to satisfy the plaintiff's claim.

APPEAL against the order of the Court of the Subordinate Judge of South Kanara, dated 3rd July 1933 and

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\* Appeal No. 182 of 1934.



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APPU NAIKA. made in Registered Interlocutory Application No. 315  
of 1933 in Original Suit No. 84 of 1928.

B. Sitarama Rao for appellant.

K. Y. Adiga for respondents.

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The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal arises out of an order passed by the lower Court on an application under Order XXXIV, rule 6, Civil Procedure Code. In that application, the plaintiff asked for a decree against defendants 2 to 4 and against the assets of the first defendant in the hands of these defendants. The lower Court passed a decree only against the assets of the first defendant in the hands of defendants 2 to 4 but dismissed the application so far as it asked for a decree against defendants 2 to 4. It is this latter portion of the order that is complained of in the appeal.

Defendants 2 to 4 are the grandsons of the first defendant by a predeceased son. That son had executed a mortgage in favour of a third person and that mortgagee obtained a decree and brought to sale the mortgaged properties. As the father of defendants 2 to 4 was dead by that time, the grandfather, who was acting as guardian of his grandsons, though he had become divided from them, executed a mortgage in favour of the present plaintiff to raise money and stave off that sale. This later mortgage was executed by the grandfather for himself and as guardian of defendants 2 to 4. On this later mortgage, the plaintiff instituted a suit, obtained a decree for sale and has sold the properties covered by the mortgage. As the sale proceeds were not sufficient to satisfy the decree amount, he made this application under Order XXXIV, rule 6, Civil Procedure Code. The learned Subordinate Judge has dismissed the application so far as it sought relief against defendants 2 to 4 on some ground of *res*

*judicata* which it is not easy to follow. What he seems to have held is that though there has been no prior decision on this point, the omission to reserve the personal liability of these defendants in the preliminary decree precludes the plaintiff from claiming any relief against them under Order XXXIV, rule 6, Civil Procedure Code. We do not think that this is a proper position.

It is no doubt the practice in mortgage suits to consider even at the preliminary stage the question whether the personal remedy against the mortgagor is barred or not, but the omission to consider it or the omission to provide for it in the preliminary decree will not operate as *res judicata* because the proper stage for dealing with the question of personal liability arises only after the mortgaged property has been sold and the proceeds are found insufficient to satisfy the plaintiff's claim. There can be no suggestion in this case of any question of limitation as regards personal liability, but as defendants 2 to 4 were minors at the time of the execution of the suit mortgage, there can be no question of personal liability in the sense of their being arrested or their self-acquired properties being proceeded against. The utmost that the mortgagee would have been entitled to is that not merely the mortgaged properties but also other family properties in their hands should be held liable for their father's debt and it is only in that sense that the application under Order XXXIV, rule 6, can be granted against them.

Mr. Adiga, who appears for these defendants before us, points out that the mere absence of any scope for the plea of limitation does not conclude the question of their liability because the Court did not on the former occasion consider whether the other joint

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family properties in the hands of defendants 2 to 4 could be held liable for the debt contracted by the guardian. This question will have to be decided in the light of the principle laid down in *Ramajogayya v. Jagannadhan*(1).

We accordingly set aside the decree of the lower Court and send the case back for disposal in the light of the above observations. We would however add that as the appeal has been limited to Rs. 800 the properties of the minor defendants 2 to 4 will not, in any event, be held liable for more than Rs. 800. Costs of this appeal will abide the result. Any application for relief under the Madras Agriculturists Relief Act will have to be made to the lower Court to which the case has been remanded.

Court-fee paid on the memorandum of appeal will be refunded.

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### APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice  
Krishnaswami Ayyangar.

BODA VIRARAJU (PLAINTIFF), APPELLANT,

v.

VETCHA VENKATARATNAM AND TWENTY-FOUR OTHERS  
(DEFENDANTS 1 TO 19 AND 21 TO 24 AND NIL),  
RESPONDENTS.\*

*Hindu law—Widow—Nature of estate owned  
by—Powers of alienation of.*

A Hindu widow in possession of her husband's estate is in no sense a trustee for the ultimate reversioner. She is the

(1) (1918) I.L.R. 42 Mad. 185 (F.B.).  
\* Appeal No. 288 of 1932.

owner for the time being, fully capable of representing the estate in her transactions with the outside world so long as she acts *bona fide* and in the interests of that estate, but it is an ownership qualified by limitations which are of the very essence of her estate. For purposes which are purely secular or temporal, her powers of alienation are no wider than those which inhere in the manager of an infant's estate. But in respect of those other purposes which the Hindu law regards as religious or charitable, she possesses a larger discretion, and a wider authority. For obligatory, observances essential for the salvation of her husband's soul, she could go the length of disposing of the entirety of the estate, where it is not considerable, and where the requirements of the particular occasion demand it. For other but less peremptory purposes, though in themselves meritorious yet not indispensable, her authority is necessarily circumscribed. She may, for such objects, dispose of only a small and no more than a reasonable portion of the estate, the *quantum* to be measured by the custom and sentiment prevalent in the community to which she belongs.

Case-law reviewed and discussed.

APPEAL against the decree of the Court of the Subordinate Judge of Rajahmundry, dated 28th April 1932, and passed in Original Suit No. 60 of 1930.

*P. V. Vallabhacharyulu* for appellant.

*V. V. Srinivasa Ayyangar* for *V. V. Ramadurai* for twenty-fifth respondent.

Other respondents were not represented.

*Cur. adv. vult.*

The JUDGMENT of the Court was delivered by KRISHNASWAMI AYYANGAR J.—We have found very little difficulty either in the ascertainment of the true principle of law or in the application of it to the facts disclosed in this appeal. Whether and to what extent a Hindu widow in possession of her husband's estate can make a gift in favour of a dependent relation or for objects considered meritorious by the Hindu religion was the question discussed before us

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at the hearing of this appeal. It is unnecessary for a decision of this question to carry a research into the ancient texts of Hindu law, or indeed to do anything more than refer to two decisions of the Privy Council in which the principle has, if we may say so with respect, been clearly and precisely defined. As early as 1861, it was laid down in *The Collector of Masulipatam v. Caval Vencata Narrainapah*(1) that

“for religious and charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband she” (the widow) “has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity.”

The principle received further elucidation by their Lordships in 1922 in a case, *Sardar Singh v. Kunj Bihari Lal*(2), in which the widow had made a gift of a small fraction of the estate for the observance of *bhog* (food offerings) to the deity at Puri. The gift was upheld in spite of the fact that she had sufficient income available in her hands to provide for it without an alienation. Their Lordships drew a sharp distinction between obligatory religious ceremonies and those other observances which are merely optional though conducive to spiritual good. They said:

“There can be no doubt upon a review of the Hindu Law taken in conjunction with the decided cases that the Hindu system recognises two sets of religious acts. One is in connection with the actual obsequies of the deceased and the periodical performance of the obsequial rites prescribed by the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. In the later cases this distinction runs clearly through the views of the learned Judges.... With reference to the first class of acts the powers of the Hindu

(1) (1861) 8 M.I.A. 529.

(2) (1922) I.L.R. 44 All. 503 (P.C.).

female who holds the property are wider than in respect of the acts which are simply pious and, if performed, are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case she can alienate a small portion of the property for the pious or charitable purposes she may have in view.”

These observations have furnished valuable guidance for the Courts in India in approaching the decision of questions relating to a widow's power of alienation. The principles that emerge from the decided cases may be stated in these terms: A Hindu widow in possession of her husband's estate is in no sense a trustee for the ultimate reversioner. She is the owner for the time being, fully capable of representing the estate in her transactions with the outside world so long as she acts *bona fide* and in the interests of that estate, but it is an ownership qualified by limitations which are of the very essence of her estate—limitations which the law imposes not out of a tender regard for the right of the reversioner, for none such exists during her life, but for reasons which are intimately bound up with the ideals of life and conduct considered proper and appropriate for a person in her position. A simple life of abstinence and piety devoted to the acquisition of merit for the departed soul of her husband and a cessation from mere sense enjoyments in the pursuit of pleasure for its sake lie at the bottom of the restrictions on her powers of disposal. It is to be remembered that, according to the ancient law givers, restriction was indeed the rule, absolute power an exception, whether the holder was a female or even a male. For purposes which are purely secular or temporal, her powers are no wider than those which inhere in the manager of an infant's estate.

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But in respect of those other purposes which the Hindu law regards as religious or charitable, she possesses, as might naturally be expected, a larger discretion and a wider authority; see the texts collected in *Ram Sumran Prasad v. Gobind Das*(1). For obligatory observances essential for the salvation of her husband's soul, she could go the length of disposing of the entirety of the estate, where it is not considerable and where the requirements of the particular occasion demand it. For other but less peremptory purposes, though in themselves meritorious yet not indispensable, her authority is necessarily circumscribed. She may, for such objects, dispose of only a small and no more than a reasonable portion of the estate, the *quantum* to be measured by the custom and sentiment prevalent in the community to which she belongs. It is impossible to define her powers in this behalf with any more precision. The circumstances of the family, the extent of its property, the demands upon it of other legitimate calls, and all those social customs and sentiments which make up what one may call the conscience of the community, must, it seems to us, be among the main factors to be considered. We think that it is this same principle, though expressed in different language, which we find laid down in *Gobindchund Bysack v. Cossinaut Bysack*(2), where Lord GIFFORD said that care must be taken to avoid impressions derived from the English law and to consider in what way a Hindu Court of Justice would have decided the point.

Marriages of girls born in the family and the maintenance of female members stand on a higher footing. For, it is a legal obligation cast on the father, the *karta*

(1) (1926) I.L.R. 5 Pat. 646, 677 to 679.  
(2) (1826) Montr.ou, Cases of Hindu Law, 477, 498.

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or whoever happens to be in possession of the family estate, to defray, out of it, the expenses necessary for these purposes, which accordingly come under the head of strict legal necessity. How exactly this obligation is to be carried out, whether by a mortgage, sale or other means, is not to be determined by strict rules or legal formulæ, but must be left to the reasonable discretion of the party bound. In the absence of *mala fides* or extravagance, and so long as it is neither unfair in character nor unreasonable in extent, the Court will not scan too nicely the manner or the *quantum* of the alienation. A widow, like the manager of a family, must be allowed a reasonable latitude in the exercise of her powers, provided she acts fairly to the expectant heir [see at page 582 of *Khub Lal Singh v. Ajodhya Misser*(1)] and in a manner conformable to the legitimate wishes of her husband or the prescriptions of Hindu religious law. It may also be observed that, in respect of pious or charitable acts, what a husband might have done, the widow is competent to do after his death. For, according to an ancient text of Brihaspati [see *Venkaji Shridhar v. Vishnu Babaji Beri*(2)] the husband and wife participate in the effects of good and evil actions and this mutual relation is not dissolved by the death of either partner; *Khub Lal Singh v. Ajodhya Misser*(1) and *Venkaji Shridhar v. Vishnu Babaji Beri*(2). Her position will be much stronger if the husband had himself instructed or directed her to incur the particular charge or specified the objects for which the alienation was to be made. Such directions, though short of the requirements of a valid bequest, are, we think, a sufficient justification for her acting upon them.

(1) (1915) I.L.R. 43 Cal. 574, 582. (2) (1893) I.L.R. 18 Bom. 534.

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Bearing these principles in mind we proceed to refer to the facts found or established in the case. The disputed alienations are all gifts of land made by Mahalakshmi, a widow who had succeeded to the estate of her husband, Sarayya, who died on 18th December 1890, leaving him surviving besides her, two daughters, Suramma and Mariamma.

[His Lordship considered the evidence and proceeded:]

Mahalakshmi died on 19th July 1930. The appellant claiming to be the son adopted by Mahalakshmi's daughter Suramma and her husband Seshayya has now succeeded to the estate of Sarayya as his daughter's son. His adoption, though disputed in the trial Court, has not been challenged before us. By the suit out of which this appeal arises the appellant has impugned the gifts as being beyond the powers of Mahalakshmi and consequently not binding on him and has sought the recovery of the properties conveyed, together with mesne profits. According to him the gift to Venkamma is invalid as no necessity for making it has been proved, and as Mahalakshmi had in her hands at the time sufficient income from the assets from which she ought to have met the expenses of maintaining Venkamma. This circumstance is no doubt an element to be taken into account, but no serious importance can be attached to it, for we find it existed in *Sardar Singh v. Kunj Bihari Lal*(1) but made no difference to their Lordships' decision. As regards the other gifts, it is argued that the purposes for which the gifts were made have not been sufficiently established, as there was nothing to indicate that the widow acted from motives of religion or piety, and apart from this, that such gifts

(1) (1922) I.L.R. 44 All. 503 (P.C.).

even though of small portions of the estate cannot be made except on special ceremonial occasions.

[His Lordship discussed the evidence and concluded as follows:]

The appellant's Advocate also contended that the burden of proof is on the alienees to justify the gifts and that it has not been discharged by them. Though none of the donees except the tenth defendant actually contested the claim, yet we must hold that in this case the burden has been discharged, as there is satisfactory evidence to show that there was ample justification for this widow to make the gifts. Concurring with the Subordinate Judge, we hold that the gifts to the Brahmins are also valid. The appeal therefore fails and has to be dismissed with costs of the twenty-fifth respondent. We may mention that, as between the appellant and respondents 1, 2 and 4 to 8, there has been a settlement by a compromise which has been made a decree of Court on 31st August 1937. The twenty-fifth respondent will receive the costs proportionate to his interest in the subject-matter of the appeal.

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## APPELLATE CIVIL.

Before Mr. Justice Wadsworth.

1938,  
August 19.

PATURI VEERAYYA AND ANOTHER (DEFENDANTS  
1 AND 2), APPELLANTS,

v.

PATURI CHELLAMMA (PLAINTIFF), RESPONDENT.\*

*Hindu law—Maintenance—Widow—Suit for enhancement of maintenance fixed by a decree of Court—Circumstances to be considered—Principles in fixing the rate—Date from which arrears at the enhanced rate to be calculated.*

In a suit by a Hindu widow for the enhancement of maintenance already fixed by a decree of Court,

*held*: (i) The maximum which could be awarded to the widow would be the amount of the income of the share to which her deceased husband would have been entitled had he been alive and a coparcener at the date of the suit for enhancement.

(ii) In assessing a claim based on changes of circumstances the Court is entitled to have regard to the changes not only in the needs of the widow but also any changes of those other circumstances to which the Court had regard in fixing the original rate of maintenance, provided that those changes were not foreseen or allowed for at the time when the original decree was passed. A change in the wealth of the family and the growth of the income of the family are circumstances to which the Court must have regard.

(iii) The date from which arrears at the enhanced rate should be calculated is the date of the suit for enhancement and not the date when the payments under the old decree ceased or the date of the decree of the trial Court in the suit for enhancement.

*Ekradeshwari Bahwasin v. Homeshwar Singh and others*(1) referred to.

*Sreeram Bhattacharjee v. Puddomookhee Debia*(2) applied.

\* Second Appeal No. 4 of 1935.

(1) (1929) I.L.R. 8 Pat. 840 (P.C.). (2) (1868) 9 W.R. 152.

APPEAL against the decree of the District Court of East Godavari at Rajahmundry, dated 1st October 1934, and passed in Appeal Suit No. 20 of 1934 preferred against the decree of the Court of the Subordinate Judge of Cocanada, dated 13th February 1934 and passed in Original Suit No. 59 of 1930.

*Ch. Raghava Rao* and *M. Sriramamurthi* for appellants.

*P. Somasundaram* for respondent.

## JUDGMENT.

WADSWORTH J.—This appeal arises out of a suit for the enhancement of maintenance ordered to a Hindu widow by a decree of the year 1899. The original rate of maintenance was Rs. 10 per mensem. The Courts below have raised this figure to Rs. 50 per mensem, allowing also a lump sum for pilgrimage not provided for in the original decree and another lump sum for the replacement of worn out utensils. The lower appellate Court differing from the trial Court allowed arrears only from the date of the trial Court's decree instead of arrears from the date on which payment under the earlier decree had ceased. This question of the date from which arrears are to be paid forms the subject-matter of the memorandum of cross objections.

There are findings of fact, into which it is unnecessary for me to enter, that in the interval from the first decree of 1899 to the date of the present suit, the income of the family property had arisen from Rs. 1,100 a year to a little over Rs. 7,000 a year, that is to say, the increase in the rate of maintenance allowed is something less than the proportionate increase having regard to the rise in the income of the family. The plaintiff herself in her evidence regarding

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the prices of the main items of expenditure during this period estimated the rise in the price of paddy as from Rs. 60 to 150 and the rise in the price of clothes as from Rs. 5 to 12 to 15. This would indicate, if the evidence were accepted as correct, that the rise of prices of the principal commodities required for her consumption, amounts to something less than 300 per cent.

The basis upon which the maintenance of a widow is to be fixed in the first instance is well settled. It should be fixed, so far as means are available, at an amount which will enable her to live comfortably, according to the standard of comfort obtaining in the community to which she belongs. In fixing the figure regard will be had to the amount of money available and the ordinary rule is that the maximum allowance which she should get would be an amount equal to the income of her husband's share in the property; *Rangathayi Ammal v. Munusawmi Chetty*(1) and *Subbarayulu Chetty v. Kamalavalli Thayaramma*(2). In the cases just quoted the income of the husband's share was taken to be the income of the share which he would have got if a division had taken place in his lifetime. That appears also to be the basis of the decision in *Jayanti Subbiah v. Alamelu Mangamma*(3), where the rate of maintenance is treated as being limited to the share of the deceased husband which has come by survivorship to the coparcener. But on this question of the date with effect from which the husband's share is to be estimated, there is a very clear ruling of a Bench of this Court in *Manikka Mudaliar v. Soubagia Ammal*(4), which is later than the cases just referred to and, so far as I know, has not

(1) (1911) 21 M.L.J. 706.

(3) (1902) I.L.R. 27 Mad. 45.

(2) (1911) 21 M.L.J. 493.

(4) (1914) 27 M.L.J. 291.

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been challenged by subsequent rulings of this Court in the twenty-four years which had elapsed since the decision was passed. In that case, it was definitely laid down that the maximum amount of maintenance of a widow should be fixed with reference to the income from the husband's share, not calculated as on the date of his death, but as on the date of the suit, regard being had to the increase of the family property which had taken place in the interval between the date of the husband's death and the date of the suit. That decision must be taken as authoritative, at least so far as I am concerned. I think it follows that in a suit for enhancement of maintenance the maximum which could be awarded to the widow would be the amount of the income of the share to which her deceased husband would have been entitled had he been alive and a coparcener at the date of the suit for enhancement.

What are the considerations which must govern the Court in dealing with a claim for enhancement of maintenance already fixed by the Court's decree? Clearly, the matter must not be treated as *res integra*. The Court cannot proceed to fix the maintenance without any regard to the judicial decision already passed and binding on both the parties. The only grounds upon which this decision can be said to lose its force are such changes in the circumstances governing the widow and the family as were not foreseen and allowed for at the time when the original decree was passed. It has been argued by Mr. Raghava Rao for the appellants that it is only a change in the needs of the widow and the prices of those needs that should be taken into consideration. That, to my mind, is overstating the case of those who have to pay the maintenance. In assessing a claim based on changes

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of circumstances the Court is entitled, in my opinion, to look into the changes not only in the needs of the widow but also any changes of those other circumstances to which the Court had regard in fixing the original rate of maintenance. For instance, the Court must have regard to any rise of prices; it must have regard to additional expenses necessitated by the deterioration of the health of the maintenance holder; it must also have regard to any reasonable change in the standard of comfort and in the conventional necessities of the widow due to the improvement in the circumstances of the family to which she belongs. If it is obvious that in fixing the original rate of maintenance, you have regard to those conventional necessities and conventional comforts which can reasonably be expected by a member of the community to which the widow belongs, any change in those circumstances can be made a ground for enhancement or reduction of maintenance in a subsequent suit, always provided that these changes were not foreseen or allowed for in the original decree. To this extent, a change in the wealth of the family is a valid factor for it is common experience that conventional standards of comfort and conventional necessities grow with the growth of income. Finally, the Court must have regard to the growth of the income of the family in order to ascertain the maximum which must govern the maintenance allowance having regard to the rule laid down in *Manikka Mudaliar v. Soubagia Ammal*(1).

It does not seem to me that these principles have, to any considerable extent, been ignored by the lower appellate Court. In fact, to a very large extent, they are set forth clearly and succinctly by the learned District Judge and the learned District Judge has

(1) (1914) 27 M.L.J. 291.

quite rightly referred to the observations of the Privy Council in *Ekradeshwari Bahwasin v. Homeshwar Singh and others*(1) in which their Lordships deprecate interference with a lower Court's estimate as to what is a proper rate of maintenance, provided that the principles on which the rate has been calculated are sound. There is, to my mind, no apparent error in the application of the correct principles so far as the basic rate of maintenance allowance is concerned. It is true that the rate has been raised five-fold whereas, according to the evidence, prices have risen something less than three-fold. But the Court was entitled to take into consideration, as it did, the fact that the declining years of the widow and the weakness of her health made it necessary for her to have extra comforts in the shape of a servant to attend upon her and the Court was also entitled to take into consideration the fact that the family has very greatly increased in wealth and consequently, the widow could reasonably expect a standard of comfort higher than that which was permissible in 1899 and similar to that which the other members of the family have enjoyed after their income has very greatly appreciated. Moreover, the Court was also entitled to take into consideration the facts that the amount available for providing the widow with maintenance is something like six times the amount which was available in 1899 and that, consequently, there was no financial necessity to stint the widow in the matter of satisfying her conventional needs and providing her with the conventional standard of comfort such as presumably prevailed when the first decree was passed.

I am therefore of opinion that there are no grounds for interfering with the decision of the lower appellate

(1) (1929) I.L.R. 8 Pat. 840 (P.C.).



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Court so far as the basic rate of maintenance is concerned. But, in my opinion, the Courts below have erred in granting to the widow a lump sum to pay for a pilgrimage for the benefit of the soul of her deceased husband. If the necessity for such pilgrimage exists now, it existed even in 1899 and it is not apparent that any such expenditure was refused at the time of the original suit on grounds of lack of funds. Nor do I see why the widow should be allowed a lump sum for the replacement of utensils which have worn out in the interval between 1899 and 1933. It must be inferred that when the original maintenance decree was passed, the Court would make provision for reasonable replacements which could be foreseen and there is no more justification, to my mind, for allowing a fresh suit every time the utensils wore out than there would be for allowing a fresh action whenever the widow's clothes wore out. To the extent of these two minor items, I therefore set aside the decree of the lower Courts, confirming the decree for the amount allowed for maintenance pure and simple.

On the question of the memorandum of cross objections, it seems to me that both the Courts were wrong in the fixation of the date from which arrears should be calculated. The trial Court adopted as its starting point the date when the payments under the old decree ceased. A mere cessation of payment is no ground for an enhancement of maintenance and it does not appear that any formal demand was made for enhancement to the rate now claimed prior to the filing of the suit. The appellate Court has fixed the date from which arrears should be allowed as the date of the lower Court's decree. This, as is pointed out by the Privy Council in *Ekradeshwari Bahwasin v.*

*Homeswar Singh and others*(1), is a very dangerous date to adopt, for, the adoption of such a criterion is an incentive to the defendants in a suit for maintenance to use every means at their disposal to delay the trial of the suit. As a matter of fact, the trial of the present suit was delayed from the beginning of 1930 until February 1934. I do not see why the plaintiff should be made to pay for the dilatoriness of the proceedings in the trial Court. Incidentally, the matter is covered by the express authority of a decision in *Sreeram Bhattacharjee v. Puddomookhee Debia*(2) though it is not apparently a case of enhancement of maintenance decreed in a previous suit, but merely one of an enhancement of maintenance fixed by a family arrangement. But the principle enunciated in that case, viz., that the date from which arrears should be calculated should be the date of the suit and not the date from which former payment ceased, holds good.

In the result, therefore, the appeal is allowed and the lower Court's decree will be modified so as to exclude the sums decreed for the cost of pilgrimage and the cost of replacement of utensils.

The memorandum of cross objections is allowed and the date from which arrears will be calculated will be the date of the institution of the present suit. In other respects, the lower Court's decree is confirmed. Parties will pay and receive costs in both the appeal and the memorandum of cross objections proportionate to their failure and success.

I am reminded that the decree of the lower Court gives a charge over the whole of the family properties. It seems to me unreasonable to encumber the family properties to a greater extent than is necessary to

(1) (1929) I.L.R. 8 Pat. 840 (P.C.).

(2) (1868) 9 W.R. 152.

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WADSWORTH J. secure the payment of the maintenance. The charge will therefore be limited to properties sufficient to yield an income of Rs. 1,200, which will allow a sufficient margin in case there is any difficulty in realization. If the parties can agree as to the properties which shall be charged, they may file a statement in this Court within one month; otherwise further proceedings in this matter will go on in the trial Court.

V.V.C.

## APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Stodart.

VADREUV SANKARAMURTHY AND ANOTHER  
(DEFENDANTS 3 AND 4), APPELLANTS,

v.

VADREUV SUBBAMMA (PLAINTIFF), RESPONDENT.\*

*Hindu law—Maintenance—Widowed daughter-in-law—Donee or devisee of self-acquired property of her father-in-law—Legal right to maintenance against, or against such property—Donee or devisee surviving son's son of father-in-law.*

A widowed daughter-in-law has no legal right to maintenance against the devisee or donee of the self-acquired property of her father-in-law or against the property itself if it descends not by inheritance but by will or gift.

Where A, a Hindu, executed and registered a document described as a will by which he bequeathed his self-acquired properties to his surviving sons' sons and handed over the properties to them and thereafter became a sanyasin,

*held*, accordingly, that, whether the said document was a will or a gift deed, the widow of a predeceased son of A had no legal right to maintenance either against his grandsons or

\* Second Appeal No. 1227 of 1932.

against the properties transferred to them under the said document.

*Obiter dictum* of SUBRAMANIA AYYAR J. to the contrary in *Rangammal v. Echammal*(1) disapproved.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Amalapuram in Appeal Suit No. 103 of 1929 preferred against the decree of the Court of the District Munsif of Razole in Original Suit No. 13 of 1929 (Original Suit No. 401 of 1926, District Munsif's Court, Amalapuram).

K. Bhimasankaran for appellants.

V. Viyyanna for respondent.

*Cur. adv. vult.*

The JUDGMENT of the Court was delivered by KING J.—This appeal raises an important question regarding the right of maintenance. The respondent is the widow of one of the sons of one Surayya. Her husband died in 1920. In 1923 Surayya became a sanyasi after executing and registering a document described as a will (Exhibit IV-c). In that will he bequeathed his self-acquired properties to his grandsons (defendants 3 and 4 in the suit) who are respectively the sons of Surayya's two other sons (defendants 1 and 2). Surayya handed over his properties to his grandsons, and thereafter disappeared out of their lives. In 1926 the respondent sued the four defendants for maintenance and in both of the Courts below she has obtained a decree for maintenance against defendants 3 and 4, which is also charged upon the property acquired by them under Exhibit IV-c. Defendants 3 and 4 have now filed this second appeal, and in our opinion the appeal must succeed.

The construction of Exhibit IV-c need not delay us long. Though it appears to have been treated

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(1) (1898) I.L.R. 22 Mad. 305.

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throughout the trial and the first appeal as a will which spoke from the day on which Surayya renounced his civil rights, we think it should be more properly styled a gift deed which came into effect when possession of the properties was actually given to the appellants—but whether it be a will or a gift deed, we think the principles upon which any rights of the respondent to maintenance are or are not affected by it are the same.

We begin the discussion of the question before us by enunciating two propositions of law which are well-established and have not been contested :

(i) A widowed daughter-in-law has no legal right to maintenance from her father-in-law out of his self-acquired property but only what is called a moral right ; and

(ii) but if on her father-in-law's death that property descends by inheritance to his heirs her moral right becomes a legal right at the moment of his death, as against them and as against the property which they have so inherited.

The point which now arises for determination is : “ Does she acquire a similar legal right against the devisee or donee of the self-acquired property or against the property itself if it descends not by inheritance but by will or gift ? ” Now in discussing this matter the first thing which strikes us is that the second proposition of law which has been enunciated above is a very startling one, and we immediately ask ourselves the question : “ Why should an estate which is unburdened in the hands of one owner become burdened in the hands of a second owner who acquires it from him ? ” This is contrary to all general provisions of law, and it must be due to some peculiarity in the nature of the death of a Hindu and of the

succession to his property. The answer is given in *Janki v. Nand Ram*(1) in these words :

“ An essential element of the son's right of inheritance from his father is the spiritual benefit which in the contemplation of the Hindu law the son confers upon the soul of the deceased father. Therefore the son inheriting the self-acquired property of his father takes that property subject to such moral obligations as are conducive to the spiritual benefit of his father, and such moral obligations become legal obligations as against the son who holds his father's property by inheritance.”

Now it is true, of course, that this may not be the only answer, but throughout the long arguments in this case that was the only answer that the learned Advocate for the respondent could give, or that appears in the authorities which he brought to our attention. Let us therefore examine whether this answer can be pressed into service in the case of a will or gift. It seems to us obvious that it cannot. It is impossible to argue that there is anything in the nature of the transference of property by will or by gift which requires that the legatee or donee should take any thought for the spiritual welfare of the testator or donor. The legatee or donee may be a stranger, may be a Muhammadan, may be a Christian, may be anybody ; and, as has happened in this case, the donor may expressly say that his widowed daughter-in-law is *not* to be maintained. The essence of the idea of inheritance is that only the heir-at-law can succeed ; the essence of the idea of a will or a gift is that the testator or donor is disposing personally and at his own will and pleasure of the property which he possesses. The Bombay High Court, it may here be mentioned, has consistently held the view that the widow acquires no legal right in circumstances like the present [see

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(1) (1888) I.L.R. 11 All. 194, 208 (F.B.).

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*Yamunabai v. Manubai*(1), *Bai Parvati v. Tarwadi Dolatram*(2) and *Bhagirathibai v. Dwarkabai*(3)] and has drawn a clear distinction between the acquisition of a father's property by inheritance and by other means such as a will.

There is however an important pronouncement in a case in Madras (which has been followed in Calcutta and Allahabad) and it is necessary to discuss this before finally disposing of this appeal. The case is *Rangammal v. Echammal*(4) and SUBRAMANIA AYYAR J. is there dealing with the very question which is now before us, viz., whether a widow acquires a legal right to maintenance out of the self-acquired property of her father-in-law which had been bequeathed by will. What the learned Judge says is this :

"The better conclusion is, perhaps, that the party whose moral claim becomes a legal right would not be affected by testamentary dispositions in favour of volunteers made by the person morally bound to provide the maintenance. No doubt, if the title of the female claiming the maintenance were dependent on the volition of such a testator, he could by his will have directed that she should get no maintenance out of his estate. But in cases like this, her claim to maintenance originating from the status acquired by her marriage, becomes a legal right independently of his volition and comes into existence at the same moment as the dispositions in favour of the volunteer become operative. It is consequently difficult to see how the latter could affect the former. It is not, however, necessary to put our decision in favour of the appellant on this ground."

It will at once be clear from this quotation that what SUBRAMANIA AYYAR J. says, though deserving of the very greatest respect, does not lay down the law in the full sense of that term. It is expressly made *obiter dictum*, and is prefaced by the word "perhaps" which can hardly suggest that the learned

(1) (1899) I.L.R. 23 Bom. 608, 611.  
(3) A.I.R. 1933 Bom. 135.

(2) (1900) I.L.R. 25 Bom. 263.  
(4) (1898) I.L.R. 22 Mad. 305.

Judge had finally made up his mind. We ourselves are, again with great respect, unable to follow him. He does not cite any text or any authority in support of his statement of the law. He does not say *why* the right to maintenance is independent of the volition of the testator. His argument really in our opinion amounts to this, that the right to maintenance is *charged upon* the testator's self-acquired property, and that he cannot get rid of the charge. But if the widow has no legal claim against him during his lifetime it cannot be charged on his property. We return to what we said when considering the distinction between inheritance and the passing of property by will or gift, and repeat that we can see no valid reason why the right of a Hindu to dispose of his self-acquired estate should be in any manner restricted.

The rulings in *Gopal Chandra Pal v. Kadambini Dasi*(1) and *Jeot Ram v. Mt. Lauji*(2) in our opinion merely accept and follow *Rangammal v. Echammal*(3) without attempting any analysis or examination, and cannot advance the case of the respondent any further. On the other hand we are fortified in our conclusion by *Bhagwanti v. Thakur Mal*(4) where it is laid down without qualification (though without, it is true, considering specifically the case of a will) that "a man has absolute right under the Hindu law to dispose of his self-acquired property in any way he chooses".

For these reasons we think that the decrees of the Courts below cannot be supported. The appeal is allowed and the plaintiff's suit dismissed with costs throughout. The plaintiff must pay the court-fee due to Government on her plaint.

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(1) A.I.R. 1924 Cal. 364.  
(3) (1898) I.L.R. 22 Mad. 305.

(2) A.I.R. 1929 All. 751.  
(4) A.I.R. 1926 Lah. 198.

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## APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice  
Krishnaswami Ayyangar.

1938,  
August 30.

PABBATI VENKATA REDDI (PETITIONER), APPELLANT,

v.

DOREDLA VENKATARATNAM AND SONS REPRESENTED  
BY DOREDLA SATYANARAYANAMURTHI AND  
TWO OTHERS (RESPONDENTS), RESPONDENTS.\*

*Code of Civil Procedure (Act V of 1908), sec. 63—Court of highest grade calling up proceedings in execution of a decree transferred to Court of lower grade—Sale of property attached in execution of that decree—Jurisdiction of Court of highest grade as to—Decree not transferred to that Court—Sec. 63, if controlled by sec. 38 of the Code in this matter.*

In execution of three decrees the same property of the same judgment-debtor was attached. Two of the decrees were transferred to the Subordinate Judge's Court of Narsapur, while the third, that held by the first respondent, was transferred to the District Munsif of Narsapur. Subsequently on action taken under section 63, Civil Procedure Code, the proceedings before the District Munsif were called up to the Subordinate Judge's Court and on an application made to the Subordinate Judge the attached property was sold.

Held that the Subordinate Judge's Court had jurisdiction to sell the attached property, that jurisdiction being necessarily implied in the use of the word "realize" in section 63, Civil Procedure Code, and that that section was not controlled by section 38, Civil Procedure Code, in that matter.

Where the facts come within the definition of the situation as given by section 63, it is obviously section 63 which must be applied and that section, if the facts apply, cannot be controlled or governed by section 38.

APPEAL against the order of the Court of the Subordinate Judge of Narsapur, dated 6th July 1935 and

\* Appeal Against Order No. 486 of 1935.

made in Civil Miscellaneous Petition No. 1140 of 1934 (Original Suit No. 42 of 1926 on the file of the District Court, Kistna).

V. Govindarajachari and N. Vasudeva Rao for appellant.

P. Satyanarayana Rao for respondents.

The JUDGMENT of the Court was delivered by KING J.—This appeal raises a question of the interpretation of section 63, Civil Procedure Code. The facts are that in execution of three decrees against the same judgment-debtors the same property was attached. Two of the decree-holders, one of whom is the present appellant, had their decrees transferred to the Sub-Court, Narsapur. The third decree-holder, who is the present first respondent, had his decree transferred to the District Munsif of Narsapur. Subsequently action was taken under section 63 by which the proceedings before the District Munsif of Narsapur were called up to the Subordinate Judge's Court. The decree-holder whose decree had been thus called up, that is to say the first respondent, then applied to the learned Subordinate Judge to sell the attached property. The sale was duly held. Thereupon the present appellant filed an application under Order XXI, rule 90, Civil Procedure Code, requesting the Court to set aside the sale on two grounds: (i) that it was vitiated by material irregularities and (ii) that the Subordinate Judge had no jurisdiction to hold the sale at all. This application was filed on 23rd November 1934 whereas the sale had been held on 9th July. The application was therefore *prima facie* out of time and the learned Subordinate Judge has held that the appellant has not pleaded in sufficient detail any fraudulent actions on the part of the respondent which

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would enable him to rely upon section 18 of the Limitation Act. The learned Judge has therefore held that the application under Order XXI, rule 90, is barred by limitation.

In appeal we have been asked to read into the application what is not obviously there, namely, an allegation that there has been fraudulent conduct on the part of the respondent which has prevented the appellant from having knowledge of the sale. We are unable to find any material which would form the basis for such an assertion and we think that the decision of the learned Subordinate Judge on the question of limitation is right.

The main argument however in appeal was on the question of jurisdiction. It is contended that although it was necessary under section 63 to bring the proceedings which were then pending before the District Munsif up to the Court of the Subordinate Judge, the Subordinate Judge has by virtue of section 38 jurisdiction to execute only such decrees as have actually been transferred by the Court of first instance to his Court. The question then is whether section 63 overrides section 38 or not on the assumption that section 63 contains within itself any clause conferring jurisdiction upon the Subordinate Judge. We think that on a common sense interpretation of the language of section 63 this jurisdiction is certainly conferred. The language of section 63 is :

"Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto, shall be the Court of highest grade."

It is conceded for the appellant that, in spite of the enactment of section 38, the Subordinate Judge in this case would have had jurisdiction to hear and

determine all claim petitions. To that extent therefore it is conceded that section 63 overrides section 38. It is however argued that section 63 does not give the Sub-Court any jurisdiction to sell the attached property except in execution of its own decrees. It seems to us that this jurisdiction is necessarily included in the use of the word "realize". "Realize such property" must obviously refer to bringing such property to sale. Nowhere in section 63 is there any restriction as to how and in what manner and in what petition the Court of highest grade should realize the property and inasmuch as it is already conceded that section 63 overrides section 38 with regard to claim petitions, we are of opinion that it overrides section 38 in this matter also. After all, section 38 is a general section dealing with execution. It contemplates only one decree-holder applying to execute only one decree and it lays down which is the proper Court to order execution. Section 63 deals with more complicated facts in which there are not only more decree-holders than one but the same property has been attached by more Courts than one. Where the facts come within the definition of the situation as given by section 63, it is obviously section 63 which must be applied and section 63, if the facts apply, cannot, we think, be controlled or governed by section 38. We are of opinion therefore that the Subordinate Judge in this instance had jurisdiction to conduct the sale.

The appeal must therefore fail on both points and is dismissed with costs.

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## APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice  
Krishnaswami Ayyangar.

1938,  
September 27.

NANDURI SRIRAMACHANDRA RAO (PETITIONER—  
PLAINTIFF), APPELLANT,

v.

CHINTAMANIBHATLA VENKATESWARA RAO AND TWO  
OTHERS (COUNTER-PETITIONERS—DEFENDANTS 2, 6  
AND 7), RESPONDENTS.\*

*Indian Limitation Act (IX of 1908), art. 182—Ex parte decree—  
Order refusing to set aside—Appeal against, by some of  
defendants—Judgment allowing, extending its benefits to  
other defendants also subject to a specified condition to be  
complied with within a specified time—Condition not com-  
plied with by them and ex parte decree therefore standing  
confirmed against them as and from expiry of that time  
—Execution of decree against them—Starting point of limita-  
tion for—“Appeal” in column III of article—Meaning of.*

An application made to a Subordinate Judge to set aside an *ex parte* decree passed on 5th March 1930 was dismissed by him and against that order of dismissal defendants 1 and 3 to 5 in the suit appealed to the High Court. On 20th October 1932 the High Court gave judgment allowing the appeal and extending its benefits to defendants 2, 6 and 7 also on condition that they deposited the decree amount within three months. That deposit was not however made, and so as against defendants 2, 6 and 7 the *ex parte* decree stood confirmed as from 20th October 1932. On 15th August 1935 the decree-holder filed an application to execute the decree against defendants 2, 6 and 7.

Held that the period of three years prescribed by article 182 of the Limitation Act ran from 20th October 1932, the date of the appellate decree of the High Court, and not from 5th March 1930, the date of the *ex parte* decree, and that the application of 15th August 1935 was not barred by limitation.

\* Appeal Against Order No. 419 of 1936.

“Appeal” in column III of article 182 means “an appeal in the suit which is likely to affect the decree sought to be executed” and not merely an appeal against the actual decree or order sought to be executed.

*Firm Dedhraj Lachminarayan v. Bhagwan Das*(1) followed.

*Koyakutti v. Veerankutti*(2) approved.

*Nagendranath De v. Sureshchandra De*(3) referred to.

*Fakir Chand Mandal v. Daiba Charan Parni*(4) not followed.

APPEAL against the order of the Court of the Subordinate Judge of Vizagapatam, dated 15th April 1936 and made in Execution Petition No. 108 of 1935 in Original Suit No. 24 of 1929.

Y. Suryanarayana for appellant.

B. V. Ramanarasu for respondents.

*Cur. adv. vult.*

The JUDGMENT of the Court was delivered by KING J.—This appeal arises out of an application by the decree-holder in Original Suit No. 24 of 1929 on the file of the Principal Subordinate Judge, Vizagapatam, to execute against defendants 2, 6 and 7 the decree which he obtained against them *ex parte* on 5th March 1930. There was an application to the Subordinate Judge to set aside this *ex parte* decree which was dismissed. Against this order of dismissal defendants 1 and 3 to 5 appealed to the High Court. On 20th October 1932 the High Court gave judgment allowing the appeal, and extending its benefits to defendants 2, 6 and 7 also on condition that they deposited the decree amount within three months. This deposit was not however made, and so as against defendants 2, 6 and 7 the *ex parte* decree stood confirmed as from 20th October 1932. The present application for execution was made on 15th August 1935. It has been dismissed by the learned

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(1) (1937) I.L.R. 16 Pat. 306.

(2) (1937) 1 M.L.J. 407.

(3) (1932) I.L.R. 60 Cal. 1 (P.C.).

(4) (1927) I.L.R. 54 Cal. 1052.

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Subordinate Judge as being filed more than three years after the date of the decree and the question before us is whether that order of dismissal is in accordance with law.

The law which applies to these facts is formulated in article 182 of the Limitation Act. The description of the application in column I is :

"For the execution of a decree or order of any Civil Court . . ."

The period of limitation in column II is three years. The "time from which period begins to run" in column III is :

"1. The date of the decree or order, or

2. (Where there has been an appeal) the date of the final decree or order of the appellate Court . . ."

If the first date is to be chosen in the present case, the execution application is clearly barred; if the second, it is clearly within time, and the very simple question for our determination is whether the words "where there has been an appeal" apply to the present case or not.

Simple, however, as these words are, they have been in the past interpreted in two distinct ways. According to the first interpretation "appeal" can and must mean only an appeal against the actual decree or order sought to be executed. The second interpretation gives it a wider meaning which for the present we may best express in the words of VENKATARAMANA RAO J. in *Koyakutti v. Veerankutti*(1) as

"an appeal in the suit which is likely to affect the decree sought to be executed."

Although this more liberal interpretation was adopted more than fifty years ago in *Narsingh Sewak Singh v. Madho Das*(2) and *Lutful Huq v. Sumbhudin Pattuck*(3),

(1) (1937) 1 M.L.J. 407.

(2) (1882) I.L.R. 4 All. 274.

(3) (1881) I.L.R. 8 Cal. 248.

the current of authority thereafter set strongly against it, so that by 1927 the learned Judges who decided *Fakir Chand Mandal v. Daiba Charan Parni*(1) were able to hold that the first view was both "clear upon principle" and "concluded by authority". Then came the decision of the Privy Council in *Nagendranath De v. Sureshchandra De*(2) and of the four cases decided since then, *Nagappa Bandappa v. Gurushantappa Shankrappa*(3), *Firm Dedhraj Lachminarayan v. Bhagwan Das*(4), *Ahammad Kutty v. Kottekkat Kuttu*(5) and *Koyakutti v. Veerankutti*(6), only one has failed to take the more liberal view.

With all respect to the learned Judges in *Fakir Chand Mandal v. Daiba Charan Parni*(1) we are unable to see how the narrower view which they upheld is "clear upon principle." The only principle we can discover in the rulings cited for the respondents is that the words "where there has been an appeal" must be taken in their context, that is to say, with reference to the words in column I of article 182. But it does not necessarily follow that because a decree or order is mentioned in column I, the appeal which is mentioned in column III must be *against* that decree or order. It is equally logical to say that it must be something which *affects* that decree or order, and, after all, the Legislature has refrained from saying, what it could have said with ease if that had been its intention, "where there has been an appeal against that decree or order."

The true principles which, we think, should govern this interpretation are set out in the judgment of the

(1) (1927) I.L.R. 54 Cal. 1052.

(3) (1932) I.L.R. 57 Bom. 388.

(5) (1932) I.L.R. 56 Mad. 458.

(2) (1932) I.L.R. 60 Cal. 1 (P.O.).

(4) (1937) I.L.R. 16 Pat. 306.

(6) (1937) 1 M.L.J. 407.

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Privy Council in *Nagendranath De v. Sureshchandra De*(1). On page 5 their Lordships say :

"There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptance of the term, and that it is no less appeal because it is irregular or incompetent."

On page 6 they say :

"The question must be decided upon the plain words of the article . . . There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions, equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide. It is at least an intelligible rule that, so long as there is any question *sub judice* between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution, which, if the final result is against them, may lead to no advantage."

Now it is true that their Lordships were not dealing with an actual appeal against an order refusing to set aside an *ex parte* decree, as we are here, but with an appeal against the decree itself which was sought to be executed, and the immediate result of their decision was to hold that, even if such an appeal were irregular in form and one to which the judgment-debtors were not parties, it was none the less an appeal within the meaning of article 182. But the principles contained in the passages quoted are, we think, wide enough to cover the present case and other cases of a similar nature. In *Firm Dedhraj Lachminarayan v. Bhagwan Das*(2) it was held that the definition of an appeal given by their Lordships would apply to an appeal

(1) (1932) I.L.R. 60 Cal. 1 (P.C.). (2) (1937) I.L.R. 16 Pat. 306.

against an order refusing to set aside an *ex parte* decree—and with this we respectfully agree. And it is, of course, obvious that the "intelligible rule" laid down by their Lordships in the concluding sentence of the second passage quoted must apply to the facts of the present case, where the success of an appeal against an order refusing to set aside an *ex parte* decree has precisely the same effect in regard to execution as a successful appeal against that decree itself.

The principles of the Privy Council ruling have also been applied to two other somewhat similar situations—in *Nagappa Bandappa v. Gurushantappa Shankrappa*(1) to an appeal against an order granting a review of the original decree, and in *Koyakutti v. Veerankutti*(2) to an appeal against a preliminary decree in a mortgage suit which is not itself executable. The only case in which the principles of *Nagendranath De v. Sureshchandra De*(3) have apparently not been followed is *Ahammad Kutty v. Kottekkat Kuttu*(4) where also the appeal was against a preliminary decree. But it is significant that MADHAVAN NAIR J. who decided that case did so, not on the ground that the final decree actually obtained in that suit was not in fact imperilled by the appeal, but on the ground that there was nothing to prevent the plaintiff from applying for a fresh final decree (*see* page 465). Such an argument, even if accepted, could of course obviously not apply to an appeal against an order refusing to set aside an *ex parte* decree.

It was argued for the respondents by Mr. Ramanasu that the narrower interpretation of the word "appeal" must be accepted for if we choose the wider one, we would be bound to apply it to a situation in which there had been a separate suit to set aside

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a decree on some such ground as that of fraud, and the filing of an appeal against a decree in *that* suit. That is a situation with which we have not now to deal and may well we think be left until it arises. Meanwhile it is not difficult to perceive a clear distinction between an appeal arising from an order in the very suit whose decree is sought to be executed and an appeal from a decree in quite a different suit. We do not therefore feel deterred by the consideration of that particular hypothetical case from expressing our respectful agreement with *Firm Dedhraj Lachminarayan v. Bhagwan Das*(1) which is a direct authority on the present facts. We accordingly allow this appeal and setting aside the order of the learned Subordinate Judge direct that Execution Petition No. 108 of 1935 be restored to file and be disposed of on its merits. Costs in the execution petition to abide the result. The respondents must pay the appellant's costs of the appeal.

A.S.V.

(1) (1937) I.L.R. 16 Pat. 306.

## ORIGINAL CIVIL.

Before Mr. Justice Venkataramana Rao.

L. VENKATAKRISHNAMA NAIDU (FIRST DEFENDANT),  
PETITIONER,

1938,  
September 21.

v.

R. NARAYANASAMI IYER AND FIVE OTHERS  
(PLAINTIFF AND DEFENDANTS 2 TO 5),  
RESPONDENTS.\*

*Original Side Rules, Madras, O. V-A.—Third party procedure prescribed by—Scope of—Suit for recovery of property on the ground that it is trust property—Defendant applying under O. V-A to implead his vendor who had covenanted for title and agreed to indemnify—Test to be applied in such a case—Civil Procedure Code (Act V of 1908), O. I, r. 10—If the vendor a proper party under.*

A sale deed, in addition to the usual covenants for title, also contained a covenant for indemnity. In a suit by a plaintiff against the vendee to recover the property covered by the sale deed on the ground that it was trust property the vendee took out a third party notice against his vendor under Order V-A, rule 1, of the Original Side Rules. The vendor appeared and raised the contention that the claim of the vendee against him was only in the nature of a right to damages and as such the third party procedure was not applicable.

*Held* : The third party notice under Order V of the Original Side Rules could be issued in the present case.

Whether the property belonged to the trust or to the vendor's predecessor-in-title was a question which was common not only between the plaintiff and the vendee but also between the vendee and his vendor and in which all alike were interested, and therefore the vendor would be a person who would have to be cited to take part in the present litigation for the purpose of binding him by the decision on the question and preventing the possibility of any conflicting decision in an independent action by the vendee against his vendor.

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*Held further:* The vendor would be a proper property under Order I, rule 10, of the Code of Civil Procedure for the purpose of completely adjudicating upon the question of title to the property in the suit.

*C. A. Seshagiri Sastri* for *K. Sankaranarayana* and *R. Natesan* for petitioner.

*T. Aravamuda Ayyangar* for first respondent.

*N. S. Srinivasan* for second respondent.

*R. S. Sankara Ayyar* for *S. Rajarama Sastri* (third party).

*A. Suryanarayana* for *T. Raghavendra Rao* (third party).

### JUDGMENT.

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VENKATARAMANA RAO J.—This is an application by the first defendant for directions under Order V-A, rule 5, of the Original Side Rules relating to third party procedure. The application is resisted by the plaintiff and by the respondents on whom notices under rule 1 have been served. The contention on behalf of the plaintiff is that the third party procedure is not applicable at all with reference to the persons who are now sought to be added as third parties or against whom notices have been served. The objection on behalf of the third parties is also similar except that, in addition to the above common contention, each raises a contention peculiar to himself. Though the application has been taken for giving directions against three respondents, Mr. Seshagiri Sastri on behalf of the first defendant has confined his application to *T. S. Rajarama Sastri* alone and did not press it as against the others. No directions need therefore be given in regard to them and the application must be dismissed as against them.

To appreciate the contentions it is necessary to state a few facts. The plaintiff seeks to recover property described in schedule A to the plaint as

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trust property belonging to the deity *Sri Tholasinga Perumal*. The plaintiff's claim is that the property was endowed of the said deity by one *Narasimhalu Chetti* who by his will appointed his widow and another as executors to the said property. But his adopted son, one *Venkataramaghalu Chetti*, after the death of the executors, purporting to treat the said property as his private property in violation of the terms of the endowment, made several alienations, one of such being to one *T. Raghavendra Rao*. The sale in favour of *Raghavendra Rao* was effected in or about August 1915 of six grounds of vacant land which is part of the property comprised in schedule A. The said *Raghavendra Rao* sold the said property by a deed of sale, dated 31st March 1920, to *T. S. Rajarama Sastri* who by a sale deed, dated 14th March 1923, sold the said property to the first defendant. The first defendant also purchased portions of the suit property from other persons who also claim to be either alienees from *Venkataramaghalu Chetti* or from persons who claim to be alienees from him. Thus, the first defendant became owner of over 9 grounds and 2,123 square feet, and on the entire plot of ground he has erected substantial buildings. The plaintiff seeks to ignore these alienations and sues for a declaration that they are null and void and not binding on the trust and to recover possession of the A schedule property from the first defendant and other persons who are in occupation of the same. The case of the first defendant is that he is a *bona fide* purchaser for value and that he is protected by covenants of indemnity which he took from his several vendors and, as he has got a right of indemnity against his vendors, he seeks to avail himself of the third party procedure and wants to have his vendors also made parties so that the question of their liability to him may also

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be determined in case he loses in the action. So far as Rajarama Sastri is concerned, the sale deed, dated 14th March 1923, in favour of the first defendant contains the following covenant :

"The said vendor (Rajarama Sastri) doth hereby covenant with the said vendee (the first defendant) that he has full right and title to convey the said land to the said vendee and also agrees to indemnify the said vendee against all loss or damage which the vendee may at any time sustain in consequence of any defect in the title of the said vendor to the said land or of the right of the said vendor to convey the said land."

Order V-A, rule 5, of the Original Side Rules runs thus :

"If a third party appears pursuant to the third party notice, the defendant giving the notice may apply to the Court, for directions, and the Court, upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the Court may direct, and if not so satisfied, may pass such decree as the nature of the case may require in favour of the defendant giving the notice against the third party."

The third party notice is issued under rule 1 which provides that

"where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the suit, he may, by leave of the Court or a Judge, issue a notice (hereinafter called a third party notice) to that effect . . . ."

My learned brother, GENTLE J., has issued such a notice. The question therefore is—and it is open to the third parties to raise the question—whether the defendant is entitled to add them as third parties. The claim of the first defendant as against Rajarama Sastri is that not only must the latter pay the price the first defendant paid for the purchase of the land from him but also the value of the buildings which the first

defendant has erected thereon. It is contended on behalf of the plaintiff and on behalf of Rajarama Sastri that the claim is only in the nature of a right to damages and not a right to indemnity and therefore the third party procedure is not applicable. The rules relating to the third party procedure are based on English procedure and the decisions in England which bear on the point may usefully be referred to in dealing with the contention of the parties. Construing a rule in England, corresponding to rule 1 of Order V-A, BOWEN L.J. in *Birmingham and District Land Company v. London and North Western Railway Company*(1) observed thus :

"The rule, when it deals with claims to indemnity, means claims to indemnity as such either at law or in equity. In nine cases out of ten a right to indemnity, if it exists at all as such, must be created either by express contract or by implied contract; by express contract if it is given in terms by the contract between the two parties."

The right to indemnity is here given in terms by the sale deed in favour of the first defendant. *Prima facie*, therefore, there is a right to indemnity against Rajarama Sastri. But it is contended that, though the term indemnity is used, what was intended to be expressed by the covenant was only a liability to damages which would arise from the breach of the covenant for title. No doubt, a covenant for title is not the same as a covenant for indemnity; the measure of damages for breach of a covenant for title may not strictly be based upon a right to indemnity, but there is nothing to preclude a vendor agreeing to indemnify against all loss for defects of title, and, when such a covenant is expressly given, I do not see any reason why effect should not be given to it. In this case, in addition to the usual covenant for title there is also

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(1) (1886) 34 Ch.D. 261, 274.

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a covenant for indemnity. Even in cases where damages are claimed on the ground of a covenant for title, there seems to be authority for permitting a defendant to avail himself of the third party procedure. In *Page v. Midland Railway Company*(1) a purchaser was given relief under a covenant for title upon a third party notice in connection with a sale of land. Referring to this case, ROWLATT J. in *Marten v. Whale*(2) at page 550 points out that the point that the third party procedure was not applicable was not raised and he seems to be of the opinion that the third party procedure would not be applicable to cases of this sort, that is, where damages are claimed for breach of a covenant for title. In *Marten v. Whale*(2) the defendant, Whale, bought a motor car from one Thacker who had no title to it. The true owner brought an action against Whale for the detention of the car. The defence of Whale was that Thacker was in possession at the time and he passed a good title to it, but, in the event of its being held that he had acquired no title by the purchase, he claimed to be entitled to indemnity as against Thacker. Therefore Whale served upon Thacker a third party notice under the rules of the English procedure, Order XVI, rule 48. ROWLATT J. dismissed the notice in the view that no right of indemnity within the meaning of the rule would exist unless the remedy of the defendant against the third party was the same as that of the plaintiff against himself. He observed thus:

"Even if the measure of the damages is the same, it does not follow that it is an indemnity; and where it is not the same it seems to me impossible that it can be an indemnity. Assume that the plaintiff here had succeeded, the defendant would have had to give up this chattel, the motor car. He would be entitled to recover against Thacker on his warranty of title the money he had thrown away by paying him. But

(1) [1894] 1 Ch. 11.

(2) [1917] 1 K.B. 544, 550.

the right to recover that money is not a right of indemnity, because the money he paid Thacker is not the same thing as the motor car, and it may not represent the motor car. . . . It seems to me the third party rule is inapplicable to the case of a claim in detinue for a specific chattel. Under those circumstances it seems to me that this third party notice was misconceived."

It may be that in a case of damages for detention of a specific chattel the right of the defendant to claim damages against his vendor may not be strictly viewed as a right to indemnity but merely as a right to damages for misrepresentation that he had authority to sell whereas in fact he had not. But I am unable to see, if there is a contract of indemnity either express or implied given by a vendor to his vendee, why such a right of indemnity would not fall within the terms of the rule. I am not able to find any reported decision where the test formulated by ROWLATT J. was applied in construing rule 48 of Order XVI of the English Rules of Practice—the rule which is now replaced by Order XVI-A, rule 1. On the other hand, I find that *Page v. Midland Railway Company*(1) is cited by the Editors of the Annual Practice, 1938 Edition, in their commentary on Order XVI-A, rule 1, of the Rules of the Supreme Court for the following proposition:

"Covenantors for title in the usual form could, even under the old Rule 48, be brought in as third parties by their covenantees sued on the basis of a defect in title against which the latter had also covenanted, although the defect was known to such covenantees at the date of their covenant."

In a later case, *Baxter v. France* (No. 2)(2), where the claim was based on a right to indemnity conferred by the statute [the Conveyancing and Law of Property Act, 1881, section 7 (1) A] Lord Esher M.R. was inclined to the view that, if the covenantee was

(1) [1894] 1 Ch. 11.

(2) [1895] 1 Q.B. 591.

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claiming the value of the land which he would lose in the action and mesne profits which he may have to pay, the third party procedure would be applicable. This also seems to have been the view of LOPES L.J. and RIGBY L.J. But, in that case they dismissed the third party notice on the ground that the purchaser in that case claimed against his own vendor not only the price of the land and mesne profits but also the value of the buildings which he erected on the land. This claim according to the view of Lord ESHER and the other Lords Justices would not be a claim for indemnity within the rules but an independent claim for damages, and it would be very doubtful whether the indemnity given by the statute would cover such a claim; and further Lord ESHER observed that "where an application to a Judge at chambers for directions involves the trial of such a preliminary question as whether in a case like this, on the true construction of such an enactment as section 7 of the Conveyancing and Law of Property Act, 1881, a claim for indemnity arises, that alone is a sufficient ground for refusing to give directions."

But in a case where a vendor covenants to indemnify against all loss or damage which the vendee might at any time sustain, the question would not be whether there is an indemnity at all, but whether the loss in respect whereof the covenant is given would include the value of buildings, and the question would be more a measure of damages. The object of the third party notice, as observed by JESSEL M.R. in *Swansea Shipping Co. v. Duncan*(1), is this:

"The object of these enactments was to prevent the same question being tried twice over, where there is any substantial question common as between the plaintiff and the defendant in the action and as between the defendant and a third person";

(1) (1876) 1 Q.B.D. 644, 649.

and in such a case, as JESSEL M.R. also observes, "the third person is to be cited to take part in the original litigation, and so to be bound by the decision on that question once for all".

To a similar effect FREY L.J. in *Carshore v. North Eastern Railway Co.*(1) observed:

"It is suggested that the plaintiff ought not to be embarrassed by the introduction of questions between the defendants and a third party. Possibly some delay may be caused by the third party proceedings, but the object of the rule is to enable the Court to try once for all an issue of fact in which all parties are alike interested."

In this case it cannot be doubted that whether the property belongs to the trust or to Venkataraghavalu Chetti is a question which is common not only between the plaintiff and the first defendant but also between the first defendant and Rajarama Sastri and in which all alike are interested, and therefore Rajarama Sastri would be a person who will have to be cited to take part in the present litigation for the purpose of binding him by the decision on the question, and preventing the possibility of any conflicting decision in an independent action between the first defendant and Rajarama Sastri. It seems to me also that, apart from any question of third party procedure, it would be open to the Court to add him as a proper party under Order I, rule 10, Civil Procedure Code, for the purpose of completely adjudicating upon the question of title to the property in the suit. No doubt, the plaintiff is not interested in the question of damages or the extent of the liability of Rajarama Sastri to the first defendant but all the questions between the first defendant and Rajarama Sastri need not be identical with the questions to be tried between the plaintiff and the first defendant. It is enough if there is a

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(1) (1885) 29 Ch. D. 344, 346.

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common question to be tried. At the same time it is the duty of the Court to see that by the addition of the third party the plaintiff is not embarrassed in the trial of questions with which he would have no concern. If the adjudication of the question between the defendant and the third party would embarrass the plaintiff in his trial, the Court generally exercises its discretion by ordering the trial of those issues subsequent to the trial of the action. If therefore Rajarama Sastri would, according to the dictum of JESSEL M.R. in *Swansea Shipping Co. v. Duncan*(1), be a proper party to be cited to take part in the litigation between the plaintiff and the first defendant, and if the question of liability of Rajarama Sastri to the first defendant on the covenant for indemnity can be postponed till the trial of the action, I do not see any objection to allowing the third party notice so far as he is concerned.

I therefore direct that Rajarama Sastri be added as a third party to the action and the first defendant is given leave to serve a statement of his claim in two weeks from to-day on Rajarama Sastri who will have leave to file an answer thereto in two weeks from the date of service of the said statement. The issues relating to the liability of Rajarama Sastri to the first defendant should be adjudicated upon only after the trial of the action and, so far as the conduct of the defences in regard to the trial of the issues raised by the plaintiff in the action is concerned, it should, as between the first defendant and Rajarama Sastri, be in the hands of the first defendant; but the first defendant will not be at liberty to enter into any compromise with the plaintiff without the consent of Rajarama Sastri. If Rajarama Sastri has reason to believe

(1) (1876) 1 Q.B.D. 644.

that the first defendant is conducting his defence in a manner adverse to his interest or is otherwise not properly conducting the defence, liberty is reserved to Rajarama Sastri to move the Court for directions to enable him to contest the plaintiff's claim without reference to the first defendant.

Solicitor for first respondent: *N. T. Shamanna.*

G.R.

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### INCOME-TAX REFERENCE.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice Madhavan Nair and Mr. Justice Varadachariar.*

COMMISSIONER OF INCOME-TAX, MADRAS,  
PETITIONER,

v.

P. R. A. L. M. MUTHUKARUPPAN CHETTIAR,  
RESPONDENT.\*

1938,  
November 14.

*Indian Income-tax Act (XI of 1922), sec. 26 (2)—“Assessment” in—Meaning of—Process of determining amount of profit or loss on which tax is to be levied, if included in—Foreign business—Applicability of sec. 26 (2) to.*

The word “assessment” is used in two senses in the Indian Income-tax Act of 1922—the process of determining the amount of profit or loss and the process of levying tax—but, if there is nothing repugnant in the context, the word refers to the process of determining the amount of profit or loss. As under sub-section 2 of section 26 of the Act the assessment is to be made on the person succeeding as if he had been carrying on the business throughout the year of account and as if he had made the whole of the profits for that year, the sub-section must be held to include the process of computing the amount on which tax is to be paid. The sub-section not

\* Original Petition No. 254 of 1937.

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only fixes the liability for payment of the tax but governs the computation of the tax.

*S. V. Karuppaswami Mooppanar v. The Commissioner of Income-tax, Madras*(1) followed.

*Quaere* whether section 26 (2) applies to a foreign business of a person who is chargeable to income-tax in British India.

*Arunachalam Chettiar v. Commissioner of Income-tax, Madras*(2) considered.

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

*P. R. Srinivasan* for assessee.—The question is as to the effect of the application of section 26 (2) of the Indian Income-tax Act of 1922 in the present case. The succession is for income-tax purposes antedated to the commencement of the year of account.

[THE CHIEF JUSTICE.—The real purpose of antedating is to enable the Crown to recover the tax from the successor.]

What is sought to be done under this section is to treat the successor as being subject to the burdens and as entitled to the rights of the person to whom there is a succession. *S. V. Karuppaswami Mooppanar v. The Commissioner of Income-tax, Madras*(1) is a direct decision on this point.

[THE CHIEF JUSTICE.—What is the effect of the antedating?]

The successor becomes the sole owner of the business as from the commencement of the year of account. The contention of the Crown is that the succession is deemed to have occurred at the date of the commencement of the account year only for the purpose of finding out the person on whom the assessment is to be made. This contention is not in accordance with the wide language of the section. Further, the Act is concerned with a full year and therefore the assessment is to be antedated and, if it is to be antedated, the antedating must be for all purposes.

*M. Patanjali Sastri* for Commissioner of Income-tax.—The fiction of treating the succession as having taken place at the commencement of the year of account is applicable only for the purpose of reaching the person liable to pay the tax and is inapplicable for the purpose of computing the income liable to be taxed. For that purpose the succession is

(1) (1934) 7 I.T.C. 283.

(2) (1929) 3 I.T.C. 441.

ignored and the previous owner is regarded as having continued to be owner throughout the whole of the year of account. The predecessor's capital cannot by reason of the succession become the successor's capital.

[VARADACHARIAR J. referred to the judgment of the Chief Justice in *S. V. Karuppaswami Mooppanar v. The Commissioner of Income-tax, Madras*(1).]

[THE CHIEF JUSTICE.—The Judges in that case say in plain and unmistakable words that the successor becomes the owner for all purposes.]

But the decision in the case was that for the purpose of computing the income the fiction of antedating is not applicable. [*S. V. Karuppaswami Mooppanar v. The Commissioner of Income-tax, Madras*(1) was then explained.] *Ram Rakha Mal and Sons, Limited v. Commissioner, Income-tax, Punjab*(2) is an exact decision on the point and is in favour of the contention of the Crown. The successor's ownership is material as regards (i) the person liable for the tax and (ii) the rate at which the tax is leviable. Apart from these two purposes the fiction of antedating succession is inapplicable. What are profits must be determined on the footing of the predecessor's ownership. [Reference was made to page 342, Question No. 6, in *Ram Rakha Mal and Sons, Limited v. Commissioner, Income-tax, Punjab*(2).] *S. V. Karuppaswami Mooppanar v. The Commissioner of Income-tax, Madras*(1) takes up precisely the same position though there are one or two loose sentences in the judgment. The assessee wanted to introduce the fiction into the computation of the profits but the Full Bench in that case refused to do so.

[VARADACHARIAR J.—Suppose in section 26 (2) you omit the words "as if . . ." would not the idea you are now contending for have been made clear if the only purpose of the fiction is to ascertain the person liable for the tax?]

But for the qualifying words the successor could not be got at at all. The assessment complained against in the present case is not under section 26 (2). Even with regard to the assessee's foreign profits he is not sought to be assessed as successor under section 26 (2). It is the assessee that is trying to use that section to lend a different colour to the

(1) (1934) 7 I.T.C. 283.

(2) (1936) I.L.R. 18 Lah. 323.



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foreign remittance. [Reference was made to *Arunachalam Chettiar v. Commissioner of Income-tax, Madras*(1).]

[THE CHIEF JUSTICE.—We cannot treat this decision as *obiter*.]

The fiction under section 26 (2) cannot be introduced for the purpose of computing profits; *Commissioner of Income-tax, Bombay v. The Mazagaon Dock, Ltd.*(2). The profits must be calculated on the actual basis without introducing the fiction under that section.

*P. R. Srinivasan* in reply.—[*Commissioner of Income-tax, Bombay v. The Mazagaon Dock, Ltd.*(2), *S. V. Kuruppaswami Mooppanar v. The Commissioner of Income-tax, Madras*(3) and *Arunachalam Chettiar v. Commissioner of Income-tax, Madras*(1) were explained and page 159, paragraph 10 of the last section, of the latest edition of the Income-tax Manual was referred to.]

Assessment means only computation of income. [*Commissioner of Income-tax, Bombay v. Khemchand Ramdas*(4) was referred to as to the meaning of assessment.] *Bhogilal Hargovandas Patel v. The Commissioner of Income-tax, Bombay*(5) is not quite consistent with *Commissioner of Income-tax, Bombay v. The Mazagaon Dock, Ltd.*(2) cited by the other side. The predecessor's loss is by reason of the fiction treated as the successor's loss.

[THE CHIEF JUSTICE.—The fiction is applied for purposes of computation of profits as well as for purposes of reaching the person liable for the tax.]

The decision in *Ram Rakha Mal and Sons, Limited v. Commissioner, Income-tax, Punjab*(6) is only concerned with the meaning of the expression "original cost" and is based solely on the decision of the Privy Council in *Commissioner of Income-tax, Madras v. The Buckingham and Carnatic Co., Ltd.*(7). The decision does not consider the broad aspect of the question arising in the present case and it does not consider the authorities.

*Cur. adv. vult.*

(1) (1929) 3 I.T.C. 441, 448.

(2) I.L.R. [1938] Bom. 374, 380, 397 (S.B.).

(3) (1934) 7 I.T.C. 283.

(4) (1938) L.R. 65 I.A. 236; I.L.R. [1938] Bom. 487.

(5) (1935) 9 I.T.C. 110, 113. (6) (1936) I.L.R. 18 Lah. 325.

(7) (1935) I.L.R. 59 Mad. 175 (P.C.).

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The JUDGMENT of the Court was delivered by LEACH C.J.—The assessee carries on business as a money-lender at Paganeri in the Ramnad district and at various places outside British India. Until the month of February 1936 the assessee was a partner in the firm of P.R.A.M. carrying on business at Singapore. In that month the partnership was dissolved and the assessee took over the business. On 23rd March 1931 the P.R.A.M. firm advanced Rs. 1,00,000 to the S.P.K.A. firm of Zigon, Burma. On 10th February 1934 the S.P.K.A. firm repaid the loan with the interest then due, in all Rs. 1,22,659. The loan was discharged by payment of the amount to the assessee through the S.P.K.A.A.M. firm of Rangoon. The assessee retained the money in Rangoon, it being held on his behalf by the S.P.K.A.A.M. firm. The repayment of the loan to the P.R.A.M. firm was effected by the debiting of the assessee's personal account in that firm and crediting the Zigon firm with the amount. This was done on 12th April 1935. The amount debited to the assessee and credited to the P.R.A.M. firm was actually Rs. 1,26,463, the difference between this sum and the Rs. 1,22,659 representing the interest which had accrued between 15th October 1934 when the assessee received the money and 12th April 1935 when the loan to the S.P.K.A. firm was closed in the books of the P.R.A.M. firm. The Commissioner of Income-tax has treated the deposit of the Rs. 1,22,659 in the books of the S.P.K.A.A.M. firm as a remittance to British India of profits made by the assessee outside British India and this reference is concerned with the legality of the decision. The questions referred are as follows :—

"(a) Whether by applying the provisions of section 26 (2) of the Act the petitioner should not be considered as having become the sole owner of the debt originally advanced by the

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firm and whether the sum of Rs. 1,22,659 was not assessable as realization of the debt by the petitioner in British India.

(b) Whether apart from the applicability of section 26 (2) of the Income-tax Act in any event the sum of Rs. 1 lakh (out of the sum of Rs. 1,22,659) advanced more than three years prior to the account year was not assessable as a return of capital or profits earned more than three years prior to the account year."

Before us the learned Advocate for the assessee has conceded that the assessee is liable to tax on the Rs. 22,659 the amount of the interest gained on the Rs. 1,00,000 whether section 26 (2) applies or not.

It will be convenient to take the second question first and its decision does not require much discussion. The assessee had admittedly profits lying to his credit in the books of the Singapore firm in excess of the amount which he retained in Rangoon. The repayment to the assessee by the S.P.K.A. firm in Burma, of course, operated to discharge the S.P.K.A. firm and, if the assessee had remitted the money to Singapore, no question would have arisen. But, instead of sending the money to Singapore, the assessee retained it in Burma for his own purposes and, so far as the P.R.A.M. firm was concerned, the repayment came from his account with that firm. By doing this, the assessee in effect transferred the sum of Rs. 1,22,659 from Singapore to Burma and, as Burma was then within British India, it amounted to a transfer of profits to British India. It has been accepted that, if the amount is to be treated as a remittance of profits, it must be regarded as a sum having been received in British India within three years of the period in which the profits were earned.

The main question is that relating to section 26 (2) of the Income-tax Act. Both the assessee and the Commissioner of Income-tax say that this section

applies to a foreign business of a person who is chargeable to income-tax in British India and the first question referred must therefore be answered on this footing. At the same time I wish to make it clear that in discussing the provisions of section 26 (2) it must not be taken that we are in fact holding that it does apply to a foreign business. In *Arunachalam Chettiar v. Commissioner of Income-tax, Madras*(1) this Court took the view that the section did apply, but we consider that the question calls for further consideration in a suitable case. The Commissioner of Income-tax contends that section 26 (2) merely operates to fix the liability for payment of the tax. The assessee, on the other hand, says that it not only fixes the liability but governs the computation of the tax. In other words, the Commissioner of Income-tax says that the assessment must be based on the method which would apply if the P.R.A.M. firm had continued to be a partnership throughout the year of account, whereas the assessee says that the assessment should be on the footing that he became the owner of the business on the first day of the year of account.

In *Ram Rakha Mal and Sons, Limited v. Commissioner, Income-tax, Punjab*(2) a Bench of the Lahore High Court accepted the opinion put forward by the Commissioner of Income-tax. In the *Commissioner of Income-tax, Bombay v. The Mazagaon Dock, Ltd.*(3) RANGNEKAR J. also read the section in this way, but BLACKWELL J. took the opposite view. BEAUMONT C.J. answered the reference without dealing specifically with the question, but in *Bhogilal Hargovandas Patel v. The Commissioner of Income-tax, Bombay*(4) the learned CHIEF JUSTICE sitting with BLACKWELL J.

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(2) (1936) I.L.R. 18 Lah. 325.

(3) I.L.R. [1938] Bom. 374 (S.B.).

(4) (1935) 9 I.T.C. 110.

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regarded the section as covering the method of computation. The reading of the section as the assessee would have it read was accepted by this Court in *S. V. Karuppaswami Mooppanar v. The Commissioner of Income-tax, Madras*(1) and by the Income-tax authorities in presenting the case. The matter related to the assessment of a person who had continued the business of a partnership. He sought to deduct interest which had been paid on additional capital supplied by the outgoing partners. The Income-tax Officer refused to allow the deduction and the question was referred to the Court. In his statement of the case the Commissioner of Income-tax observed :

"The plain meaning of the sub-section is that the place of the predecessor as the proprietor of the business during the previous year must be regarded as having been occupied by the successor, the other things remaining the same. Thus during the period of the previous year, the predecessor's capital becomes the successor's capital, the predecessor's acts and transactions the acts and transactions of the successor and the predecessor's profits the profits of the successor. In other words the profits of the business have to be computed as though there had been no change and the profits arrived at treated for assessment purposes as profits made by the successor."

I have quoted this passage in full as Mr. Patanjali Sastri has contended that the Commissioner of Income-tax did not adopt in that case a different attitude to the attitude which he now takes up, but this cannot be accepted. As it was said that the predecessor's capital becomes the successor's capital, the predecessor's acts and transactions the acts and transactions of the successor and the predecessor's profits the profits of the successor, the contention was clearly one that the section applied for all purposes and

(1) (1934) 7 I.T.C. 283.

moreover this is shown to be the case in the judgment of BEASLEY C.J. who observed :

"The plain reading of the sub-section is, in my opinion, that the predecessor's capital becomes the successor's capital and that for all purposes the succeeding partner is to be regarded as the former firm. I agree with the reasons given by the Income-tax Commissioner for taking the view opposed to that put forward by the petitioner."

The argument put forward by the petitioner in that case was that the loans from the ex-partners should be treated as loans from strangers, whereas the Court decided that the whole of the capital was to be deemed to be the capital of the successor and he could not be allowed deductions by way of interest on his own money. This decision is binding on us and if section 26 (2) does apply to a foreign business, the section is wide enough to admit of this view. The section says that assessment shall be made on the person succeeding

"as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year".

The word "assessment" is used in two senses in the Act—the process of determining the amount of profit or loss and the process of levying tax—but, if there is nothing repugnant in the context, the word refers to the process of determining profit or loss. And this is the view of the Income-tax authorities; *vide* the Income-tax Manual (7th edition), page 159. As the assessment is to be made as if the person had been carrying on the business throughout the year of account and as if he had made the whole of the profits for that year, it is difficult to see how it can be said that the sub-section does not include the process of computing the amount on which tax is to be paid. Unless a contrary intention is to be drawn

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from the section itself, the assessee is entitled to have it read in this way.

The parties having agreed that section 26 (2) does apply to the present case, and as we hold that it does cover the process of computation, the assessee must be regarded as the lender of the Rs. 1,00,000 to the S.P.K.A. firm and deemed to have received repayment of the loan. The amount which he received covered both principal and interest and as the payment was made to him in British India, the interest is taxable but not the principal.

The reference will be answered in the sense indicated and as the assessee has succeeded in the main part of the claim, he will be entitled to his costs, which we fix at Rs. 250, and to the return of the deposit.

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### INCOME-TAX REFERENCE.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice Madhavan Nair and Mr. Justice Varadachariar.*

S. N. NARAYANAN CHETTIAR, PETITIONER,

v.

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RESPONDENT.\*

*Indian Income-tax Act (XI of 1922), sec. 4 (2)—Foreign businesses carried on by assessee—Profits, if have resulted from—Mode of finding out—Losses in some of businesses—Deduction of, from profits earned in others—Necessity.*

Where an assessee carries on two money-lending businesses outside British India, both being his sole businesses having current transactions and controlled by him, and where one of

\* Original Petition No. 118 of 1937.

the two businesses has suffered loss and the other has profits and the assessee has received remittances from both, in determining whether the remittances so received are his income, profits and gains under section 4 (2) of the Indian Income-tax Act of 1922 the results of both the businesses should be considered together and the assessee is entitled to set off his loss in one business against the profits of the other business to arrive at the resultant profit available for remittance to be taxed.

When a person carries on the same kind of business in two places abroad, in order to ascertain whether he has made a profit the result of the working of the two branches must be considered. If at one branch he makes a profit and at the other a loss, the profit in his business can only be the gain made at one branch less the loss suffered at the other branch. There can be no question of a remittance representing profits when no profits have been earned taking the business abroad as a whole.

In the matter of the Indian Income-tax Act XI of 1922 and in the matter of the assessment of S. N. Narayanan Chettiar and Brothers, Karaikudi, Ramnad District.

*R. Kesava Ayyangar for assessee.*

[THE CHIEF JUSTICE.—We shall hear Mr. Patanjali Sastri first.]

*M. Patanjali Sastri for Commissioner of Income-tax.*—The assessment in the present case is sought to be made under section 4 (2) of the Act. The only question is whether section 4 (2) proceeds on quite a different basis from that on which section 10 proceeds in regard to businesses in British India.

[VARADACHARIAR J.—What has to be regarded under section 4 (2) is whether the assessee has received profits from abroad. No doubt if a sum is remitted to the assessee from abroad as profits the assessee is liable for tax thereon. But when all that appears is that a particular amount has been remitted to the assessee from one of his foreign businesses, then the law will find out whether, having regard to all the foreign businesses carried on by the assessee, that sum can be said to represent the profits of his foreign businesses. For that purpose all the businesses should be put together and

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it should be seen whether on that basis the assessee has earned a profit. If the assessee has sustained losses in some businesses and earned profits in others, the losses must be deducted from the profits.]

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The assessee in this case is a Nattukottai Chettiar. He carries on a money-lending business at Karaikudi in the Madras Presidency and at Ipoh and Telukanson in the Federated Malay States. Ipoh and Telukanson lie some fifty miles distance apart. During the year 1934–35 the business at Telukanson showed a profit of \$16,047 but that at Ipoh showed a loss of \$6,598. In respect of the year 1935–36 the assessee was assessed on a total income of Rs. 20,515 which included a sum of Rs. 20,000 remitted to Karaikudi from Telukanson. The Income-tax Officer treated this as a remittance of profits of a foreign business. In addition to the Rs. 20,000 remitted from Telukanson a sum of \$1,954.48 was remitted from Ipoh. In view of the absence of profits at Ipoh the Income-tax Officer did not include the \$1,954.48 in the assessment. The assessee contended that the sum of Rs. 20,000 remitted from Telukanson should not be treated wholly as profits. He said that the proper method of calculating the profits of his business abroad was to deduct the loss suffered at Ipoh from the profits made at Telukanson. As the assessee had an agent at each of the two towns and the two branches worked independently of each other the Income-tax Officer held that the profits and losses of the two branches should be considered separately, and consequently refused to allow the loss at Ipoh to be set off against the profits at Telukanson. The Assistant Commissioner of Income-tax agreed with the Income-tax Officer when the matter was before him on appeal, and the Commissioner

of Income-tax refused to state a case to this Court under section 66 (2) of the Income-tax Act on the ground that no question of law arose. This Court, however, considered that a question of law did arise and directed the Commissioner to refer to us the following question :

“Where an assessee carries on two money-lending businesses outside British India in close proximity, both being his sole businesses having current transactions and controlled by him, and where one of the two businesses has suffered loss and the other has profits and the assessee has received remittances from both, in determining whether the remittances so received are his income, profits and gains under section 4 (2) of the Indian Income-tax Act XI of 1922, should not the results of both the businesses be considered together and is not the assessee entitled to set off his loss in one business against the profits of the other business to arrive at the resultant profit available for remittance to be taxed ? ”

In our opinion this reference must be answered in the affirmative. Section 4 (2) of the Act allows the Income-tax Officer to assess to income-tax income, profits and gains arising out of British India, but in deciding whether sums which are brought in from a business abroad are income, profits or gains he must have regard to the business as a whole. When a person carries on the same kind of business in two places abroad, in order to ascertain whether he has made a profit the result of the working of the two branches must be considered. If at one branch he makes a profit and at the other a loss the profit in his business can only be the gain made at one branch less the loss suffered at the other branch. So far as this case is concerned we know that at one of the branches a profit was made and at the other place a loss was suffered. When the loss in one case is set off against the profit in the other it is clear that the assessee did not make a profit of Rs. 20,000. His profits at Telukanson stated in dollars

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were \$16,047 and his loss at Ipoh amounted to \$6,598. The profit was therefore \$9,449. It was only to this extent that the Income-tax Officer could hold that the remittance was out of profits. The decision on the question whether a particular remittance represents profits or capital will turn on the particular facts of each case, but there can be no question of a remittance representing profits when no profits have been earned taking the business abroad as a whole.

The reference having been answered in favour of the assessee there will be an order for costs in his favour. These we fix at Rs. 250. His deposit will also be refunded.

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### APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Madhavan Nair.

T. MUHAMMAD SHAMSUDDIN RAVUTHAR &  
BROS. (FIRST DEFENDANT), APPELLANTS,

v.

MESSRS. SHAW WALLACE & COMPANY AND TWO OTHERS  
(PLAINTIFFS AND SECOND DEFENDANT),  
RESPONDENTS.\*

*Indian Contract Act (IX of 1872), sec. 233—Principal and agent—Agent personally liable—If both principal and agent could be sued.*

In India under section 233 of the Indian Contract Act a person can sue both the principal and the agent in a case where the agent is personally liable.

The dictum of COUTTS TROTTER C.J. in *Kuttikrishnan Nair v. Appa Nair*(1), that the section could only be construed as

\* Original Side Appeal No. 49 of 1936.  
(1) (1926) I.L.R. 49 Mad. 900.

meaning that a plaintiff might sue both the principal and the agent in the alternative but he could not get judgment against both of them jointly for the amount sued for, *dissented from.*

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APPEAL from the decree and judgment of WADSWORTH J., dated 7th May 1936 and passed by the High Court in its Ordinary Original Civil Jurisdiction in Civil Suit No. 173 of 1931.

*T. L. Venkatarama Ayyar* for appellants.

*V. V. Srinivasa Ayyangar* for second respondent.

*R. Sundararajan* for third respondent.

First respondent was not represented.

*Cur. adv. vult.*

The JUDGMENT of the Court was delivered by LEACH C.J.—The appellant firm and the firm of M. A. P. Muhammad Hussain Ravuthar & Sons (now represented by the Official Assignee, the third respondent) were defendants in a suit instituted on the Original Side of this Court by the first and the second respondent firms. The first respondents are a firm of European merchants carrying on business in Madras. The second respondents are their “guarantee brokers”, which means that for consideration they guarantee to the first respondents the fulfilment of the obligations of those contracting with them. The appellants are manufacturers of brass and copper articles and carry on their business at Pettai, Tinnevely. The firm of M. A. P. Muhammad Hussain Ravuthar and Sons (for the sake of convenience I will hereafter refer to this firm as “the M.A.P. Firm”) were merchants and commission agents carrying on business at Pettai, Madras and Bombay, with their

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head office at Pettai. The suit was filed to recover a sum of Rs. 16,940-11-10 in respect of contracts entered into by the M.A.P. Firm with the first respondents for the purchase of brass sheets. Of this sum, Rs. 1,008-10-5 represented a claim for damages for breach of a contract dated 22nd January 1930, the balance representing the price of goods sold and delivered under earlier contracts. The figures are not in dispute and the liability of the M.A.P. Firm is admitted, but as they were insolvents and a decree against them alone would be infructuous it was sought to make the appellants also liable. The plaintiff-respondents alleged that the appellants through their principal partner, one Muhammad Shamsuddin Ravuthar, had guaranteed the liabilities of the M.A.P. Firm. This was their main contention in the Court below, but they advanced other pleas which may be summarised as follows:—(i) The business of the M.A.P. Firm was really the business of the appellants, (ii) if the business of the M.A.P. Firm did not belong to the appellants absolutely, the members of the appellant firm must be regarded as partners in the M.A.P. Firm and (iii) in any event, the M.A.P. Firm acted as the agents of the appellants for the purposes of the contracts with the first respondents.

The case was tried by WADSWORTH J., who held that the alleged guarantee had not been proved, but granted a decree against the appellants on the ground that they were principals and that the M.A.P. Firm were merely their agents. Although he did not say so, the learned Judge seems to have treated the appellants as undisclosed principals. The appellants deny that the M.A.P. Firm were their agents. They say that the M.A.P. Firm dealt with the first respondents as principals and that they had nothing to do with the

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contracts. The plaintiff-respondents contend that the learned Judge erred in holding that the guarantee had not been proved. They maintain that the appellants and the M.A.P. Firm are really one and the same firm, but, if not, the appellants are liable as the contracts were entered into by the M.A.P. Firm as the agents of the appellants. The plea of partnership has been abandoned in this Court, but the appeal throws open all questions except that of partnership.

The appellant firm consists of three brothers, Muhammad Shamsuddin Ravuthar, Muhammad Ghanni and Peer Mohideen. The M.A.P. Firm was founded many years ago by one M. A. P. Muhammad Hussain Ravuthar, the brother-in-law of the partners in the appellant firm. When the M.A.P. Firm was started the appellant firm had not been constituted. Muhammad Hussain Ravuthar had with him as his partners his two sons, Muhammad Yusuf Ravuthar and Muhammad Abu Bakar Ravuthar. The business was that of general merchants and commission agents. Muhammad Hussain Ravuthar died on 1st December 1927 when his sons were aged 32 and 28 years respectively. After the father's death the sons carried on the business. The M.A.P. Firm supplied goods to the appellants as principals and also as commission agents. It is the appellants' case that in so far as brass and copper sheets were concerned the M.A.P. Firm were the actual sellers, unless such goods were obtained from Bombay in which case they were supplied on a commission basis. It is clear that from 1925 onwards the M.A.P. Firm had not sufficient capital to finance their contracts with the appellants. The result was that the appellants had to make advances to the M.A.P. Firm. At the end of the financial year in 1926 the books of the M.A.P. Firm showed

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that the appellants were creditors for the sum of Rupees 16,338-13-4. At the end of 1927 the M.A.P. Firm owed the appellants Rs. 10,433-4-7; at the end of 1928, Rs. 27,432 and at the end of 1929, Rs. 21,235-6-9. The partners of the M.A.P. Firm were adjudicated insolvents on 24th April 1930 and at that time they were indebted to the appellants in the sum of Rs. 15,421-10-3 in respect of advances made. The appellants have in fact proved in the insolvency as creditors for this sum.

It is admitted that according to the books of the respective firms the M.A.P. Firm bought as principals brass and copper sheets and sold a large proportion of their purchases to the appellants.

[His Lordship discussed the evidence and held that the allegation that the appellants had guaranteed the first respondent had not been proved and that the appellants and the M.A.P. Firm were not one and the same entity, and proceeded :]

The question which remains to be considered is whether the M.A.P. Firm acted in the transactions in suit as agents for undisclosed principals, but before alluding to the facts it is necessary to deal with a legal argument advanced by the learned Advocate-General on behalf of the appellants. He says that it is not open to the plaintiff-respondents to contend that the appellants were principals because the second respondent had already proved in insolvency against the M.A.P. Firm. He says that the doctrine of election here comes in and the proof in insolvency amounts to obtaining a judgment against agents which precludes a suit being subsequently maintained against their principals. In this connection he has cited *Morel Brothers & Co., Limited v. Earl of Westmorland*(1),

(1) [1904] A.C. 11.

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*Moore v. Flanagan and Wife*(1) and *Firm of R.M.K. R.M. v. Firm of M.R.M.V.L.*(2). In the case of *Morel Brothers & Co., Limited v. Earl of Westmorland*(3) the House of Lords held that a judgment signed against one defendant was conclusive evidence of an election not to proceed against the other and, following this decision, the Court of Appeal in *Moore v. Flanagan and Wife*(1) held that the plaintiff having signed judgment against the agent could not afterwards recover judgment against the principal in respect of the same debt. The case of *Firm of R.M.K.R.M. v. Firm of M.R.M.V.L.*(2) was decided by the Privy Council on an appeal from a judgment of the Supreme Court of the Straits Settlements. A judgment had been obtained against the agent of a local money-lending firm, but in a subsequent suit it was sought to make the firm liable. The Judicial Committee, however, held that the second suit did not lie. These decisions expound the law of England and of the Straits Settlements, but it does not necessarily follow that the law in British India is the same. We are here governed by the provisions of the Indian Contract Act, and section 233 of that enactment states that, in cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable. An illustration is given to the section and it is in these words :

“A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.”

Therefore, there is in India a statutory provision allowing a plaintiff to sue both the principal and the

(1) [1920] 1 K.B. 919.

(2) [1928] A.C. 761.

(3) [1904] A.C. 11.



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agent in a case where the agent is personally liable. In *Kuttikrishnan Nair v. Appa Nair*(1) COUTTS TROTTER C.J. expressed the opinion that the section could only be construed as meaning that the plaintiff might sue both the principal and the agent in the alternative, but he could not get judgment against both of them jointly for the amount sued for. I find myself unable to accept this construction. There is no ambiguity in the language used in the section and I am unable to see anything unreasonable in the rule which it embodies. What would be the position if a suit is brought against the principal after judgment had been obtained against the agent in an earlier suit is another matter, but we are not called upon to consider that question here. Even if proof in insolvency amounted to a judgment for the purposes of the doctrine of election—I express no opinion on the point—it appears that the action which the second respondent took in the Insolvency Court was entirely without prejudice to the rights of the parties in this suit. For these reasons we reject the argument of the learned Advocate-General that it is not open to the plaintiff-respondents to advance in this suit the plea that the appellants were principals.

The learned Advocate-General is, however, on much firmer ground when he says that the evidence does not warrant the conclusion that the M.A.P. Firm were agents of the appellants. As I have already pointed out, the M.A.P. Firm dealt with the first respondents as principals and they sold to the appellants as principals. The books and the course of dealing are entirely inconsistent with the suggestion that the M.A.P. Firm were acting as agents of the

appellants. But there is also a letter which shows that the two firms were distinct. On 29th May 1928 the Madras agents of the M.A.P. Firm when writing to the appellants at Pettai in respect of a shipment of brass sheets enclosed the bills of lading and asked that as soon as they were received by the appellants they should take “the signature of the principal and do the needful”. The principal was the M.A.P. Firm in Pettai.

The learned trial Judge observed that if the M.A.P. Firm were merely selling to the appellants it is inconceivable that the appellants would have been a large creditor of the M.A.P. Firm. Considering that the partners in the appellant firm were the uncles of the partners in the M.A.P. Firm there is nothing extraordinary in this financial aid. Moreover the appellants were requiring brass sheets for their own business and if they wanted to secure their requirements from the M.A.P. Firm, which was only natural considering the relationship, they had to finance the transactions. They had to finance transactions at a time when the two firms were deemed by the plaintiff-respondents to be distinct. The learned trial Judge considered that the action of the M.A.P. Firm in quoting market prices to the appellants' firm, not their own selling prices, and asking for instructions regarding the placing of orders was evidence that they were acting as agents. We do not view the position in this light as I have already indicated. There was undoubtedly a close connection between the two firms, but there is no evidence which in our opinion justifies the conclusion that the M.A.P. Firm acted in these transactions as agents for the appellants. In fact we regard the evidence as pointing directly the other way.

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(1) (1926) I.L.R. 49 Mad. 900.

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For these reasons we allow the appeal and the suit will be dismissed with costs both in this Court and in the Court below against the plaintiff-respondents.

G.R.

### APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice  
Krishnaswami Ayyangar.

1938,  
September 20.

M. PARAMASIVAM PILLAI (FIRST PLAINTIFF),  
APPELLANT,

v.

A.V.R.M.S.P.S. RAMASAMI CHETTIAR AND ANOTHER  
(THIRD DEFENDANT AND FIFTH PLAINTIFF),  
RESPONDENTS.\*

*Surety bond—Stay of proceedings pending appeal—Surety bond executed as a condition of, providing for payment of specified amount in event of appellant's failure in that appeal—Failure of appellant in that appeal but success in Letters Patent Appeal therefrom—Enforceability of liability under bond in case of—Code of Civil Procedure (Act V of 1908), Appx. G, Form No. 2—Modification of, so as to provide for more appeals than one—Desirability of.*

In a suit upon a mortgage a receiver was appointed at the instance of the mortgagee. The third defendant in the suit filed an appeal, Civil Miscellaneous Appeal No. 375 of 1931, in the High Court against the order appointing the receiver and along with the appeal filed an application for stay of further proceedings by the receiver. Stay was ordered on condition of the third defendant giving security for one year's income from the mortgaged property fixed at a sum of Rs. 1,600. In accordance with that order the third defendant executed a surety bond which provided: "If the C.M.A. No. 375 of 1931 preferred by me to the High Court against the order appointing receiver is decided in favour of the said first

\* Appeal Against Order No. 378 of 1936.

plaintiff, I shall pay into Court the one year's net income of Rs. 1,600-7-4 as aforesaid." Civil Miscellaneous Appeal No. 375 of 1931 was allowed by a single Judge but a Letters Patent Appeal against the decision therein was allowed with the result that the final decision of the High Court on the question of the validity of the order appointing the receiver was to confirm it. On an application by the mortgagee who obtained a decree in his suit for the recovery from the third defendant of the sum of Rs. 1,600 referred to in the surety bond executed by him,

held that, on the true interpretation of the surety bond, the decree-holder was not entitled to proceed against the surety.

There was nothing in the surety bond which extended the liability of the surety to the contingency of there being an appeal against Civil Miscellaneous Appeal No. 375 of 1931.

*Raj Raghubar Singh v. Jai Indra Bahadur Singh*(1) explained and distinguished.

Modification of Form No. 2 in Appendix G of the Code of Civil Procedure by using language appropriate for dealing with all possible eventualities, due provision being made in certain circumstances for more appeals than one, suggested.

APPEAL against the order of the Court of the Subordinate Judge of Tuticorin, dated 14th April 1936 and made in Execution Petition No. 8 of 1935 in Original Suit No. 42 of 1929.

*K. V. Sessa Ayyangar* for appellant.

*K. S. Ramabhadra Ayyar* for first respondent.

Second respondent was not represented.

The JUDGMENT of the Court was delivered by KING J.—The question in this appeal is whether in the circumstances of this case the decree-holder in Original Suit No. 42 of 1929 on the file of the Subordinate Judge's Court of Tuticorin can proceed against the first respondent to recover from him the sum of Rs. 1,600 referred to in the surety bond

(1) (1919) I.L.R. 42 All. 158 (P.C.).

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executed by him in 1932. The facts are that Original Suit No. 42 of 1929 was a suit upon a mortgage and in that suit at the instance of the mortgagee a receiver had been appointed. There was an appeal by the third defendant against this order appointing the receiver which was numbered as Civil Miscellaneous Appeal No. 375 of 1931 in the High Court. When the appeal was filed, an application was also filed for stay of further proceedings by the receiver and stay was granted on condition that the third defendant should give security for one year's income from the mortgaged property fixed at a sum of Rs. 1,600. In accordance with that order the third defendant executed a surety bond the terms of which are now in dispute. The actual sentence in which his liability is expressed runs as follows :

"If the Civil Miscellaneous Appeal No. 375 of 1931 preferred by me to the High Court against the order appointing receiver is decided in favour of the said first plaintiff, I shall pay into Court the one year's net income of Rs. 1,600-7-4 as aforesaid."

Civil Miscellaneous Appeal No. 375 of 1931 was allowed but there was a Letters Patent Appeal against the decision of the learned Judge who decided it and that Letters Patent Appeal was also allowed so that the final decision of the High Court on the question of the validity of the order appointing the receiver was to confirm it. The decree-holder accordingly brought this application before the Court of first instance contending that on a true interpretation of the bond he was entitled to proceed against the surety. The learned Subordinate Judge rejected his application on the authority of two decisions of the Madras High Court. The decree-holder accordingly filed the present appeal.

The argument of the learned Counsel for the appellant has been reinforced by the citation of a large number of authorities but there is no clear authority which can deal with the facts of the present case and the only certain proposition of law which can be deduced from all the authorities cited is this, that each bond must be interpreted according to its own terms. We are of opinion that the terms of this bond are absolutely explicit. The bond definitely says that if a particular appeal (the number of which is given) is decided in favour of the plaintiff, the executant of the bond shall pay the money into Court. We do not find any language in this bond which extends the liability of the surety to the contingency which is not anywhere referred to of there being a second appeal against Civil Miscellaneous Appeal No. 375 of 1931. It may be, no doubt, that if the parties had drafted this bond more carefully and had thought of every possible eventuality, they would have made it clear that the surety shall be liable or not according to the final decision of the High Court in the matter. But although that might well be said to be the only reasonable conclusion at which the parties could have arrived had they discussed the matter in all its aspects, we have to deal with the bond as it has actually been drafted and if the decree-holder has permitted the surety to sign a bond which does not protect him in all the emergencies in which he intended to be protected, that is his misfortune and a misfortune which we cannot correct.

There is only one of the authorities quoted to which we think it necessary to refer and that is a decision of their Lordships of the Privy Council in *Raj Raghubar Singh v. Jai Indra Bahadur Singh*(1). That was

(1) (1919) I.L.R. 42 All. 158 (P.C.).

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a case in many respects similar to this one because the parties referred in the bond specifically only to the order which the immediate appellate Court was about to pass. Their Lordships of the Privy Council held that to make the bond in that case applicable only to the immediate appellate decision would lead to strange results, and they set out the hypothesis of the appellate Court and the second appellate Court both giving decisions contrary to the decision which they actually gave. They thereupon describe the surety bond as a form of wagering contract in which the liabilities of the surety depended upon the chances of the decisions given by two appellate Courts. But this is clearly not in our opinion an authority for holding that all security bonds are to be interpreted not according to their plain terms but in such a way as to make them the most reasonable bonds that the parties might have contemplated executing. Their Lordships say on page 165:

"It would be strange indeed if the language of the instrument had been such as to create a kind of wagering contract of this nature."

They then go on with words which appear to us to be of vital importance:

"But there is really no difficulty in the language of the instrument."

They point out that the bond relates not only to the immediate appeal judgment of the appellate Court but to any order which the appellate Court might pass at any time and they show how after the appellate Court's judgment had been set aside by the second appellate Court the appellate Court did pass later orders in accordance with the orders of the second appellate Court, and therefore that within the plain meaning of the terms of the bond the liability of the surety was clear. As already pointed out, in the

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present case there is no reference to any such contingency as a further order by the High Court whether by the original Judge or by any Bench which might sit in appeal over his decision. The words are clear and explicit: "If a particular Civil Miscellaneous Appeal (the number of which is given) is decided in a particular way."

We are accordingly of opinion that there are no sufficient reasons for differing from the interpretation of this bond at which the learned Subordinate Judge has arrived and this appeal must accordingly be dismissed with costs.

We would like however to point out that it is very probable in this case that what might or would have been the real intention of the parties has not been correctly expressed in the bond which has been signed. We feel that may be due in some measure to a too rigid adherence to the forms of bonds which are provided by Appendix G of the Code of Civil Procedure. We notice that Form No. 2 in that appendix which deals with a security bond to be given on an order being made to stay execution of a decree deals in terms only with one appeal and one appellate Court. We think it likely that much time might be saved in hearing appeals of this kind and possibly much real injustice might be obviated if parties and Courts which order the execution of such bonds could be guided by a different form modifying the form actually given in Appendix G and using language appropriate for dealing with all possible eventualities, due provision being made in certain circumstances for more appeals than one.

A.S.V.

## APPELLATE CIVIL.

*Before Mr. Justice Burn.*1938,  
August 16.P. R. GOVINDASWAMI NAICKER (PLAINTIFF),  
APPELLANT,

v.

C. JAVAMMULL SOWCAR AND ANOTHER (RESPONDENTS  
1 AND 2), RESPONDENTS.\*

*Madras Agriculturists Relief Act (IV of 1938), sec. 7—Mortgage by "agriculturist" giving mortgagee power of sale without intervention of Court—Sale by mortgagee for entire amount due under mortgage—Injunction preventing—Mortgagor's application for, on ground that amount for which property was sought to be sold was in excess of what would be due to mortgagee if debt was scaled down under Act—Maintainability of.*

The mortgagee under a mortgage deed, which was executed on 28th January 1935 and which gave the mortgagee power of sale without the intervention of Court, sought to sell the mortgaged property out of Court for the entire amount due under the mortgage. The mortgagor applied for a permanent injunction restraining the mortgagee from bringing the mortgaged property to sale, alleging that he was an "agriculturist," that under section 7 of Madras Act IV of 1938 he was entitled to have his debt due to the mortgagee scaled down in accordance with the provisions of the Act and that a sale out of Court for an amount in excess of what would be due to the mortgagee after such scaling down was an injury which the mortgagee should be prevented from inflicting upon him by means of a permanent injunction.

*Held* that if the mortgagor was an "agriculturist" and so entitled to the benefit of Madras Act IV of 1938, the action of the mortgagee in bringing the mortgaged property to sale for a sum in excess of the amount scaled down in accordance with the provisions of that Act would *prima facie* be an injury to the mortgagor which the mortgagee ought to be prevented

\* Appeal Against Order No. 261 of 1938.

by an injunction from inflicting on the mortgagor and that it was no answer to the application for such an injunction to say that under section 69 of the Transfer of Property Act the mortgagor would be entitled to recover damages if the mortgagee exercised his power of sale in an improper or irregular manner.

There is nothing in section 7 of Madras Act IV of 1938 to indicate that the scaling down must necessarily be the act of a Court. After the passing of the Act, it is the duty of the creditor to scale down the amount due to him by his debtor. It will only be in cases in which the creditor does not scale down his claim in accordance with the provisions of the Act that intervention of the Court will be necessary.

APPEAL against the order of the Additional City Civil Judge of the City Civil Court, Madras, dated 12th May 1938 and made in Civil Miscellaneous Petition No. 1488 of 1938 in Original Suit No. 815 of 1938.

*S. Krishnamachariar* and *K. Subba Rao* for appellant.

*V. S. Arunachalam* for respondents.

## JUDGMENT.

BURN J.—This is an appeal from the order of the learned Additional Judge of the City Civil Court, Madras, in Civil Miscellaneous Petition No. 1488 of 1938, dated 12th May 1938, in which he refused to issue a temporary injunction under Order XXXIX, rule 1, of the Civil Procedure Code.

The plaintiff in the suit, Original Suit No. 815 of 1938, prayed for a permanent injunction restraining the first defendant from exercising his power of selling out of Court three houses situated in the City of Madras. The three houses together with an oil engine, it is alleged, had been mortgaged in the first instance to the second defendant in 1934. The first defendant is a subsequent mortgagee whose deed was executed

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by the plaintiff on 28th January 1935. It is not disputed that the deed gives the first defendant power of sale without the intervention of Court and therefore under section 69 (1) (c) of the Transfer of Property Act, the first defendant has power to sell the mortgaged property out of Court. The plaintiff's case is that he is an "agriculturist" and that under section 7 of the Madras Act IV of 1938, he is entitled to have his debt to the first defendant scaled down in accordance with the provisions of the Act. His contention is that a sale out of Court for an amount in excess of what would be due from him to the first defendant after such scaling down is an injury which the first defendant should be prevented from inflicting upon him by means of a permanent injunction. The learned Judge of the City Civil Court considers that this point does not arise at the present stage. He thinks it will only arise after the property has been sold and that the plaintiff will have a remedy in damages under section 69 (3) of the Transfer of Property Act. I agree with my learned brother STODART J., who expressed the opinion in his order on Civil Miscellaneous Petition No. 2464 of 1938, that it is no answer to say that under section 69 of the Transfer of Property Act the petitioner will be entitled to recover damages if the mortgagee exercises his power of sale in an improper or irregular manner. Section 7 of the Madras Act IV of 1938 expressly says :

"Notwithstanding any law, custom, contract or decree of Court to the contrary all debts payable by an agriculturist at the commencement of this Act shall be scaled down in accordance with the provisions of this chapter."

It goes on to say :

"No sum in excess of the amount as so scaled down shall be recoverable from him or from any land or interest in land belonging to him."

There is nothing in this section that indicates that the scaling down must necessarily be the act of a Court. It appears to me to be implied that after the passing of this Act, it is the duty of the creditor to scale down the amounts due to him by his debtors. It will only be in cases in which the creditor does not scale down his claim in accordance with the provisions of the Act that the intervention of the Court will be necessary. It is not alleged on behalf of the respondent that he has made any scaling down. I understand that he does not admit that the plaintiff is an "agriculturist" and so entitled to the benefit of Madras Act IV of 1938. It is clear however that if the plaintiff is an "agriculturist" the amount due from him to the first defendant will have to be scaled down in accordance with Chapter II of the Madras Act IV of 1938. And it is obvious, as my learned brother has already held in the order referred to, that the action of the creditor in bringing the debtor's property to sale for a sum in excess of the amount so scaled down is *prima facie* an injury. I am told by learned Counsel for the respondent that the respondent offered to postpone the auction if the plaintiff deposited in Court the amount of principal due under the mortgage bond. The plaintiff, it is said, refused to accept this offer. On the other hand I am informed by learned Counsel for the appellant that the amount of the principal is one of the main questions in dispute between these two parties. The plaintiff alleges that though the bond recites the principal amount as Rs. 800, he actually received only Rs. 400 less a considerable sum deducted as advance interest. The learned Counsel for the appellant says that he offered to deposit Rs. 400 which according to him was the real amount of principal advanced by the respondent.

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It is clear to me there is a case to be tried and therefore I think this is a case in which an injunction should issue. But it should be on condition that the plaintiff deposits the amount of Rs. 400 in the lower Court within a reasonable time. Learned Counsel on both sides are not agreed as to what is reasonable time and I shall therefore fix four weeks. This appeal is accordingly allowed and the order of the Court will be that an injunction do issue restraining the first defendant from exercising his power of bringing the hypotheca to sale out of Court pending disposal of Original Suit No. 815 of 1938 on the file of the City Civil Court. It is further ordered that if the plaintiff fails to deposit in the City Civil Court the sum of Rs. 400 towards the amount due to the first defendant, the temporary injunction will be cancelled forthwith. The appellant will be entitled to his costs of this appeal from the first respondent and the first respondent will be permitted to withdraw the money from the City Civil Court, if deposited, on furnishing security to the satisfaction of that Court.

V.V.C.

# APPELLATE CIVIL.

*Before Mr. Justice King.*

KOCHERLAKOTA GOPALA RAO (PETITIONER),  
APPELLANT,

v.

KOPPARAJU LAKSHMINARASAMMA  
(RESPONDENT), RESPONDENT.\*

*Code of Civil Procedure (Act V of 1908), sec. 73—Decree for recovery of a certain sum from defendants 1 and 2 and of costs from defendants 1 to 3—Rateable distribution—Amount received by decree-holder by way of, in respect of total amount due to him under decree—Application of, solely towards amount payable by defendants 1 and 2 alone under decree—Decree-holder's right of.*

The decree in a suit awarded the respondent (i) a certain sum payable by defendants 1 and 2 and (ii) a further sum by way of costs payable by them and by the third defendant. There was thus a total sum payable to the respondent under the decree in respect of what might be called two debts due by his judgment-debtors, defendants 1 and 2 being liable for both the debts and the third defendant also being liable for that relating to costs. The respondent executed his decree and in his own execution petition and in another execution petition by another creditor of defendants 1 and 2 the respondent received a certain sum amounting roughly to about one half of the total decree amount by way of rateable distribution. The money which he received by way of rateable distribution was realised by the sale of property belonging to defendants 1 and 2 alone. The respondent contended that he had a right to appropriate the money received by him by way of rateable distribution to any portion of the decree which he liked and claimed that it must all go towards the satisfaction of the first of the two debts, i.e., the sum payable under the decree by defendants 1 and 2 alone.

\* Appeal Against Appellate Order No. 135 of 1935.

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*Held* that the respondent was not entitled to appropriate the sum he received by way of rateable distribution in any way he liked and that the said sum must go towards the payment of every rupee of his debt if the total amount due to him under the decree was regarded as a single debt, or equally towards the payment of both the debts contained in the decree if the sums payable to him under the decree were regarded as two debts; in other words, that the third defendant was entitled to a credit for a portion of the amount received by the respondent by way of rateable distribution.

Though the money which the respondent received by way of rateable distribution was realised by the sale of property belonging to defendants 1 and 2 alone, it was because of the total of the two debts that he was able to get as much as he did get by way of rateable distribution.

*Bardwell v. Lydall*(1) applied.

APPEAL against the order of the Court of the Subordinate Judge of Bezwada, dated 27th March 1935 and made in Appeal Suit No. 5 of 1935 preferred against the order of the Court of the District Munsif of Bezwada, dated 24th November 1934 and made in Civil Miscellaneous Petition No. 1830 of 1934 in Original Suit No. 326 of 1929.

*B. V. Ramanarasu* for appellant.

Respondent was not represented.

### JUDGMENT.

KING J.

KING J.—This appeal raises an interesting point with regard to the effect of rateable distribution of assets upon the amounts payable to the decree-holder under the decree in Original Suit No. 326 of 1929. That decree awards the decree-holder a certain sum payable by the first and second defendants and also a further sum by way of costs payable by not only the first and second defendants but by the third defendant also.

(1) (1831) 7 Bing. 489; 131 E.R. 189.

The decree was executed by the decree-holder and in his own execution petition and in another execution petition by another creditor of the first and second defendants he received a certain sum amounting roughly to about one half of the total decree amount by way of rateable distribution. Subsequently to the receipt of this money the third defendant has admittedly paid Rs. 100 to the decree-holder. In 1934 the third defendant filed a petition in the Court of the District Munsif of Bezwada praying that full satisfaction might be entered in his favour with regard to that portion of the decree for which he was liable, namely, costs. Both the learned District Munsif and the learned Subordinate Judge of Bezwada have dismissed this petition. Hence this appeal.

I have not had the advantage of hearing any arguments on behalf of the respondent. But it seems to me quite clear from the principles contained in the English cases cited by the learned Counsel for the appellant that these decisions of the Courts below are wrong. The right of the decree-holder to receive the money which he received in the rateable distribution was derived from the fact that there was payable to him a total sum in respect of what may fairly be called two debts due by his judgment-debtors. For both these debts the first and second defendants were liable and for that relating to costs the third defendant also. The decree-holder opposes the third defendant's application to record full satisfaction and argues that he had a right to appropriate this money to any portion of the decree which he liked; and at first sight it does appear as if such a right may reasonably be claimed inasmuch as the money was realised by the sale of property which was the property of the first and second defendants alone. The fact however still remains that it was

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—  
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because of the *total* of the *two* debts that the respondent was able to get as much as he did get by way of rateable distribution. It will then be clearly inequitable and unfair for him to claim after receiving the money that it must all go towards the satisfaction of the first of these two debts. The result would then be that he had received for the first debt more than was due to him under the provisions of the rule dealing with rateable distribution and less on the second debt.

The case which is the foundation for the argument of the learned Counsel for the appellant is *Bardwell v. Lydall*(1), decided more than a century ago in the English Courts. That was a case in which a guarantee had been given by the defendant to the plaintiffs to be responsible for the debts of a certain Lionel Mayhew to the extent of £400. Mayhew's debts to the plaintiffs amounted eventually to £625 and he became virtually insolvent and entrusted his properties to trustees for payment of his creditors. The trustees paid the plaintiffs 8 s. 7 d. in the pound on this sum of £625. They then sued the defendant on his guarantee for the remainder of that debt, which amounted to less than £400. It was held by the Court that the 8 s. 7 d. in the pound which had been received was 8 s. 7 d. in every pound of the £625 which constituted the debt, and therefore to the extent of 8 s. 7 d. every pound of the £400 which had been guaranteed by the defendant had already been paid off. The liability therefore under the guarantee amounted only to the remaining 11 s. 5 d. in the pound. I have carefully considered this case, which has been followed in subsequent cases in England, and consider that it must apply in principle to the facts of the present case. The decree-holder here, it is clear, cannot appropriate the sum he received

(1) (1831) 7 Bing. 489; 131 E.R. 189.

by way of rateable distribution in any way he likes. He must admit that what he has received goes towards the payment of every rupee of his debt if it be regarded as a single debt, or equally towards the payment of both the debts contained in the decree if they are regarded as two debts.

It is clear from the calculations made by the learned Subordinate Judge that if this point of law is to be accepted, the appellant is entitled to a credit for the sum of Rs. 89-15-0. It has already been said that he has paid Rs. 100. The total amount of Rs. 189-15-0 is more than the amount of costs with interest due at the time of the payment under the rateable distribution. Therefore the appellant is entitled to succeed in his contention that he has fully satisfied his liability under the decree. In the result, this appeal must be allowed and the appellant's petition ordered with costs throughout.

V.V.C.

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—  
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## APPELLATE CIVIL.

*Before Mr. Justice Varadachariar and Mr. Justice  
Abdur Rahman.*

1938,  
October 5.

THE PALGHAT COIMBATORE TRANSPORT COM-  
PANY, LIMITED, BY ITS LIQUIDATOR,  
N. KRISHNASWAMI NAIDU (FIRST DEFENDANT),  
APPELLANT,

*v.*

NARAYANAN AND SEVEN OTHERS (PLAINTIFFS AND  
SECOND DEFENDANT), RESPONDENTS. \*

*Damages—Composite negligence—Injury caused by—Non-  
existence of duty to analyse the proximate cause of injury  
to find out who could be sued.*

In a suit for damages for injury arising from "composite negligence" the plaintiff is not bound to a strict analysis of the proximate or immediate cause of the event to find out whom he can sue. Subject to the rules as to remoteness of damage, he is entitled to sue all or any of the negligent persons and it is no concern of his whether there is any duty of contribution or indemnity as between those persons, though in any case he cannot recover on the whole more than his whole damage. He has a right to recover the full amount of damages from any of the defendants.

The question whether, in India, Courts will, in the absence of a statutory provision, have the power to fix contribution as between tort-feasors left open.

APPEAL against the decree of the Court of the Principal Subordinate Judge of Coimbatore in Original Suit No. 97 of 1931.

*K. Rajah Ayyar* for appellant.

*K. V. Ramaseshan* for respondents 1 to 7.

Eighth respondent was not represented.

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\* Appeal No. 151 of 1934.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal arises out of a suit instituted under the Fatal Accidents Act by the representatives of one Venkatarama Ayyar who died in February 1930 as the result of a collision between two motor buses in one of which the deceased was travelling. The owners of the two buses have been implicated as defendants 1 and 2 and they may be referred to as the U.M.S. Motor Service and the I.M.S. Motor Service respectively. It was in one of the buses run by U.M.S. Service that the deceased was travelling at the time of the accident. The I.M.S. Service bus was coming in the opposite direction, and at a point where the road is found to have measured 26 feet in breadth, there was a collision between the two buses almost in the middle of the road. The lower Court gave the plaintiffs a joint decree against both the defendants for sums aggregating Rs. 10,000. Against that decree the first defendant has preferred this appeal.

The first point urged in support of the appeal is that the driver of the U.M.S. bus was not negligent or reckless and that the appellant should not therefore be held liable. There has been some controversy as to the exact part of the road where the collision took place. The witnesses examined on behalf of the first defendant, U.M.S. Service, suggest that at the time of the accident the U.M.S. bus was very near the extreme left edge of the road which will be its proper side and was within one or two feet of a ditch which adjoined the road on that side. The evidence of some of the lay witnesses does not appear to us quite reliable; assuming they were in the bus, it is doubtful if they took note of such matters. It is the driver of the bus who puts the distance between the bus and the

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ditch at 2 feet, while the lay witnesses would swear that it was one foot. The police officer who was on the spot very soon after the incident expressed his opinion that the collision must have taken place in the middle of the road. He was no doubt not present at the spot at the time when the accident occurred; but we think that the lower Court was right in accepting his inference as correct because he stated that the brain matter of one of the passengers who was killed in the accident was found right in the middle of the road when he went to the spot and it was hardly likely that this matter could have changed its position from the spot where it actually fell at the time of the accident. It appears from the evidence that only 12 feet of the road width about the middle is metalled and there is a margin of 8 feet on the one side and 6 feet on the other unmetalled. We see no reason to differ from the conclusion of the learned trial Judge that the unfortunate accident must have happened as a result of the drivers of the two buses persisting in driving on the metalled portion, each declining to make room for the other to pass by. In this view both the defendants must be held liable; *Mills v. Armstrong. The 'Bernina'* (1).

As regards the quantum of damages, Mr. Rajah Ayyar, the learned Counsel for the appellant, first defendant, complained that the amount of Rs. 10,000 awarded by the lower Court was excessive and not warranted by the financial position of the deceased. It must be said in justification of this argument that the evidence bearing on the quantum of damages is somewhat vague and the plaintiffs could have produced more satisfactory evidence. But, such as it is, the evidence has been accepted by the learned Subordinate

(1) (1888) 13 App. Cas. 1.

Judge as substantially reliable. Assessment of damages in a case of this kind must necessarily be only rough and approximate and we are not prepared to say that the amount awarded by the lower Court is so excessive that it can be described as arbitrary or whimsical. Nor are we in a position to say that a lower figure will necessarily be the correct figure. The evidence shows that the deceased was aged only 40 at the time of his death, that he had a family of seven members to support and that he was managing to maintain that family in a certain decent standard of living. It is true that in a case of this kind the assessment of damages should not be made merely with reference to the plaintiffs' requirements, but as the evidence establishes that the plaintiffs' requirements were being fairly met by the deceased, the learned Judge was in our opinion justified in proceeding to assess damages on that basis.

The third contention urged by Mr. Rajah Ayyar relates to the propriety of awarding a joint decree against both the defendants. He urged that the present case is not one of "joint tort" and that it was open to the Court to assess separately the damages payable by each of the two defendants, *Ramratan Kapali v. Aswini Kumar Dutt* (1). We are prepared to assume that the present is not an instance of a joint tort; see *The Kursk* (2). But it will not necessarily follow therefrom that the damages should or could be assessed separately as against each of the defendants. The case will fall in the category of what is described by Sir Frederick Pollock as injury arising from "composite negligence"; see Pollock on Torts, 13th Edition, page 485. After referring to

(1) (1910) I.L.R. 37 Cal. 559.

(2) [1924] P. 140.

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the authorities bearing upon instances of this kind, the learned author observes that, in such a case, the plaintiff is not bound to a strict analysis of the proximate or immediate cause of the event to find out whom he can sue. Subject to the rules as to remoteness of damage, the plaintiff is entitled to sue all or any of the negligent persons and it is no concern of his whether there is any duty of contribution or indemnity as between these persons, though in any case he cannot recover on the whole more than his whole damage. This principle was applied by the majority of the Court of Appeal in Ireland in *M'Kenna v. Stephens and Hull*(1). See also Boven on Negligence, page 79. The case of *Piper v. Winnifrith and Leppard*(2), to which Mr. Rajah Ayyar drew our attention in this connection, is clearly distinguishable. What happened in that case was that two dogs belonging to two different owners who did not act in concert had injured the plaintiff's animal and he sued the owners of the dogs for damages. This was certainly not a case either of joint tort or of a composite act in the sense that the act or omission of the one without the act or omission of the other would not have caused the injury. *Croston v. Vaughan*(3) does not help the appellant either. The Court in that case no doubt fixed the amount respectively payable by the two wrongdoers, but that was done in exercise of the power expressly conferred on the Court by the recent statute of 1925. It must also be noted that that was a decision only between the defendants *inter se* and did not affect the right of the plaintiff to recover the full amount from either of the defendants. It was pointed out that the plaintiff was not even a party

(1) [1923] 2 Ir. Rep. 112.

(2) [1917] 34 T.L.Rep. 108.

(3) [1938] 1 K.B. 540.

to the appeal and his rights accordingly remained unaffected. Whether, in this country, Courts will in the absence of a corresponding statutory provision have the power to fix contribution as between tortfeasors is not necessary for the purpose of this case to consider. We are not prepared to do anything which will affect the plaintiffs' right to recover the full amount of damages from either of the defendants. The appeal fails and is dismissed with costs of the plaintiffs-respondents. The liquidator-appellant will not be personally liable for the costs.

G.R.

## APPELLATE CIVIL.

Before Mr. Justice Wadsworth.

KAMADANA SESHAYYA AND TWO OTHERS (DEFENDANTS),  
APPELLANTS,

1938,  
September 30.

v.

KOTAMARTHI ARUNDHATAMMA (PLAINTIFF),  
RESPONDENT.\*

*Madras Estates Land Act (I of 1908), sec. 26 (3)—Compromise decree approved by Court—Rate of rent fixed in—Applicability of sec. 26 (3) to case of—Sec. 199 of the Act—Applicability and effect of.*

Section 26 (3) of the Madras Estates Land Act is intended to deal with cases of voluntary remissions given by a landholder so as to reduce the value of the estate which is to be taken by his successor and has no application to rates of rent fixed in a compromise decree approved by the Court.

Section 199 of the Act provides for the settlement of disputes regarding the rate of rent by means of compromises

\* Second Appeal No. 741 of 1934.

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subject to the approval of the Court. The effect of a compromise of a dispute regarding the rate of rent must be taken to settle not only what is the rate of rent payable during the lifetime of the then zamindar but what is the lawful rate of rent payable on the land, unless the compromise does not purport to provide for future rates. When the compromise definitely purports to fix the rate of rent for the future and it does not purport to fix it as a favourable rent or a reduction of rent but as the proper rent and the Court as provided by section 199 approves of the compromise, the rate of rent for the future embodied in that compromise is also approved by the Court. The fixation of rent is therefore not the voluntary act of the then landholder, but it becomes the act of the Court. The rate of rent so fixed by the compromise and approved by the Court becomes the lawful rate of rent for the land in question and subsequent payments at an enhanced rate and subsequent muchilikas embodying the enhanced rate will not bind the ryot. His rent can only be raised by the procedure laid down in the Act.

APPEAL against the decree of the District Court of Kistna at Masulipatam in Appeal Suit No. 140 of 1933, presented against the decree of the Court of the Sub-Collector of Bezvada in Summary Suit No. 134 of 1933.

*P. Satyanarayana Rao* for appellants.

*N. S. Vasudeva Rao* for *V. Govindarajachari* for respondent.

#### JUDGMENT.

WADSWORTH J. — This appeal raises a question, on which so far as I am aware there is no precise authority, with reference to section 26, sub-section (3), of the Madras Estates Land Act. The appellants were defendants in a suit brought by the plaintiff, a ryot, to raise a distraint under section 112 of the Act. The basis of the plaintiff's case was that the rent at the rate of Rs. 10 claimed by the landholder in the attachment notices was not the lawful rate and that the lawful rate was Rs. 6-12-0 on the basis of a compromise

decree, Exhibit A, dated 7th January 1922, in a suit for rent brought by the predecessor of the defendants against the predecessors of the plaintiff. The appellants' contention is that the rate fixed in the decree is not a lawful rate but a favourable rate granted by their deceased predecessor and that by virtue of section 26 (3) they are entitled to revert to the lawful rate of the land after the death of the person who agreed to the favourable rate.

The facts are not in dispute. The compromise decree, Exhibit A, resulted from a suit of 1921 brought by the landholder for rent and the terms on which the suit was decreed were that the defendant should pay certain specified sums for the suit faslis and should thereafter pay at the rate of Rs. 6-12-0 per acre with a concession rate of Rs. 2-8-0 per acre in years when the crops did not yield. The pleadings in that suit have not been exhibited, but I am of opinion that from the terms of the compromise decree it can be inferred that there was a dispute as to the rate of rent due on the land. The present defendants purchased the estate in 1924. The plaintiff purchased the holding in 1925. By a curious oversight it appears not to have been noticed by the plaintiff or by her predecessor that the present suit lands were included in the lands covered by the compromise decree and both the plaintiff's predecessor and the plaintiff herself went on paying at the rate which prevailed previous to this compromise, which was Rs. 10 per acre, the rate now claimed by the appellants. Not only did they pay this rate but they executed muchilikas in which this rate was recognized as the rate on which the land was held. Recently the plaintiff discovered that her land was covered by the compromise decree and when the land was attached for rent claimed at

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the ten-rupee rate, she filed the present suit alleging that the proper rate for the land was Rs. 6-12-0.

Now I may observe that, in my opinion, section 26 (3) of the Act is not confined in its operation to original grants of land and that it does apply to a grant at a reduced rent of land already in the enjoyment of a ryot. But, so far as I know, it has never been decided whether section 26 (3) does or does not apply to a favourable rate of rent granted by the previous landholder and embodied in a decree of Court in a suit under section 77. This is a question which has to be decided with reference to the provisions of the Act and without the help of authorities. I may however refer to the ruling in *Narayana Patrudu v. Veerabadra Raju*(1) as authority for the position, about which there can be no doubt, that when there is a dispute regarding the rate of rent that dispute can be the subject of adjudication by the Court in a suit brought under section 77 merely for recovery of rent. This has a bearing in view of the provisions of section 199 which deals with compromises under the Act. Section 199 provides that the Court may pass a decree in terms of any lawful agreement or compromise so far as it relates to the suit and that any decree passed in accordance with such lawful agreement, compromise or satisfaction shall be final so far as it relates to so much of the subject-matter of the suit as is dealt with by such agreement, compromise or satisfaction. Now it is argued for the appellants that this compromise related not only to the rent for the faslis then demanded but also to future rents and that to the extent to which it provides for future rents it goes beyond the subject-matter of the suit. It is also contended that, in view of the provisions of section 26 and the finding of the Courts below that at the time of

(1) (1927) I.L.R. 51 Mad. 228.

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the compromise the lawful rent was Rs. 10 per acre, the compromise goes beyond the powers of the then landholder if it is taken to be a fixation of rent at a favourable rate in perpetuity. The argument is that the landholder cannot by contract bind his successors by a favourable rate granted to a ryot. It is argued that there is no particular sanctity attached to a contract embodied in a decree of Court which goes beyond the subject-matter of the suit, and that even if it be held in accordance with the provisions of section 199 that the contract embodied in a compromise approved by Court will bind the succeeding landholders, this can only be in so far as it related to the subject-matter of the suit and the subject-matter of the suit must be taken to be the rent payable in the light of the limitation on one landholder's powers of fixing the rent in the future. This argument is ingenious but I am of opinion that it is fallacious. Section 26, sub-section (3), is intended to deal with cases of voluntary remissions given by a landholder so as to reduce the value of the estate which is to be taken by his successor and it is in accordance with the policy of the Act to hold that such a voluntary remission given by a mere contract would have no greater sanctity than one which is given as an act of grace. But the Act provides for the settlement of disputes regarding the rate of rent by means of compromises subject to the approval of the Court. I think it must be assumed that the Court would not approve of a compromise which would be prejudicial to the rights of future zamindars. Moreover, the effect of a compromise of a dispute regarding the rate of rent must be taken to my mind to settle not only what is the rate of rent payable during the lifetime of the present zamindar but what is the lawful rate of rent payable on the land, unless the compromise

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does not purport to provide for future rates. The compromise Exhibit A definitely purports to fix the rate of rent for the future and it does not purport to fix it as a favourable rent or a reduction of rent but as the proper rent. I think it follows that the Court having as provided by section 199 approved of this compromise, the rate of rent for the future embodied in that compromise was also approved by the Court. This fixation of rent is therefore not the voluntary act of the then landholder, but it becomes the act of the Court. It seems to me to be illogical to treat a fixation of rent approved by the Court as the irresponsible act of a deceased predecessor. In that view I hold that section 26, sub-section (3), has no application to rates of rent fixed in a compromise decree approved by the Court. It follows that Exhibit A specifies what is the lawful rate of rent for the suit land and it is undeniable that subsequent payments at an enhanced rate and subsequent muchilikas embodying the enhanced rate would not bind the ryot. His rent can only be raised by the procedure laid down in the Act.

The appeal is therefore dismissed with costs.

V.V.G.

# APPELLATE CIVIL.

Before Mr. Justice Varadachariar.

EDARA VENKAYYA (DEFENDANT), PETITIONER, ●

v.

EDARA VENKATA RAO (PLAINTIFF), RESPONDENT.\*

*Code of Civil Procedure (Act V of 1908), O. II, r. 2 (3)—Application under, for leave to omit certain remedies—Time for making—Application made at later stages of suit—Power of Court to grant leave in case of.*

*Held:* It is not necessary that the application under Order II, rule 2 (3), of the Code of Civil Procedure for leave to omit certain remedies must precede or at least be contemporaneous with the plaint in the first suit. The Court has power to grant leave even when such an application is made at later stages of the suit, though in dealing with the application the Court will ordinarily have to consider whether the grant of leave to reserve certain remedies will in the circumstances be appropriate in the sense that it will not give an unfair advantage to the plaintiff or impose an unfair burden on the defendant.

Where leave is not a condition precedent to the jurisdiction of the Court to entertain the particular action, there is no inherent necessity that the application for leave should be made before the institution of the suit itself or at least along with the plaint. Where the objection under Order II, rule 2, of the Code arises, the omission to ask for a particular relief is not a defect that goes to the maintainability of the very suit in which leave should have been asked for; it only entails a disability as regards subsequent proceedings.

PETITIONS under sections 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the orders of the District Court of West Godavari at Ellore, dated 6th November 1936 and made in Interlocutory Applications Nos. 864 of

\* Civil Revision Petitions Nos. 87 and 386 to 388 of 1937.

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VENKATA RAO. 1936 in Original Suit No. 19 of 1933 ; 862 of 1936 in Original Suit No. 16 of 1935 ; 863 of 1936 in Original Suit No. 17 of 1934 ; and 865 of 1936 in Original Suit No. 13 of 1936.

*B. Somayya* for petitioner.

*V. V. Srinivasa Ayyangar* and *V. V. Ramadurai* for respondent.

### JUDGMENT.

VARADACHARIAR J.

VARADACHARIAR J.—In these revision petitions, the petitioner challenges the validity of four orders passed by the lower Court granting leave under Order II, rule 2 (3), Civil Procedure Code, to the plaintiff to omit the claim for certain reliefs, in the circumstances to be presently mentioned. The orders have been questioned on two grounds, (i) that the Court had no power to grant leave at the stage at which the applications were made, and (ii) that the circumstances alleged in the application for leave did not justify the grant of leave. The latter question relates to the exercise of the discretion which is vested by law in the lower Court and, except in very exceptional circumstances, it is not proper for a Court of revision to interfere with the way in which the lower Court has exercised its discretion. In the present case, I do not see sufficient reason for interfering with that exercise of discretion.

The question as to the power of the Court to grant leave at the stage at which the applications were made to it is not free from difficulty. The relevant facts are as follow. The plaintiff was entitled to recover a sum of Rs. 20,000 from the defendant in ten annual instalments of Rs. 2,000 each, the first instalment becoming payable on 31st March 1929. As the first instalment was not paid on the due date, the plaintiff

filed a suit for its recovery in April 1929. Several defences were raised to that suit and the plaintiff apparently waited to see what the decision in that suit would be before he filed his next suit.

But it unfortunately happened that that suit remained pending for a number of years. In 1933 he filed his second suit, Original Suit No. 19 of 1933. By that time not only the second instalment but some later instalments had also fallen due. But Original Suit No. 19 of 1933 sought the recovery of the second instalment only. Original Suit No. 17 of 1934 was filed next year for the third instalment and two other suits, viz., Original Suit No. 16 of 1935 and Original Suit No. 13 of 1936, were filed for the recovery of the later instalments. Luckily or unluckily for the parties, all the four suits beginning from Original Suit No. 19 of 1933 remain pending to this date. At some stage, the defendant raised the plea under Order II, rule 2, Civil Procedure Code, on the ground that as the claim for some of the later instalments had accrued due even before Original Suit No. 19 of 1933 was filed, the later suits would be barred by the provisions of that rule. Similar pleas were sought to be raised in the other suits as well. It was at this stage that applications were filed by the plaintiff on 1st October 1936 for grant of leave under Order II, rule 2 (3).

On the facts above stated Mr. Somayya, the learned Counsel for the defendant, contends that on a proper construction of clause 3 of Order II, rule 2, leave should have been asked for before Original Suit No. 19 of 1933 was actually filed or at least at the time the suit was instituted, and that the Court has no power at a late stage to grant such leave. I may mention here that the lower Court has taken care to leave an allied question open, namely, whether the leave granted under the orders now challenged will be



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effective to obviate the bar under Order II, rule 2, Civil Procedure Code, in respect of suits that have been *already* instituted. I do not therefore wish to say anything on that question; nor do I wish to be understood as expressing any opinion on the question whether Order II, rule 2 (3), applies to these suits or not. These are questions to be considered in the suits themselves. The only question dealt with by the Court below and proposed to be dealt with by me here is whether, assuming that the bar under Order II, rule 2 (3), would have applied to each of the later suits, the Court had power to grant leave under that clause at a late stage of the pendency of the earlier suit.

The learned Judge has laid some stress on the fact that in re-enacting this provision in the Code of 1908 the Legislature has omitted certain words which were found in the corresponding provision in the Codes of 1882 and 1877. In the last clause of section 43 of the older Codes there occurred in parenthesis the words "except with the leave of the Court obtained before the first hearing" between the words "omits" and "to sue". The learned Judge understands the reason of the omission to be that it was intended to leave the question of the time for making an application at large, subject only to the power of the Court to decline to grant leave if an application was made too late. Mr. Somayya suggests that that was not the real reason for the omission; he attributes it to a recognition by the Legislature of the fact that the words found in the old section were really inconsistent with the substantive provision that all reliefs arising out of the same claim must be claimed in one and the same suit. He points out that the question of omission or no omission in respect of some reliefs must be settled at the initial stage itself and could not be

properly dealt with at later stages of the suit. I am not by any means satisfied that there is any inherent incompatibility of the kind suggested by Mr. Somayya. The older Code obviously contemplated that the application for leave might be made after the institution of the suit, though it fixed a time-limit by prescribing that leave should be obtained before the first hearing.

The question whether leave for particular purposes should be obtained before the institution of the suit or could be obtained later will, in cases not governed by any definite statutory time-limit, have to be decided according to the bearing of the leave upon the jurisdiction of the Court to entertain the particular suit or its bearing upon the constitution of the particular action or the significance of other considerations. Taking for instance the provision in the Letters Patent that the leave of the Court should be obtained before a suit of a particular kind is instituted in the High Court, it is obviously a provision by way of condition precedent to the jurisdiction of the Court. If, on the other hand, we take the rule relating to the necessity for leave for a suit against a receiver or for a suit under Order I, rule 8, Civil Procedure Code, the leave is not one that bears on the jurisdiction of the Court; the requirement as to leave is based on considerations relating to the interests of other persons or the authority of other Courts. The provision as to leave in this latter class of cases rests not so much even on the constitution of the particular suit as upon the expediency of granting relief in that particular suit in a manner that may affect the interests of other persons. That is why the preponderance of authority is in favour of the view that in this class of cases leave is not a condition precedent to the

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institution of the suit. Another class of cases which lies midway between these two groups is illustrated by the provision in Order II, rule 4, Civil Procedure Code, as regards the joinder of particular claims in one suit with a claim for the recovery of immovable property. Under the corresponding rule of the English Practice, it has been held in England that the leave contemplated by this rule may be granted even at a later stage of the suit; see *Lloyd v. Great Western Dairies Company*(1). The observations of JESSEL M.R. in *In re Pilcher. Pilcher v. Hinds*(2) seem to suggest a stricter view, but they have been explained by BUCKLEY L.J. in the later case. Again, the leave contemplated by section 20 (b), Civil Procedure Code, in respect of defendants residing outside the jurisdiction of the Court has been held to be capable of being granted on an application made after the institution of the suit. These illustrations show that where leave is not a condition precedent to the jurisdiction of the Court to entertain the particular action, there is no inherent necessity that the application for leave should be made before the institution of the suit itself or at least along with the plaint.

Where the objection under Order II, rule 2, Civil Procedure Code, arises, the omission to ask for a particular relief is not a defect that goes to the maintainability of the very suit in which leave should have been asked for, it only entails a disability as regards subsequent proceedings. It therefore seems to me that there is even less reason in this class of cases for insisting that the application for leave to omit must precede or at least be contemporaneous with the plaint in the first suit. It may be that as a matter of prudence the plaintiff will do well to make the

(1) (1907) 2 K.B. 727.

(2) (1879) 11 Ch. D. 905.

application for leave even before he files his plaint or at least along with his plaint, because he will otherwise be running the risk of the application being refused when it will be too late to set matters right. But that is different from saying that the Court has no power to grant leave unless the application is made before the institution of the suit or along with the presentation of the plaint. So far as I can see, the Court when called upon to deal with such an application will ordinarily have to consider whether the grant of leave to reserve certain remedies will in the circumstances be appropriate in the sense that it will not give an unfair advantage to the plaintiff or impose an unfair burden on the defendant. A question of this kind can as well be dealt with by the Court during the pendency of the suit as before its institution. I am therefore unable to agree with Mr. Somayya's contention that the reason of the thing requires that such an application must have been made prior to the institution of the suit in which the application is made. In this view, the omission in the new Code of the words found in parenthesis in the third clause of section 43 of the old Code justifies the inference that the Legislature did not wish to insist upon leave being obtained before the first hearing. Some of the commentators on the new Code (including Sir Dinshaw Mulla) also take this view, and I am not satisfied that that view does not correctly represent the intention of the Legislature.

The civil revision petitions accordingly fail and are dismissed with costs in Civil Revision Petition No. 87 of 1937.

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## APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice  
Abdur Rahman.

1938,  
April 25.

NAIVARANI MATATHIL AYYA PATTAR  
(PETITIONER), PETITIONER,

v.

KRISHNAN *alias* THONDEE KARUPPASSAN *alias*  
THONDEEPUNATHUNNAVAL AND THIRTEEN OTHERS  
(RESPONDENTS 1 AND 3 TO 15), RESPONDENTS.\*

*Madras Revenue Recovery Act (II of 1864), secs. 38 and 40—  
Revenue sale of property—Purchaser at—Application for  
possession under sec. 40 of Act by—Nature of possession  
purchaser is entitled to, actual or symbolical—Persons not  
bound by sale in possession and claiming value of improve-  
ments—Encumbrance on property sold within meaning of  
sec. 42 of Act—Claim to value of improvements, if.*

A sale certificate issued in favour of the petitioner under section 38 of the Revenue Recovery Act stated that he had purchased at public auction the property mentioned therein when it was sold for arrears of revenue due by the first respondent, the jenmi of the property. The second respondent was the kanamdar and respondents 3 to 14 were tenants under him. But the sale certificate did not make any mention of any of them. On an application by the petitioner under section 40 of the Revenue Recovery Act for possession, respondents 3 to 14 claimed the value of improvements.

*Held* that in the circumstances of the case the petitioner was entitled only to symbolical possession and not to actual possession.

The sale bound the first and second respondents and not any other person directly. Respondents 3 to 14 were not bound by the sale and, as they were on the property claiming rights, the petitioner could, by virtue of section 40 of the Revenue Recovery Act, get only such possession as would be

\* Civil Revision Petition No. 1695 of 1934.

given to a decree-holder under Order XXI, rule 36, of the Civil Procedure Code, i.e., symbolical possession.

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*Held further* that, in view of the nature of the claim of respondents 3 to 14, they could not be said to have an encumbrance over the property within the meaning of section 42 of the Revenue Recovery Act.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Payoli, dated 17th July 1934 and made in Execution Application No. 1040 of 1933.

K. P. Ramakrishna Ayyar for petitioner.

A. Achuthan Nambiar for seventh respondent.

B. Pocker for eighth respondent.

Other respondents were not represented.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—This civil revision petition arises out of an application made by the petitioner before us under section 40 of the Madras Revenue Recovery Act for possession of the property in pursuance of a revenue sale certificate issued to him by the Collector.

MADHAVAN  
NAIR J.

The facts are these. The first respondent is the jenmi of the property. The second respondent is the kanamdar. Respondents 3 to 14 are tenants under the kanamdar. The property was sold for arrears of the Government revenue due on it from the first respondent and it was purchased by the petitioner. A sale certificate under section 38 of the Revenue Recovery Act was issued in his favour and it stated that the petitioner had purchased at a public auction the property mentioned therein when it was sold for arrears of revenue due by the first respondent. It did not make any mention of the second respondent or of respondents 3 to 14. When the petitioner applied for possession,

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respondents 3 to 14 claimed the value of the improvements. The lower Court passed an order that the petitioner is entitled to symbolical possession, holding that respondents 3 to 14 are entitled to the value of improvements.

In this civil revision petition two points are argued. The first is that the lower Court has committed an error in the exercise of its jurisdiction because it has refused to deliver actual possession to the petitioner, what was delivered to him being only symbolical possession. It is contended that under section 40 of the Revenue Recovery Act under which the application was made by the petitioner for possession the lower Court should have delivered to him actual possession. It appears to us that this argument is untenable. Section 40 says that the purchaser shall in the circumstances mentioned therein be put in possession "in the same manner as if the purchased lands had been decreed to the purchaser by a decision of the Court", i.e., such possession as will be given to a decree-holder under the Civil Procedure Code will be given to the purchaser under this section. This is the kind of possession which the purchaser is entitled to get of the property mentioned in the sale certificate. Under Order XXI, rule 35, Civil Procedure Code, actual possession will be delivered to the decree-holder by removing any person bound by the decree who refuses to vacate the property. Under Order XXI, rule 36, Civil Procedure Code, if in execution of the decree the amin finds that a person against whom no decree has been passed is in possession claiming right to the property, then symbolical possession only of the property will be delivered to the decree-holder. In the present case the revenue sale was directed against the first respondent (the jenmi) and the result of the sale

under section 42 of the Revenue Recovery Act was that the property became free of the encumbrance held by the second respondent. It follows that the sale bound the first and second respondents and not any other person directly; and so, when the amin went to deliver possession of the property and found that other persons were on it claiming rights, he could under the Civil Procedure Code deliver to the petitioner only symbolical possession; and that is what the learned Judge in the Court below has held that the petitioner is entitled to. It follows therefore that the argument that the lower Court should in the circumstances have ordered *actual* possession to the petitioner is not sound in law. A few cases were cited to us in support of the petitioner's contention, viz., *Chithambaram Chetti v. Natasam*(1), *Kelan v. Manikam*(2) and *Narasimma v. Surianarayana*(3). In none of these cases did the present question arise. In *Chithambaram Chetti v. Natasam*(1) the question was simply whether the Civil Procedure Code will apply to an application under section 40 of the Revenue Recovery Act. In *Kelan v. Manikam*(2) the question was whether the sale in that case was free of the kanamdar's rights. In *Narasimma v. Surianarayana*(3) the question was whether a permanent lease will amount to an encumbrance or not. For the above reasons we must overrule the first point that the lower Court should have delivered to the petitioner actual possession instead of symbolical possession.

The next point argued is that respondents 3 to 14 should be considered to be holders of an encumbrance on the property since they claim the value of improvements. The argument has not been supported by any

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(1) (1891) 1 M.L.J. 594.

(2) (1888) I.L.R. 11 Mad. 330.

(3) (1892) I.L.R. 16 Mad. 144.

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authority and we cannot, having regard to the nature of their claim which is only a right to be paid the value of improvements, hold that they have an encumbrance over the property within the meaning of section 42 of the Revenue Recovery Act. In our opinion the decision of the lower Court is right and no error in jurisdiction or irregularity in the exercise of it has been brought to our notice.

This civil revision petition is dismissed with costs of respondents 7 and 8.

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### APPELLATE CIVIL.

*Before Mr. Madhavan Nair, Officiating Chief Justice, and  
Mr. Justice Stodart.*

1938,  
August 18.

KOZHICKOTE PATINHARE KOVILAKATH MAHADEVI  
*alias* KUNHI THAMBURATTI *alias* VALIYA THAMBU-  
RATTI AVERGAL STYLED VIYATHEN NOTTI (FIRST  
PLAINTIFF), APPELLANT,

v.

KOZHICKOTE PATINHARE KOVILAKATH KULAPURA  
TAVAZHI KARNAVAN AND MANAGER VEERARAYAN  
*alias* MARUMAKAN THAMBURAN AND TWO OTHERS  
(DEFENDANTS AND SECOND PLAINTIFF), RESPONDENTS.\*

*Court-fee—Possession—Suit by landlord against his tenant for—  
Decree for possession in, conditional upon plaintiff paying  
value of tenant's improvements—Appeal by landlord contesting  
liability for value of improvements—Court-fee payable in.*

Where a suit by a plaintiff for recovery of possession of properties from his tenants was decreed but on condition that he should pay a certain amount for value of improvements and

\* Second Appeal No. 1199 of 1936.

he appealed against the compensation amount that he was ordered to pay contending that no compensation should have been decreed against him,

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*held* that the plaintiff-appellant should pay court-fee on the value of improvements decreed against him.

In a case where in appeal the only question involved relates to compensation for improvements and no question of possession is raised, the appellant should pay court-fee on the value of improvements.

*In re Paidal Nayar*(1) and *Pathumma Umma v. A. Mohideen*(2) followed.

*Obiter dictum* to the contrary in *Reference Under Court Fees Act, s. 5(3)* disapproved.

APPEAL against the order of the District Court, South Malabar, dated 6th August 1936, in Appeal Suit No. of 1935 preferred against the decree of the Court of the District Munsif of Calicut in Original Suit No. 398 of 1933.

*K. Kuttikrishna Menon* for appellant.

*D. A. Krishna Variar* for first respondent.

Other respondents were not represented.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR OFFG. C.J.—The legal representative of the first plaintiff is the appellant. In this second appeal the question is raised as regards the court-fee that should have been paid by the appellant on the memorandum of appeal that he presented to the lower Court. As there is a conflict of authority on the question the case has been posted before us for decision at the instance of LAKSHMANA RAO J. before whom the second appeal originally came for hearing.

The facts are these: The plaintiffs sued for recovery of possession of properties from their tenants. The trial Court decreed the suit, but on condition that

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NAIR  
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(1) A.I.R. 1926 Mad. 225.

(2) A.I.B. 1928 Mad. 929.

(3) (1899) I.L.R. 23 Mad. 84.

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they should pay Rs. 8,000 for value of improvements. The plaintiffs appealed against the compensation amount that they were ordered to pay. According to them no compensation should have been decreed against them. They valued the appeal treating it as one for possession ignoring the fact that the subject-matter of the appeal was the value of improvements that they were called upon to pay and not the right to recover possession of the property. The District Judge ordered that court-fee should be paid by the plaintiffs-appellants on the value of improvements. As that court-fee was not paid in time the appeal was rejected.

In second appeal it is contended that the lower Court was wrong in ordering that the appellants should pay court-fee on the value of improvements and reliance is placed on the decision in *Reference Under Court Fees Act, s. 5(1)*. In that case the plaintiff sued for recovery of land from defendants 1 to 3. The contesting defendant (the second defendant) contended that the land was not liable to be surrendered and also claimed compensation for improvements. The District Munsif disallowed the claim for improvements and decreed the surrender of the land. The contesting defendant appealed and paid for court-fee a sum which was the fee payable on the value of the land. The question was whether the value of improvements should also be taken into account for the purpose of levying the court-fee, the subject-matter of the appeal being the same as that in the suit—the question of improvements being raised incidentally. The learned Judges held that the value of the improvements should not be taken into consideration for calculating the court-fee. They held that, as the claim for improvements was not the subject-matter of the suit but was merely

(1) (1899) I.L.R. 23 Mad. 84.

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incidental to the decree for possession and on grounds of convenience, the fee payable by the appellant should be that payable in a suit for possession of land. They also stated in the judgment :

“ We think the proper answer to the reference is that on appeal even where the only question raised is as to the value of the improvements, the appellant should not be called upon to pay any fee other than that payable in a suit for possession of land.”

It is clear that on the facts the present case is different from the decision in *Reference Under Court Fees Act, s. 5 (1)*, inasmuch as the question as regards the right to possession has not been raised in appeal and could not be raised in the present case, and the only question appealed against is as regards the value of improvements. Mr. Kuttikrishna Menon relies on the observation in the judgment we have just quoted that

“ on appeal even where the only question raised is as to the value of the improvements, the appellant should not be called upon to pay any fee other than that payable in a suit for possession of land ”

in support of his argument that he should not be called upon to pay court-fee on the value of improvements. It is clear that the observation of the learned Judges is only *obiter* and it was not necessary for them to have made that observation for the decision of the case before them. This observation was treated as an *obiter dictum* in *In re Paidal Nayar*(2) where the specific question now raised in the present appeal arose for decision. In that case, the plaintiff filed a suit for redemption of a kanam. He obtained a decree for recovery of possession of the property subject to the payment of the kanam amount and the value of improvements. In appeal there was no dispute as to the plaintiff's right to redeem, but he appealed against the value allowed for

(1) (1899) I.L.R. 23 Mad. 84.

(2) A.I.R. 1926 Mad. 225.

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improvements as in the present case. The question was, what was the proper court-fee payable on the memorandum of appeal? It was held on an exhaustive consideration of the authorities that the plaintiff should pay court-fee in proportion to the value of the relief he sought in appeal and that the court-fee payable in the case before them must be determined in accordance with the value of improvements which the appellant sought to avoid. We accept the reasoning adopted by the learned Judges and have nothing to add to it. They have given sufficient reasons to show why the appellants should pay court-fee on the value of improvements when that is the only question raised in the appeal. The decision in *Pathumma Umma v. A. Mohideen*(1) refers to *In re Paidal Nayar*(2) with approval and treats the observation in *Reference Under Court Fees Act, s. 5(3)* as an *obiter dictum*. We agree with the reasoning of the learned Judges in *In re Paidal Nayar*(2) and hold that in a case where in appeal the only question involved relates to compensation for improvements and no question of possession is raised, the appellant should pay court-fee on the value of improvements. The decision of the lower Court is right and this second appeal is dismissed with costs.

We give the appellant one month's time from to-day to pay the proper court-fee to the lower Court as we observe that the appellant had filed a civil revision petition to this Court questioning the order of the lower Court before the expiry of 5th August, which was the ultimate time allowed to him by the lower Court to make the payment. If the court-fee is not paid in time the appeal will be rejected.

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(1) A.I.R. 1928 Mad. 929.

(2) A.I.R. 1926 Mad. 225.

(3) (1899) I.L.R. 23 Mad. 84.

## APPELLATE CIVIL.

Before Mr. Justice Wadsworth.

ALAPATI NARASIMHAM (PLAINTIFF), APPELLANT,

v.

AILOORI BABU RAO (DEAD) AND FOUR OTHERS  
(DEFENDANTS AND NIL), RESPONDENTS.\*

*Indian Evidence Act (I of 1872), sec. 63 (3)—Printed records of the Madras High Court—Secondary evidence, if.*

Under the present practice of the Madras High Court the printed record of the High Court is not a copy made from or compared with the original but a copy of a copy and, unless there is evidence of some comparison with the original, the printed record is, in the absence of consent, not secondary evidence of the original under section 63 (3) of the Evidence Act.

The decision in *Ganapathi Aiyar v. Sakharayappa*(1) distinguished on the ground that it dealt with the practice followed in the printing of the High Court's records prior to 1922.

APPEAL against the decree of the Court of the Subordinate Judge of Bapatla in Appeal Suit No. 52 of 1932 preferred against the decree of the Court of the District Munsif of Bapatla in Original Suit No. 679 of 1928.

V. Govindarajachari for appellant.

B. Somayya for K. Krishnamoorthi for respondents 4 and 5.

Second respondent was not represented.

## JUDGMENT.

WADSWORTH J.—This appeal arises out of a suit in which the only real question was whether the

\* Second Appeal No. 121 of 1934.

(1) A.I.R. 1929 Mad. 187.

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v.  
BABU RAO.  
WADSWORTH J. second defendant was or was not the adopted son of the plaintiff. The plaintiff denied the adoption. In the course of the arguments two documents were exhibited on behalf of the defence, namely, Exhibits XI and XI (a).

Exhibit XI is a copy of a deposition by the plaintiff in a criminal case, forming part of the printed record of the revision proceedings in the High Court. Exhibit XI (a) is a copy taken from that printed copy. In this deposition the plaintiff makes an admission which, if the copy is correct, practically puts an end to his case. He admits that the second defendant was his adopted son. When the plaintiff was in the box, he was asked whether he had made such a statement and he said :

"I did not admit there that second defendant was my son. I said that he was by courtesy my son as he married my wife's brother's daughter."

Evidently when the plaintiff was cross-examined the printed copy of the deposition was not available and was not actually used in cross-examination. The only contention in second appeal which has any basis is the contention that Exhibit XI, the printed copy of the plaintiff's deposition, is not secondary evidence of that deposition in that it is not a copy made from or compared with the original [*vide* section 63 (3) of the Indian Evidence Act]. Both the lower Courts, on the authority of the decision of RAMESAM J. in *Ganapathi Aiyar v. Sakharayappa*(1), have held that printed copies of High Court record are in practice compared with the original deposition at the time when the proofs are corrected and that therefore they are good secondary evidence under

(1) A.I.R. 1929 Mad. 187.

section 63 (3) of the Evidence Act. Both the lower Courts overlooked the fact that in the case just referred to RAMESAM J. was dealing with the procedure followed in the printing of the High Court's records prior to 1922. I have ascertained from the Translation and Printing Department of the High Court that the procedure which formed the basis of this judgment came to an end shortly after the work of printing the High Court records was transferred from the press in the High Court to the main Government Press, and this transfer took place on 4th January 1923. It would appear that for a few months thereafter the checking of proofs with the originals continued. Thereafter it ceased and the present practice which has been going on for many years is to send to the Government Press typed copies of the record from which the printed record is made and the correcting of proofs is done in the Government Press by comparison with the typed copies and not with the original depositions. Therefore it follows that the High Court record under the present procedure is not a copy made from or compared with the original but a copy of a copy and unless there is evidence of some comparison with the original, which is not the usual practice, the inference would be that the printed record is in the absence of consent not good evidence of the original. Exhibit XI was a deposition in a case which came up to the High Court on 22nd April 1924, that is to say, a year and a quarter after the transfer of the printing to the Government Press. The case was actually disposed of in April 1925. It would seem probable therefore that the present procedure was followed and that the printing was done from the typed copy and it is not likely that there would have been a comparison with the original deposition. Both the Courts were wrong

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WADSWORTH J.



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WADSWORTH J. in assuming on the strength of RAMESAM J.'s observations that the practice referred to by him still continued at the time that Exhibit XI was printed. It seems to me to follow that unless the defence is in a position to prove that in fact this record was checked with the original, Exhibits XI and XI (a) were wrongly admitted in evidence.

I have been asked to go into all the evidence in the case and hold under section 167 of the Evidence Act that excluding Exhibits XI and XI (a) there is sufficient evidence to support the finding of the Courts below. It seems to me undesirable to do so in the present case. I do not for a moment wish to state that the evidence apart from Exhibits XI and XI (a) is insufficient to establish the defence case. But what I would observe is that when one takes away a piece of evidence of the importance which Exhibit XI obviously occupies in the defence, one cannot accept the findings of the Courts below on the rest of the evidence for the defence, findings which may have been coloured by inferences from these two documents; and I do not think it is desirable in second appeal to go into the whole of the voluminous record in order to come to a decision on the question of fact without any assistance from the Courts below. Moreover, I think it is also desirable that the defendants should have an opportunity of replacing the important piece of evidence which may have to be excluded on a very technical objection. In this particular case there is some doubt as to the stage at which the objection was taken in the trial Court. The documents were marked in the course of the arguments and the objection must have been taken before the arguments were concluded, for this objection is discussed at length in the trial Court's judgment. But the stamp

on the back of the document Exhibit XI contains the note that the document is marked by consent. This may be merely an error on the part of the clerk who was docketing the various exhibits. On the other hand it may be an indication that the objection to Exhibit XI was not taken at the time when it was actually put into evidence. If so it is open to the trial Court to overrule the objection because of the lateness at which it was made.

In the result, therefore, I allow the appeal and remand the suit to the trial Court for disposal after giving the defendants an opportunity to prove the deposition of the plaintiff contained in Exhibit XI by other records, if available and admissible, and after giving both parties an opportunity to adduce evidence on the questions whether Exhibit XI was or was not marked by consent and whether the objection taken to that document was or was not belated. Should the trial Court come to the conclusion that Exhibit XI is admissible either because the plaintiff consented to its being exhibited or because objection to its admission was belated, this appeal will stand dismissed with costs throughout. In the absence of such a result, the trial Court will dispose of the suit and costs will abide the result.

V.V.G.

## APPELLATE CIVIL.

*Before Mr. Justice Burn and Mr. Justice Stodurt.*

RANI VEERAMMANI (FIRST PLAINTIFF), APPELLANT,

*v.*

RAJAVEERABASAVA CHIKKA ROYAL AND THREE

OTHERS (DEFENDANT AND PLAINTIFFS 2 TO 4),

RESPONDENTS.\*

*Code of Civil Procedure (Act V of 1908), O. XXI, r. 15—Joint decree-holders—Execution application by one of, without disclosing existence of other decree-holders—Validity of—Execution application not complying with requirements of O. XXI, r. 15—Amendment of, so as to remedy defects—Power of Court to allow—Arrangement between joint decree-holders conferring on one of them right to recover amount due under decree—Judgment-debtor's right to object to.*

The omission in an application by one of several decree-holders for execution to mention that there are other decree-holders does not necessarily invalidate the application.

Where an application for execution has not complied with any requirements of rule 15 of Order XXI of the Code of Civil Procedure, the Court when its attention is drawn to the defect subsequently can allow the application to be amended in order to bring it into compliance with the requirements of that rule.

An arrangement between joint decree-holders conferring the right to recover the whole or a portion of the decree amount on one of them is not one to which the judgment-debtor can take a valid objection; he can only request the Court under Order XXI, rule 15, to see that his interests are not in any way jeopardised by payment to one out of the several decree-holders.

*Ghanaya v. Madho Parshad*(1) and *Dharamdeo Rai v. Jwala Prasad*(2) followed.

\* Appeal Against Order No. 194 of 1937.

(1) A.I.R. 1931 Lah. 600.

(2) A.I.R. 1930 All. 188.

APPEAL against the order of the Court of the Subordinate Judge of Chittoor, dated 12th November 1936 and made in Execution Petition No. 22 of 1936 in Original Suit No. 25 of 1930. VEERAMMANI  
v.  
CHIKKA ROYAL.

*B. Sitarama Rao* for *S. V. Venugopalachari* for appellant.

*N. Srinivasa Ayyangar* for *N. C. Vijayaraghavachari* for first respondent.

*A. C. Sampath Ayyangar* and *T. U. Subramania Pillai* for respondents 3 and 4.

Second respondent was not represented.

The JUDGMENT of the Court was delivered by BURN J.—The appellant was the first plaintiff in Original Suit No. 25 of 1930 on the file of the Subordinate Judge of Chittoor. There were four plaintiffs altogether and the decree passed in the suit was in favour of all of them. In Execution Petition No. 22 of 1936, on 10th February 1936 the first plaintiff applied for execution of the decree without stating expressly that she was only one of the four decree-holders. It appears that in a subsequent suit, Original Suit No. 42 of 1933, in the same Court, which was a suit between the first plaintiff, and the second plaintiff in Original Suit No. 25 of 1930, there was a compromise by which those two persons agreed that out of the amount still due under the decree in Original Suit No. 25 of 1930 the first plaintiff, Rani Veerammani Garu, should receive Rs. 3,000 and the balance should be taken by the third plaintiff Rani Mahadevammanni Garu without any further claim by the first two plaintiffs in Original Suit No. 25 of 1930. It was further declared in the decree in Original Suit No. 42 of 1933 that the first plaintiff be entitled to a first charge on the decree in Original Suit No. 25 of 1930 to the extent of Rs. 3,000 with interest thereon and that she be entitled to execute

BURN J.

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v.  
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BURN J.

the said decree in her own name to the said extent. It is recited in the decree that Rani Mahadevammami and Raja Mahadeva Raja Varu, the third and fourth plaintiffs in Original Suit No. 25 of 1930, had recorded their consent to this arrangement in the compromise petition. It is not disputed that this latter recital is correct; when the third and fourth plaintiffs did agree to the first plaintiff taking Rs. 3,000 out of the amount decreed in Original Suit No. 25 of 1930.

It is not known how the Court came to pass the decree in Original Suit No. 42 of 1933 in those terms because it is not possible under the provisions of Order XXI, rule 15, for one of several decree-holders to execute the decree for his or her own benefit. However the decree was passed and it is quite clear that all the joint decree-holders in Original Suit No. 25 of 1930 did consent to that arrangement. It cannot therefore be alleged for a moment that the first plaintiff when she filed Execution Petition No. 22 of 1936 was attempting to perpetrate any fraud upon the Court or upon her fellow decree-holders. The judgment-debtor in Original Suit No. 25 of 1930 raised the objection that the execution petition was liable to be dismissed as it was filed only by one joint decree-holder. Notice was thereupon given to the other decree-holders in Original Suit No. 25 of 1930 and they for some unexplained reason supported the objection raised by the judgment-debtor. The learned Subordinate Judge dismissed the execution petition outright. Mr. Sitarama Rao, who appears for the appellant in this Court, concedes that the execution petition ought to have been filed on behalf of all the decree-holders in Original Suit No. 25 of 1930 but suggests that in the circumstances the lower Court would have been well advised to allow any necessary amendments to be made

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BURN J.

in the execution petition to bring it into accord with the provisions of Order XXI, rule 15. Mr. Sampath Ayyangar, who appears for the third and fourth decree-holders in Original Suit No. 25 of 1930, has no strong objection to raise to such permission being granted at this stage. The learned Advocate for the judgment-debtor however opposes this suggestion. He says in the first place that the appellant, as soon as the defect in the execution petition was brought to her notice, might have filed a fresh application at once in accordance with Order XXI, rule 15, without pursuing the matter to the bitter end in the Subordinate Court and then preferring an appeal to this Court. He points out also that it is possible that by this time more than three years may have elapsed since the dismissal of the last prior execution petition. In that case he says that the judgment-debtor would be deprived of the plea of limitation if amendment of the execution petition were now allowed. We do not think that these considerations should prevent us from saying that the petition should be allowed to be amended now. It has been pointed out by SHADI LAL C.J. in the case of *Ghanaya v. Madho Parshad*(1) that the omission in an application by one of several decree-holders for execution to mention that there are other decree-holders does not necessarily invalidate the application. The learned Chief Justice observes :

“Order XXI, rule 15, provides that any one or more of the joint decree-holders may apply for the execution of the whole of the decree for the benefit of them all; and it is nowhere laid down that the omission on the part of a decree-holder to state in his application the names of all the persons who are interested in the decree is such a defect as would invalidate the execution proceedings.”

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(1) A.I.R. 1931 Lah. 600.

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CHIKKA ROYAL.  
BURN J.

The learned Chief Justice then refers to a case decided by a Division Bench of the Calcutta High Court in which it was held that such an omission does not render the execution proceedings invalid. It is pointed out also in the case of *Dharamdeo Rai v. Jwala Prasad*(1) that

“although under rule 15 of Order XXI no duty has been cast upon the Court receiving the application for execution to have the defects remedied, it does not follow that if any requirements of rule 15 of Order XXI have not been complied with by inadvertence or otherwise, the Court when its attention is drawn to the defect subsequently cannot allow the amendment.”

We agree with the observations of the learned Judges in that case at page 190 where they observe :

“The learned Judge has dismissed the last application on the additional ground that only one of the two decree-holders applied for execution without making it appear on the face of it that it was made for the benefit of the legal representatives of the deceased co-decree-holder. In taking to this course the learned Judge has allowed his mind to be influenced by too technical a consideration which is devoid of all substance and in utter disregard of the ends of substantial justice.”

We think the same remarks apply here. It is quite clear, as we have already said, that the appellant was acting in perfect honesty when she applied for execution of the decree for her own benefit to the extent of Rs. 3,000. That was the arrangement which had been come to between the four decree-holders and it was not an arrangement to which the judgment-debtor could take a valid objection; he could only request the Court under Order XXI, rule 15, to see that his interests were not in any way jeopardised by payment to one out of four decree-holders. This being so, we think that this appeal must be allowed and the order of the learned Subordinate Judge

(1) A.I.R. 1930 All. 188.

dismissing the execution petition set aside. The execution petition must be restored to file and disposed of according to law after allowing the appellant to amend it in order to bring it into compliance with the requirements of Order XXI, rule 15. We think it is right to order that the appellant should pay the costs of all the respondents in the execution petition and in this appeal.

A.S.V.

### APPELLATE CIVIL.

Before Mr. Justice Abdur Rahman.

SOMAVARAPU BALARAMI REDDI (FOURTH  
RESPONDENT), APPELLANT,

v.

THE OFFICIAL RECEIVER, NELLORE (PETITIONER),  
RESPONDENT.\*

*Provincial Insolvency Act (V of 1920), sec. 51 (1)—“Benefit of the execution” in—Meaning of—Execution sale of judgment-debtors’ property after admission of petition to adjudicate him an insolvent—Assets realised by—Right of attaching decree-holder or other decree-holder to retain benefit of execution as against Receiver—Right of attaching decree-holder to retain costs of execution out of money realised.*

Before K, who had obtained a money decree against two persons, could bring their property to sale in execution, an application for their adjudication was presented which was admitted shortly after. K nevertheless proceeded with his application for execution. Before the property was sold and money deposited in Court some other creditors who had also secured decrees against those judgment-debtors applied for execution and rateable distribution. In spite of the pendency of the insolvency petition, the property was sold and

\* Appeal Against Order No. 465 of 1936.

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RECEIVER,  
NELLORE.

K and the other decree-holders drew their proportionate shares out of the sale-proceeds from the executing Court. An order of adjudication was passed against the judgment-debtors and thereupon the Official Receiver applied for refund of the money drawn by K and the other decree-holders. The Court below made an order allowing that petition, but while it ordered the other decree-holders to refund the whole of the money drawn by them, it permitted K to retain his costs out of the money realised by him. One of the former decree-holders appealed, contending that no distinction ought to have been made between K, the attaching decree-holder at whose instance the property was sold in execution, and the other decree-holders who were held entitled to rateable distribution.

*Held* that as the assets were realised in the course of the execution by sale not before but after the date of the admission of the insolvency petition, no person, whether he was an attaching creditor or other decree-holder, was entitled to derive the benefit of the execution against the Receiver and that the appellant could not, therefore, claim to retain any benefit for himself out of the money which he had realised in his execution.

No distinction can be made between an attaching creditor and other decree-holders so far as section 51 of the Provincial Insolvency Act is concerned.

Observations in *The Official Receiver of Tanjore v. Venkatarama Iyer*(1) referred to.

*Swaminatha Ayyar v. Official Receiver South Malabar*(2) dissented from in regard to the interpretation of the word "benefit" in section 51 of the Provincial Insolvency Act.

APPEAL against the order of the District Court of Nellore, dated 9th July 1936 and made in Interlocutory Application No. 297 of 1934 in Insolvency Petition No. 67 of 1933.

K. Sankara Narayanan for U. Ramachandran for appellant.

K. Kuppuswami for respondent.

*Cur. adv. vult.*

(1) (1921) 42 M.L.J. 361.

(2) (1933) I.L.R. 57 Mad. 330.

# JUDGMENT.

ABDUR RAHMAN J.—This appeal raises a question of some importance. It relates to the interpretation of the word "benefit" occurring in section 51 (1) of the Provincial Insolvency Act. The facts which have led to this appeal are that one Konjeti Seshayya filed a suit (Original Suit No. 65 of 1931) for the recovery of money against Duvvur Rami Reddi and Subrami Reddi. This was decreed on 7th October 1932: but before the decree-holder could bring his judgment-debtors' property to sale in execution, an application for their adjudication was presented. This was admitted shortly after. The decree-holder nevertheless proceeded with his application for execution and brought the judgment-debtors' property to sale. Before the property was sold and money deposited in Court some other creditors who had also secured decrees against these judgment-debtors applied for execution and rateable distribution under section 73, Civil Procedure Code. In spite of the pendency of the insolvency petition, the property was sold and the attaching creditor and the other decree-holders succeeded in drawing their proportionate shares out of the sale-proceeds of their judgment-debtors' property from the executing Court. After an order of adjudication was passed against these judgment-debtors, the Official Receiver applied for refund of the money drawn by the attaching creditors and the other decree-holders. This petition was allowed by the learned District Judge who, following a Madras case, permitted the attaching creditor to retain his costs out of the money realised by him. The same treatment was not accorded to the other decree-holders and they were ordered to refund the whole of the money drawn by them. One of these decree-holders

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has appealed and it has been contended on his behalf that it was wrong for the lower Court to draw a distinction between the attaching decree-holder at whose instance the property was sold in execution and the other decree-holders who were held entitled to rateable distribution. An attempt was made to support this contention by certain observations made in *The Official Receiver of Tanjore v. Venkatrama Iyer*(1). The facts have not been fully given in the report of that case but a distinction appears to have been attempted to be drawn on behalf of the appellant between the assets realised by the attaching creditor and those which were distributed amongst the other decree-holders rateably. It was claimed on behalf of the Official Receiver that the attaching creditor alone was entitled to retain the money realised by him under section 51 of the Provincial Insolvency Act and the other decree-holders who shared the balance of the sale-proceeds rateably were not entitled to do the same. This contention was repelled by the learned Officiating Chief Justice in the following words :

"It is contended that where rateable distribution has been ordered under section 73 of the Code of Civil Procedure the exception to section 51 (1) of the Provincial Insolvency Act only applies to the amount credited in favour of the attaching decree-holder and not to the amounts rateably distributed to the other decree-holders under the section. No authority is quoted and we can find nothing in the wording of section 51 to support such a view ; nor is any reason suggested for such a differentiation."

This would show that the point which the learned Judges were called upon to decide in that case was entirely different from what has to be decided now. The observation that there was nothing in the words of section 51 of the Provincial Insolvency Act which

(1) (1921) 42 M.L.J. 361.

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would entitle a Court to differentiate between an attaching creditor and other decree-holders is relevant, but it must be admitted that it was made in that case with a different object.

The main ground of attack on behalf of the appellant relates to the interpretation of the words "the benefit of the execution" used in section 51 (1) of the Provincial Insolvency Act. The section reads as follows :

"Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition."

It has been contended that the words "the benefit of the execution" should be so construed as to cover "the net realisation in execution after paying the costs." It is not denied in this case that the assets were realised in the course of the execution by sale not before but after the date of the admission of the petition for insolvency. It would therefore follow that in these circumstances no person, whether he is an attaching creditor or other decree-holder, can be held entitled to derive the benefit of the execution against the Receiver. Would it be legitimate to contend then that a decree-holder should be entitled to retain the costs out of the money realised by him in the course of the execution by sale held after the date of the admission of the petition? The words of the section are, in my opinion, quite unambiguous and the only answer to this question must therefore be in the negative. It cannot be denied that, if permitted to do so, the creditor would be receiving the benefit of the execution to the extent of the costs incurred by and awarded to him. The learned Counsel for the appellant has placed his reliance

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on *Swaminatha Ayyar v. Official Receiver, South Malabar*(1) where a learned Judge of this Court when construing section 51 of the Act observed as follows :

"I agree that section 51 does vest the property which has been sold under such circumstances in the Official Receiver but it appears to me a reasonable interpretation of the word 'benefit' to hold that it is the net realisation in execution after paying the costs."

No reasons were given by the learned Judge for arriving at this conclusion and the whole scheme of the Act appears to be opposed to this interpretation. Would not a decree-holder by realising his costs out of the proceeds of the sale, which have legally vested in the Receiver, derive a benefit for himself at the expense of other creditors? The interpretation may have been considered to be justifiable in view of the provision contained in section 73 of the Code of Civil Procedure according to which the proceeds of sale have to be applied first in defraying the expenses of the sale before they are distributed amongst various decree-holders. But in view of the distinct provision in the Provincial Insolvency Act, an Act which is self-contained, a consideration of the provisions contained in any other statute would be wholly irrelevant and out of place. Although the case of *Swaminatha Ayyar v. Official Receiver, South Malabar*(1) was decided in connection with a claim by an attaching creditor against the Official Receiver, no distinction can be made between an attaching creditor and other decree-holders so far as section 51 of the Provincial Insolvency Act is concerned. The observations of the learned Officiating Chief Justice in *The Official Receiver of Tanjore v. Venkatrama Iyer*(2), although made in another connection, are apposite to this case. I

(1) (1933) I.L.R. 57 Mad. 330.

(2) (1921) 42 M.L.J. 361.

would, in the absence of any reasons given by the learned Judge for his opinion in *Swaminatha Ayyar v. Official Receiver, South Malabar*(1) and with great deference, decline to follow the interpretation placed by him on the word "benefit" in section 51 of the Act.

For the above reasons I would hold that the appellant cannot claim to retain any benefit for himself out of the money which he had realised in his execution. This appeal therefore fails and is dismissed with costs.

A.S.V.

## APPELLATE CIVIL.

*Before Mr. Justice Varadachariar.*

MARUDAMUTHU MUDALIAR (PETITIONER—FIRST  
DEFENDANT), PETITIONER,

v.

N. K. VENKATRAMA AYYAR (DECREE-HOLDER),  
RESPONDENT.\*

*Code of Civil Procedure (Act V of 1908), O. XLIII, r. 1 (j)—  
Order refusing to set aside sale—Order rejecting application  
under O. XXI, r. 90, of the Code for failure to furnish  
security if an—Effect of proviso added to O. XXI, r. 90, by  
Madras High Court.*

A Court to which an application under Order XXI, rule 90, Civil Procedure Code, was made, acting under the proviso added in the Madras Presidency to that rule, ordered the applicant to deposit the sale amount in cash. He tendered a draft bond offering immovable property as security. The Court declined to accept it and accordingly rejected the petition.

(1) (1933) I.L.R. 57 Mad. 330.

\* Civil Revision Petition No. 1447 of 1938.

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*Held* that the order rejecting the petition was an order "refusing to set aside a sale" within the meaning of sub-clause (j) of Order XLIII, rule 1, Civil Procedure Code, and that an appeal lay against that order under the said sub-clause.

Sub-clause (j) of Order XLIII, rule 1, merely refers to an order "refusing to set aside a sale." If a person applies to have a sale set aside, a rejection of his petition is none the less a refusal to set aside the sale because the Court passed that order even before admitting the petition.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam, dated 20th July 1938 and made in Appeal No. 23 of 1938 preferred against the order of the Court of the District Munsif of Kumbakonam, dated 10th February 1938 and made in Execution Application No. 64 of 1938 in Original Suit No. 43 of 1937.

*T. K. Subramania Pillai* for petitioner.

*R. Raja gopala Ayyangar* for respondent.

#### JUDGMENT.

VARADA-  
CHARIAR J.

VARADACHARIAR J.—This revision petition raises a question of some importance turning on the effect of the proviso recently added in this Presidency to Order XXI, rule 90, Civil Procedure Code. Under that proviso, the Court to which an application under rule 90 is presented may "before admitting the application call upon the applicant to furnish security." In the present case, the Court ordered the applicant to deposit the sale amount in cash. He tendered a draft bond offering immovable property as security. The Court declined to accept it and accordingly rejected the petition. Against this order the petitioner preferred an appeal to the lower appellate Court and that Court has dismissed the appeal on the ground that the case does not fall within the terms of Order XLIII, rule 1

(j), which gives a right of appeal against an order "refusing to set aside a sale." The learned Judge was of opinion that an order contemplated by this sub-rule was one passed after the Court had entertained the application and not one whereby the Court declined to entertain the application.

There can be little doubt that at the time when the sub-clauses of Order XLIII, rule 1, were framed, this distinction between an order *on* the petition and an order declining to entertain the petition could not have been thought of, so far as applications under Order XXI, rule 90, are concerned. A distinction was recognized by the Code in the case of plaints; and different provisions were made for appeals against adjudications on the merits and appeals against orders rejecting the plaints. But as the scheme of the Code as it originally stood did not contemplate any such differentiation in respect of an application under rule 90 of Order XXI, it is unreasonable to expect any recognition of that distinction in the rules relating to appeals therefrom. When the proviso now in question was recently added to rule 90, the attention of the framers of the rule does not appear to have been specifically directed to the question of appealability. There has indeed been some discussion as to the legality of the proviso itself; but this Court has so far declined to hold the new rule to be *ultra vires*. While I follow that ruling, I do not wish to deprive the petitioner of whatever benefit he may get, even if it be a mere matter of accident, out of the language of sub-clause (j) of Order XLIII, rule 1, as it stands.

The position so far as the present case is concerned is different from what may arise in cases where a right of appeal will be available only by treating any disposal as amounting to a "decree" because in that case the

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Court has to consider, in view of the definition of the word "decree", whether there has been an *adjudication* determining the rights of the parties. An order merely rejecting a plaint will thus not *prima facie* fall within the definition of "decree." But sub-clause (j) of Order XLIII, rule 1, merely refers to an order "refusing to set aside a sale." The learned Judge thinks that such an order of refusal *prima facie* implies that the petition had been admitted. As I have already pointed out, this question could never have arisen under the scheme of the Code as it formerly stood. I cannot therefore call in aid any argument founded upon the probable intention of the Legislature. I have only to see whether the etymological meaning of the words found in the sub-clause will or will not apply to the case.

If a person applies to have a sale set aside, I do not see how a rejection of his petition is any the less a refusal to set aside the sale because the Court passed that order even before admitting the petition. After all, on an appeal against such an order, the appellate Court can only consider the reasonableness or otherwise of the order refusing to admit the petition; and I prefer not to deprive the petitioner of the right to seek the opinion of the appellate Court in the matter, unless it is possible to hold that the language of Order XLIII, rule 1 (j), is clearly incapable of being construed as comprehending the order of rejection.

The lower appellate Court's order is accordingly set aside and the learned Subordinate Judge is directed to deal with the appeal on the merits. But the question is certainly novel and not free from difficulty; I accordingly make no order as to costs.

A.S.V.

## APPELLATE CRIMINAL.

Before Mr. Justice Pandrang Row.

IN RE G. J. JOSEPH (ACCUSED), PETITIONER.\*

*Indian Penal Code (Act XLV of 1860), sec. 406—Misappropriation by Head Clerk of fines received from parties—Fits of insanity during that period—Absence of dishonest intention—Conviction for criminal breach of trust—Legality of.*

The petitioner, the Head Clerk in a Sub-Magistrate's Court, was convicted of criminal breach of trust under section 406, Indian Penal Code, in respect of amounts which were fines received by the petitioner as Head Clerk from parties. It was admitted that the petitioner received the amounts in question and spent them for his private purposes. The evidence, however, showed that during the period when the misappropriation took place, the petitioner was not in a normal state of mind and that he was subject to fits of insanity which rendered him unable to understand that what he was doing was wrongful at the time and therefore to form the criminal intention of causing wrongful gain or wrongful loss.

Held that, even if the case was not really covered by section 84, Indian Penal Code, the evidence adduced by the petitioner excluded the existence of a dishonest intention which is an essential ingredient of the offence of criminal breach of trust, that the misappropriation could not therefore be regarded as criminal and that the conviction of the petitioner was illegal.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Trichinopoly Division in Criminal Appeal No. 10 of 1938 preferred against the judgment of the Court of the Subdivisional Magistrate, Musiri, in Calendar Case No. 67 of 1937.

K. S. Jayarama Ayyar for petitioner.

Public Prosecutor (V. L. Ethiraj) for the Crown.

\* Criminal Revision Case No. 666 of 1938 (Criminal Revision Petition No. 634 of 1938).

1939,  
January 11.

## ORDER.

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PANDRANG ROW J.—This is a petition to revise the judgment of the Sessions Judge, Trichinopoly, dated 20th April 1938, dismissing the appeal preferred by the petitioner from his conviction under section 406, Indian Penal Code, by the Subdivisional Magistrate, Musiri. The petitioner was the Head Clerk of the Sub-Magistrate's Court at Kulitalai and the charge against him was that he committed criminal breach of trust in respect of an aggregate sum of Rs. 112 made up of four separate items ranging in date from 6th April to 4th May 1937. The amounts in question were fines received by the petitioner as Head Clerk from parties and the receipt of these sums is not denied. It is also stated that ultimately the whole of the amount was made good by the petitioner's wife and another. The principal defence in the case was that there was no criminal misappropriation, stress being laid on the adjective "criminal." It is unnecessary to deal at length with the contention that there was no misappropriation at all because the facts established are sufficient to support the inference that these monies must have been spent for the private purposes of the petitioner in order to gratify his own unregulated desires. The substance of the defence was that the petitioner was practically insane during the period in question; and that he was generally subject to fits of insanity during summer months when he behaved almost like a mad man, being violent in his conduct, disrespectful and threatening to his superiors and so on. The evidence as regards the petitioner's conduct during the summer in question establishes beyond doubt that he was certainly not in a normal state of mind. So far is conceded on behalf of the Crown. The question is whether the petitioner's state of mind was such that it amounted to unsoundness of mind of such a degree

that he was incapable of knowing the nature of his acts or that he was doing what was either wrong or contrary to law, or, in other words, whether the general exception contained in section 84, Indian Penal Code, applies to the petitioner. This question was considered by both the Courts below and they were of opinion that though the petitioner was, so to say, not in a normal state of mind and was behaving like a mad man, nevertheless his case would not be covered by section 84, Indian Penal Code. The Courts below, however, failed to consider another aspect of the case, namely, whether, even if section 84 did not cover the case, the state of mind in which the petitioner was did not exclude the existence of a dishonest intention which is an essential ingredient of the offence of criminal breach of trust. Evidence is certainly relevant for the purpose of ascertaining whether the petitioner's state of mind rendered it possible or likely for him to have entertained a dishonest intention when he dealt with the monies entrusted to him. As was observed by Lord BIRKENHEAD L.C. in *Director of Public Prosecutions v. Beard*(1), where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. The case was no doubt one where drunkenness was put forward as a fact which negated the existence of a criminal intention. But any other mental state can also be put forward with equal relevancy for the purpose of negating the existence of the criminal intention which is an essential ingredient of the crime that is charged against the person in question. No doubt section 86, Indian Penal Code, appears to speak

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in a different way from the law as laid down by the House of Lords in *Director of Public Prosecutions v. Beard*(1). But that is so only so far as knowledge goes and does not include intention. That section provides that where a particular knowledge or intent is a necessary ingredient of an offence a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had, had he been not intoxicated, unless he was intoxicated as the result of something being administered to him against his will or without his knowledge. It will thus be seen that the latter part of the section carefully omits the word "intention" and there would be no justification for attributing to the person the same intent which he would have had if he had not been intoxicated, though the same knowledge could be imported to him under the section. This section, moreover, applies only to cases of intoxication and does not cover a case like the present where what is alleged is an inherent defect or infirmity of mind which is of greater significance because such infirmity or disease of mind is more likely to prevent the formation of that intention which is required by the law to be established as a part of the offence charged. In this case the evidence is so full and so cogent that I find it impossible to resist the conclusion that the petitioner must have been really unable to form the criminal intention that is attributed to him by the prosecution, namely, of causing wrongful loss or wrongful gain. He was in such a mental condition that he could not have understood that what he was doing was wrongful at the time. There is indeed a good deal to be said in support of the view that the case is really covered by section 84, Indian Penal Code. Unsoundness of mind need not necessarily make a

(1) [1920] A.C. 479, 499.

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person incapable of understanding the nature of all his acts. There are some forms of unsoundness of mind which seem to affect only particular acts. In other words, unsoundness of mind may be such that in respect of certain acts the person committing them is incapable of knowing the nature of what he is doing while in the case of other acts he might have knowledge of their character. It cannot therefore be said that because the man was allowed to continue in office while he was in this state of mind, his mind must have been sufficiently sound to enable him to know that what he was doing was wrong or contrary to law. The fact seems to be that the petitioner in his unsound state of mind thought that he was in a way a representative of the Crown to whom the money belonged and that he could do what he liked with it for the purpose of making presents to children and dressing himself up in velvet and so on, the period of the alleged misappropriation having synchronised with the celebration of the Coronation. It is unfortunate that no alienist was asked in the present case to give expert evidence as to the inferences that could be drawn from the facts and circumstances elicited in the evidence about the petitioner's state of mind. But with the evidence as it stands I have little doubt that criminal intention has not only been not proved but is practically excluded by such evidence as has been adduced regarding the petitioner's state of mind during the period when the misappropriation took place. The misappropriation cannot therefore be regarded as criminal and the conviction of the petitioner and the order requiring him to give security for his good behaviour are set aside and he is acquitted.

V.V.C.

## INCOME-TAX REFERENCE.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice Madhavan Nair, Mr. Justice Varadachariar, Mr. Justice Venkataramana Rao and Mr. Justice Abdur Rahman.*

1938,  
November 10.

VOORA SREERAMULU CHETTY, PETITIONER,

v.

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

*Indian Income-tax Act (XI of 1922), sec. 33—Order under, prejudicial to assessee within meaning of sec. 66 (2) of Act—Test of—Order dismissing assessee's application for revision of a prejudicial order, if—Question of law arising out of that order—Reference to High Court in case of—Competency of—Question of law not set out in that order—Dismissal of assessee's petition under sec. 33 without statement of reasons—Effect—Sec. 66 (2) proviso—Effect of.*

An order which dismisses an application by an assessee asking for the revision of a prejudicial order must be deemed to be an order under section 33 of the Indian Income-tax Act of 1922 prejudicial to the assessee within the meaning of section 66 (2) of that Act and when a question of law arises out of that order a reference lies to the High Court. For the Commissioner's order to come within the purview of section 66 (2) it is not necessary that it must be more prejudicial than the order complained of.

*Venkatachalam v. Commissioner of Income-tax, Madras*(1) overruled.

The effect of the first proviso to section 66 (2) is that a reference shall lie only when a question of law arises out of the order passed under section 33 but if the matter is one which relates to an order under section 31 or section 32 a question of law which arose out of the previous order alone cannot be referred.

Whether a question of law arises on an order of the Commissioner passed on an application under section 33 will

\* Original Petition No. 146 of 1938.

(1) (1934) I.L.R. 58 Mad. 367; 8 I.T.C. 74, 76.

depend on the circumstances of the particular case, but because a question of law is not set out in an order it does not necessarily follow that a question of law does not arise.

When the Commissioner receives a petition filed under section 33 it is his duty to consider it and pass an order on it. He cannot render the provisions of section 66 (2) nugatory by dismissing the assessee's petition without stating his reasons.

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

*K. Bhimasankaran* for assessee.—*Venkatachalam v. Commissioner of Income-tax, Madras*(1) was, it is submitted, wrongly decided. Section 66 (2) of the Indian Income-tax Act of 1922 speaks merely of an order "otherwise prejudicial to the assessee." That does not mean that the order complained of must be prejudicial to him for the first time, that is to say, more prejudicial than the order sought to be revised under section 33. If it had been intended to confine the assessee's remedy to such an order, the intention could easily have been made clearer. The words in question in section 66 (2) must be given their natural meaning and there is nothing in the context to operate to vary such meaning. The same words in section 33 must also be interpreted in the same way. There is nothing even in that section to affect the natural meaning of the words. When power is vested by statute in a public authority to do a thing for the benefit of a certain class of persons, the word "may" must be interpreted as imposing a duty upon that authority to exercise that power. The Commissioner of Income-tax moved under section 33 is bound, at any rate after calling for the records of the case, to hear the assessee, when he is disposed to pass an order prejudicial to the assessee.

*M. Patanjali Sastri* for Commissioner of Income-tax.—Sections 30 and 32 of the Act dealing with appeals give the assessee a statutory right of appeal. Section 33-A also provides for appeals to a Board of Referees. These sections deal with statutory right of appeals. In between these provisions occurs the provision for a reference. An order under section 33 prejudicial to an assessee is not merely an order dismissing an application by an assessee.

(1) (1934) I.L.R. 58 Mad. 367; 8 I.T.C. 74, 76.

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[THE CHIEF JUSTICE.—Suppose the Commissioner reduces the amount assessed by the Income-tax Officer by a half, will his order be one prejudicial to the assessee?]

No. The phrase “enhancing an assessment or otherwise prejudicial to the assessee” qualifies orders under section 33. It is not every order under section 33 that gives rise to a right of reference. This is an important consideration which must be taken into account in construing section 66 (2). A statute must be construed in such a way as to give a meaning to every word used in it. In construing section 66 (2) effect must be given to the consideration that the words “enhancing . . . prejudicial to the assessee” are made to qualify only orders under section 33. Section 66 (2) itself draws a sharp contrast between orders under sections 31, 32 and 33-A and orders under section 33. [Reference was made to section 33.]

[THE CHIEF JUSTICE.—Suppose an assessee makes an application to the Commissioner to interfere with an order which is not appealable, can the Commissioner dismiss the application without hearing the applicant?]

Yes. An assessee has a statutory right of appeal, but he has no statutory right of revision. The true scope and object of section 33 is merely to enable the Commissioner to set right the order of the lower authorities in appropriate cases. The grounds on which he can interfere are not stated in that section or anywhere else.

[THE CHIEF JUSTICE.—If a person makes an application to a Court for revision of an order which is not appealable, is not the Court bound to hear the applicant?]

No. If the assessee is held to have a right to apply in revision then the provisions conferring a right of appeal would be useless.

[THE CHIEF JUSTICE.—The proviso to section 33 says that the applicant must be heard and that otherwise no order can be made to his prejudice?]

If the assessee has a statutory right to apply in revision, sections 30, 32 and 50-A giving a right of appeal would be redundant because the object of an appeal may be achieved by a revision application.

[THE CHIEF JUSTICE.—Under section 33 the Commissioner is entitled to make any order he thinks fit. What is the practice in the case of an application in revision?]

If the Commissioner finds on the face of the application that there is no ground for interference he dismisses the application straightaway without even calling for the records.

[VENKATARAMANA RAO J.—In a case in which the Commissioner calls for the records, considers the facts of the case and then passes an order dismissing the application, is not the order one prejudicial to the assessee?]

The right of reference ought not to be made to depend upon the circumstance whether or not the Commissioner discusses the points arising in the case and makes an order dismissing the application.

[THE CHIEF JUSTICE.—Will it not depend upon the order passed in the particular case? If in his order the Commissioner discusses a question of law and dismisses the application, then a question of law arises for reference.]

The object of the first proviso to section 66 (2) is to prevent the assessee preferring a revision to the Commissioner under section 33 and asking for a reference on points of law considered by the order of the Commissioner, which points he could have raised in appeal to the Assistant Commissioner or Commissioner. An order dismissing an application in revision is not an order prejudicial to the assessee within the meaning of the proviso to section 33. The expression “order prejudicial to the assessee” in section 66 (2) must be understood in the same sense as in the proviso to section 33. Section 33 does not give a right of appeal to the assessee. It only confers certain powers on the Commissioner. Enhancement of assessment is not the only possible case of prejudice to the assessee. Cases of the Commissioner’s order being prejudicial to the assessee even though there has been no enhancement of assessment can easily be conceived of, e.g., penalty, registration of firm, refund. The words “hearing him, etc.” in the proviso to section 33 clearly imply that the assessee’s position is altered to something worse by the order the Commissioner is likely to pass. Mere confirmation of the order sought to be revised does not place the assessee in a worse position. “Prejudicial to the assessee” in the proviso to section 33 and in section 66 (2) must be understood in the restricted sense given in *Venkatachalam v. Commissioner of Income-tax, Madras* (1). That case

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has been followed in *Central India Spinning, Weaving & Mfg. Co., Ltd. v. The Commissioner of Income-tax, C. & U. Provinces*(1).

[ABDUR RAHMAN J.—The judgment in that case gives no reason. The learned Judges merely follow the Madras view.]

[VARADACHARIAR J.—It does not appear whether in that case the Commissioner merely declined to interfere or discussed any question of law in his order.]

The first proviso to section 66 (2) is designed to prevent an assessee from contending that he is entitled to ask for a reference on a question of law arising under the Commissioner's order under section 33 even though the same question of law arose out of the Assistant Commissioner's order and the assessee did not ask for a reference within the sixty days allowed to him.

[THE CHIEF JUSTICE.—Your argument is that the order under section 33 must be an order which places the assessee in a worse position than he was under the orders sought to be revised.]

That is made clear by the language of section 66 (2) itself.

[THE CHIEF JUSTICE.—The proviso has reference only to an order under section 31 or 32. If the order is not one under either of these sections the proviso does not apply.]

The words "prejudicial to the assessee" are used only with reference to orders under section 33. They are not used with reference to orders under section 31 or section 32.

*K. Bhimasankaran* in reply.—The Commissioner may decline to call for the records. Under section 33 (1) he is not obliged to call for the records. But if he entertains the application and calls for the records his order comes under section 66 (2) and a reference lies.

*Cur. adv. vult.*

### JUDGMENT.

LEACH C.J.—The question which has been referred is whether the case of *Venkatachalam v.*

*Commissioner of Income-tax, Madras*(1) was rightly decided. The answer depends on the meaning to be given to the word "prejudicial" in section 66 (2) of the Indian Income-tax Act. Section 66 (2) states that within sixty days of the date on which he is served with notice of an order under section 33 enhancing an assessment or otherwise prejudicial to him the assessee may require the Commissioner of Income-tax to refer to the High Court any question of law arising out of the order. Section 33 authorizes the Commissioner of Income-tax of his own motion to call for the record of a proceeding under the Act which has been taken by an authority subordinate to him or by himself when exercising the power of an Assistant Commissioner under sub-section 4 of section 5, and having called for the record he is empowered, subject to the provisions of the Act, to pass such order as he thinks fit, but he may not pass an order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard. The section makes no mention of the right of an assessee to move the Commissioner to take action but as the Commissioner may take action of his own motion the assessee must have the right of calling his attention to a prejudicial order and of asking that action be taken. This in fact frequently happens.

In *Venkatachalam's* case(1) the petitioner applied to the Income-tax Officer for a refund of income-tax under section 48 of the Act, but his application was refused. The petitioner then filed an application asking the Commissioner to revise the order of the Income-tax Officer under section 33. Having heard the application the Commissioner refused.

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(1) (1934) I.L.R. 58 Mad. 267; 3 I.T.C. 74.

(1) (1936) 10 I.T.C. 131, 135; A.I.R. 1937 Nag. 154.

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to interfere. The petitioner then required the Commissioner to refer the matter to the High Court under section 66 (2) of the Act as involving a question of law. The Commissioner dismissed the application on the ground that it was incompetent. His reason was that his order under section 33 was not one enhancing the assessment or otherwise prejudicial to the applicant. In accepting this interpretation BEASLEY C.J. observed :

"What section 33 clearly contemplates is an order made by the Commissioner which alters the position of an assessee or an applicant to that person's prejudice. In this particular case, his position had been prejudiced already by the refusal of the Income-tax Officer to grant him the refund which he required. The Commissioner's order did no more than leave him in that position and, it is quite clear to us, was not an order which was prejudicial to the petitioner in the sense intended, namely, that his position at that time, that is, the date of the Commissioner's order, was altered by that order to one of prejudice to him."

With these observations the other Judges (RAMESAM and KING JJ.) agreed.

With great respect I am unable to accept this interpretation. It means that the Commissioner's order must be more prejudicial than the order complained of before it can come within the purview of section 66 (2). The section does not say so. All that it contemplates is a prejudicial order. It seems to me that if an order of the Income-tax Officer is prejudicial an order which confirms it or rejects an application asking that it be revised is also prejudicial. It could not be said that a decree of an appellate Court dismissing an appeal from a Court of first instance is not prejudicial to the appellant. It is just as prejudicial as the original decree. There is no difference in this respect between the dismissal of an appeal and the

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dismissal of an application for revision when the law permits such an application to be made.

In expressing this opinion I have not lost sight of the first proviso to section 66 (2), which reads as follows :

"Provided that a reference shall lie from an order under section 33 only on a question of law arising out of that order itself, and not on a question of law arising out of a previous order under section 31 or section 32 revised by the order under section 33."

Section 66 (2) also applies to orders made under sections 31 and 32. Mr. Patanjali Sastri has suggested that the proviso only relates to orders under sections 31 and 32 revised under section 33. In other words he asks the Court to read the second part of the proviso as governing the first part. I do not read it in that way. I consider the effect of the proviso to be this. A reference shall lie only when a question of law arises out of the order passed under section 33 but if the matter is one which relates to an order under section 31 or section 32 a question of law which arose out of the previous order alone cannot be referred.

Reading the first part of the proviso as standing alone it does not mean that the Commissioner can render the provisions of sub-section 2 nugatory by dismissing the assessee's petition without stating his reasons. When the Commissioner receives a petition filed under section 33 it is his duty to consider it and pass an order on it. If the petition relates to an order of the Income-tax Officer the consideration of the petition involves the consideration of the Income-tax Officer's order and if the Commissioner dismisses the petition without mentioning the question of law, supposing one arises on the order complained of, the Commissioner's order must be read with the order of

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the Income-tax Officer. Whether a question of law arises on an order of the Commissioner passed on an application under section 33 will depend on the circumstances of the particular case, but because a question of law is not set out in an order it does not necessarily follow that a question of law does not arise. The Commissioner cannot, of course, be required to receive a frivolous or belated petition.

Our attention has been drawn to the case of *Central India Spinning, Weaving & Mfg. Co., Ltd. v. The Commissioner of Income-tax, C. & U. Provinces*(1) in which the Nagpur High Court followed the decision in *Venkatachalam's case*(2) and considered the first proviso to section 66 (2). The Court accepted *Venkatachalam's case*(2) without discussing it and therefore its judgment does not carry the matter further. With regard to the proviso the Court considered that its true intent is that a question of law that is common to both the Assistant Commissioner's and the Commissioner's order is not a proper subject-matter of a reference unless the question of law is raised on a reference from the decision of the Assistant Commissioner. This question does not arise in the present case and we are not called upon to discuss it.

The answer that I would give to the question referred is that *Venkatachalam v. Commissioner of Income-tax, Madras*(2) was wrongly decided and that an order which dismisses an application asking for the revision of a prejudicial order must be deemed to be prejudicial within the meaning of section 66 (2).

The costs of this reference will be made costs in the case out of which it arises and we fix the amount at Rs. 150.

(1) (1936) 10 I.T.C. 131; A.I.R. 1937 Nag. 154.

(2) (1934) I.L.R. 78 Mad. 367; 8 I.T.C. 74, 76.

MADHAVAN NAIR J.—I agree.

VARADACHARIAR J.—I agree.

VENKATARAMANA RAO J.—I agree.

ABDUR RAHMAN J.—I concur and wish to add nothing more.

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### APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Wadsworth and Mr. Justice Krishnaswami Ayyangar.

PANANGIPALLI SURYANARAYANACHARYULU (FIRST DEFENDANT), PETITIONER,

1938,  
November 20.

v.

RAVI NARASIMHASWAMI AND FOURTEEN OTHERS (PLAINTIFF AND DEFENDANTS 2 TO 14 AND 16), RESPONDENTS.\*

*Court Fees Act (VII of 1870), sec. 7, cls. (v) and (x) (c)—Lease of immovable property executed and registered—Suit by lessee for specific performance of the contract of lease, for possession and for mesne profits—Strangers in possession of property sued for—Proper court-fee to be paid in suit.*

In 1913 A granted a lease of the suit property for twenty years to respondents 2 and 3 and to the fathers of respondents 4 to 6. A died some time before 1929 whereupon the suit property devolved on the petitioner, his son. In November 1929 the petitioner granted a lease of the same property to the first respondent for twenty years, the period to commence from June 1935. A deed of lease was drawn up, duly executed and registered. The first respondent sued for specific performance of the contract of lease entered into with the petitioner, for possession of the property and for the recovery of mesne profits, averring in his plaint that the petitioner had in collusion with respondents 2 to 15 and another put them into possession of the property and had refused his demand for possession. The suit property was found to be worth not less than Rs. 8,000.

\* Civil Revision Petition No. 1253 of 1936.



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Held that for purposes of jurisdiction and of court-fee, the suit must be regarded as one for possession and not as one for specific performance, and that as the property was worth not less than Rs. 8,000 the suit could not be tried in the Court of the District Munsif.

The lease had been executed long before suit and according to the first respondent he was compelled to bring the action because the petitioner had parted with possession to the other respondents. The suit was, therefore, one for possession against strangers to the contract, who according to the plaintiff were unlawfully withholding possession from him.

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 Razole, dated 7th August 1936 and made in Original Suit No. 200 of 1935.

V. Subrahmanyam for petitioner.—The point that has to be decided in this case is whether the suit in question falls under clause (x) (c) or clause (v) of section 7 of the Court Fees Act. The father of the petitioner leased the suit properties in 1913 for a period of twenty years to the second and third respondents and to the fathers of respondents 4, 5 and 6. He died some time before 1929 and the petitioner succeeded to his properties. On 2nd November 1929 the petitioner gave a lease of the properties to the first respondent for twenty years and the lease was to commence from 2nd June 1935. The lease deed was executed and registered. The first respondent later on filed a suit in the Court of the District Munsif, Razole, praying for specific performance of the contract of lease entered into with the petitioner, for possession of the properties and for the recovery of mesne profits. Treating the suit as one for specific performance of a contract of lease he paid court-fee on the amount of one year's rent, under section 7, clause (x) (c), of the Court Fees Act. The District Munsif upheld that contention and held that he had jurisdiction to try the suit relying on the decision in *Sundara Ramanujam v. Sivalingam*(1). The valuation stated by the plaintiff is wrong. The suit is not really

(1) (1923) I.L.R. 47 Mad. 150.

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one for specific performance of a contract of lease. The lease was executed and registered. There is nothing more to be specifically performed. Delivery of possession is not a part of the contract of lease. [Sections 105 and 107 of the Transfer of Property Act were referred to.] The plaintiff wants delivery of possession of the properties. The suit was filed mainly for that purpose. If that is so, section 7, clause (v), governs the case; vide *Madan Mohan Singh v. Gaja Prasad Singh*(1). An *ad valorem* court-fee on the value of the subject-matter will have to be paid. The District Munsif finds that the value of the properties mentioned in the plaint is above Rs. 8,000. An *ad valorem* court-fee on that amount should be paid. The District Munsif has no pecuniary jurisdiction to try the suit.

[THE CHIEF JUSTICE.—For the purpose of this case we need not consider whether *Sundara Ramanujam v. Sivalingam*(2) was correctly decided or not.]

[*Muhi-ud-din Ahmad Khan v. Majlis Rai*(3), *Nihal Singh v. Sewa Ram*(4) and *Fakir Chand v. Ram Datt*(5) were referred to.]

V. Parthasarathi for respondents.—The suit is for specific performance of a contract to lease. Specific performance of a contract to lease consists of (i) the execution of the document and (ii) delivery of possession of properties; vide *Sundara Ramanujam v. Sivalingam*(2).

[THE CHIEF JUSTICE.—You have impleaded in the suit third parties also who are in possession of the properties. How can you do that in a suit for specific performance?]

The suit is in conformity with the provisions of section 27 of the Specific Relief Act (I of 1877). Simply because a prayer for possession is added, the suit does not cease to be one for specific performance.

[THE CHIEF JUSTICE.—The suit is really for delivery of possession and for nothing else.]

In a suit for specific performance of a contract to lease, the plaintiff can ask for delivery of possession, even though the contract has been executed. The valuation of the plaint

(1) (1911) 14 C.L.J. 159.

(2) (1923) I.L.R. 47 Mad. 150.

(3) (1884) I.L.R. 6 All. 231.

(4) (1916) I.L.R. 33 All. 232.

(5) (1923) I.L.R. 5 Lah. 75.

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under section 7 (x) (c) of the Court Fees Act is correct and the District Munsif has jurisdiction to try the suit. [*B. Suraj Patish v. Mt. Atul Bibi*(1) was referred to.]

The JUDGMENT of the Court was delivered by LEACH C.J.—This matter arises out of a suit filed by the first respondent in the Court of the District Munsif of Razole for specific performance of a contract of lease entered into with the petitioner, for possession of the property, and for the recovery of mesne profits. The property in suit had belonged to the petitioner's father who in May 1913 granted a lease of it for twenty years to the second and third respondents and to the fathers of the fourth, fifth and sixth respondents. The lessor died some time before 1929 and the property devolved on the petitioner. On 2nd November 1929 the petitioner granted a lease of the property to the first respondent for twenty years, the period to commence from 2nd June 1935. A deed of lease was drawn up, duly executed and registered. The first respondent averred in his plaint that the petitioner had in collusion with the other defendants (respondents 2 to 15 and one Maley Venkataratnam, the fifteenth defendant) put the defendants into possession of the property and had refused his demand for possession. He treated the suit as being one for specific performance of the contract of lease and stamped his plaint on the amount of one year's rent under the provisions of section 7 (x) (c) of the Court Fees Act. The petitioner contended that the suit was really one for possession and that it should be stamped in accordance with the provisions of section 7 (v) of the Act, that is, on the value of the property leased. The value which the first respondent had placed on the property in suit was Rs. 2,000. The District

(1) A.I.R. 1935 All. 569.

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Munsif held an inquiry into the question of value and found that the property was worth not less than Rs. 8,000. This finding has not been challenged. If the suit is to be regarded as one for possession and not as one for specific performance, it cannot be tried in the Court of the District Munsif. The Court having jurisdiction will be that of the Subordinate Judge. The District Munsif decided that the suit should be classified as a suit for specific performance and therefore held that it had been properly stamped. In coming to this conclusion he relied on the decision of this Court in *Sundara Ramanujam v. Sivalingam*(1). The petitioner filed an application for revision of this order. The matter came before VARADACHARIAR J. who considered that the observations in *Sundara Ramanujam v. Sivalingam*(1) did lend support for the conclusion arrived at by the District Munsif and referred the matter to a Bench. This Bench has been constituted to decide the question.

In *Sundara Ramanujam v. Sivalingam*(1) KRISHNAN AND VENKATASUBBA RAO JJ. held that a suit to compel the defendant to execute a sale deed in pursuance of an agreement for sale was a suit for specific performance within the meaning of section 7 (x) (a) of the Court Fees Act and did not become a suit for possession by reason of the addition of a prayer for possession. In the course of his judgment KRISHNAN J. observed :

“The delivery of possession is a part of the specific performance of a contract of sale unless the terms thereof show that the vendee was not under an obligation to deliver possession. The claim for delivery of possession is as much a part of specific performance as the claim for the payment of the price is, when the seller brings the suit for specific performance.”

(1) (1928) I.L.R. 47 Mad. 150.

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He also observed that when the prayer for possession was allowed to be added the suit did not cease to be one for specific performance and become a suit for possession or combination of both suits under the Court Fees Act. In that case there was only one defendant and there was no question of the property being in the possession of a stranger to the contract. The Allahabad High Court in *Muhi-ud-din Ahmad Khan v. Majlis Rai*(1) and *Nihal Singh v. Sewa Ram*(2) also held that a suit for specific performance carried with it the right to claim possession and in *Fakir Chand v. Ram Dutt*(3) the Lahore High Court gave a decision to the same effect. On the other hand, the Calcutta High Court in *Madan Mohan Singh v. Gaja Prasad Singh*(4) came to a contrary conclusion. In that case MOOKERJEE and CASPERSZ JJ. held that where in a suit for specific performance a claim for possession is added the suit thereby becomes one in substance for possession of the property and should be valued under section 7, clause (v), of the Court Fees Act.

It is not necessary for the purposes of this case to decide whether the opinion of KRISHNAN J. in *Sundara Ramanujam v. Sivalingam*(5) which is shared by the Allahabad and Lahore High Courts is to be preferred to that expressed by the Calcutta High Court; nor is it necessary for us to discuss whether the observations of KRISHNAN J. went too far, because it is quite clear that in the present case the suit is in substance one for possession and not for specific performance. The lease had been executed long before suit and according to the first respondent he was compelled to bring the action because the petitioner had parted

(1) (1884) I.L.R. 6 All. 231.

(3) (1923) I.L.R. 5 Lah. 75.

(2) (1916) I.L.R. 38 All. 292.

(4) (1911) 14 C.L.J. 159.

(5) (1923) I.L.R. 47 Mad. 150.

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with possession to the other respondents. The suit is, therefore, one for possession against strangers to the contract, who according to the plaintiff are unlawfully withholding possession from him. The District Munsif was impressed by the fact that in his written statement the petitioner had said that the property was in his possession and that the other defendants were not in possession. This is a question of fact which will have to be tried in the suit, but for the purposes of the court-fee what the Court has to look at is the plaint. The plaint must be stamped according to the nature of the suit. The plaintiff formulates his claim and the court-fee must be paid according to the category in which the suit falls.

In the course of his argument the learned Advocate for the first respondent laid great stress on the provisions of section 27 of the Specific Relief Act. That section states that except as otherwise provided by Chapter II of the Act specific performance of a contract may be enforced against either party thereto and any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. In this case defendants 2 to 16 are not, according to the plaint, persons claiming under the first respondent, but persons who have been put in possession of the property in collusion with the petitioner in order to defeat the first respondent.

The petition must, therefore, be allowed and the plaint returned to the first respondent for presentation to the Court having jurisdiction after being stamped with the proper fee. The petitioner is entitled to his costs.

V.V.C.

## APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Wadsworth and Mr. Justice Krishnaswami Ayyangar.

AYYAPPA NAICKER (PETITIONER), PETITIONER,

v.

KASIPERUMAL NAYAKAR AND TWO OTHERS (RESPONDENTS), RESPONDENTS.\*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 90—  
“Person whose interests are affected by the sale”—Meaning of—Person obtaining attachment before judgment—If entitled to set aside sale of the attached properties in execution of a decree obtained by another person.

A person who has obtained an attachment before judgment is a person whose interests are affected within the meaning of Order XXI, rule 90, of the Civil Procedure Code, when the property attached has been sold in execution of a decree obtained by another person.

*Kathiresan Chettiar v. Ramasami Chettiar*(1) overruled.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the Subordinate Judge of Tuticorin, dated 22nd August 1934 and made in Civil Miscellaneous Appeal No. 32 of 1933 preferred against the order of the Court of the District Munsif of Tuticorin in Execution Application No. 922 of 1933 in Small Cause Suit No. 552 of 1932, Sub-Court, Tuticorin.

The petition originally came on for hearing before VARADACHARIAR J. who made the following

## ORDER OF REFERENCE TO A FULL BENCH:—

The point arising for decision in this civil revision petition is whether the petitioner had a *locus standi* to apply under

\* Civil Revision Petition No. 1995 of 1934.  
(1) (1914) 27 M.L.J. 302.

Order XXI, rule 90, Civil Procedure Code, to set aside the sale complained against. That this is a question of jurisdiction within the meaning of section 115, Civil Procedure Code, has been held in *Sundaram v. Mausā Mavuthar*(1) which related to Order XXI, rule 89.

The relevant facts are that the petitioner attached certain properties before judgment and in due course obtained a decree; but before the date of that decree, the attached properties were sold in execution of a decree obtained by another creditor. As soon as the petitioner obtained his decree, he filed the present application under Order XXI, rule 90, to set aside the execution sale on certain grounds.

The Courts below have dismissed his petition, holding that he is not entitled to apply under Order XXI, rule 90. A decision of a Division Bench of this Court in *Venkatesha v. Villa Bhakta*(2) was brought to the notice of the lower appellate Court and apparently of the first Court also. The learned Subordinate Judge has attempted to distinguish that case, but I am not satisfied that the distinction is beyond doubt. The lower Court assumes that in that case the decree had probably been obtained before the Court auction sale. The records of that case are reported to have been destroyed and I am not, therefore, able to verify whether this was so or not. Even assuming that the facts were as assumed by the lower appellate Court, I am very doubtful whether those facts furnished a sufficient ground for distinction. I can understand the view taken in *Kathiresan Chettiar v. Ramasami Chettiar*(3) that except where the attaching decree-holder has applied for rateable distribution he has no *locus standi*, merely on the ground of his attachment, to apply under Order XXI, rule 90. This view has, however, been departed from by a Division Bench in *Venkatesha v. Villa Bhakta*(2) though it does not appear from the judgment whether the earlier case was brought to the notice of the learned Judges or not. There has been considerable diversity of opinion amongst the various High Courts as to the import of the expression “whose interests are affected by

(1) (1921) I.L.R. 44 Mad. 554 (F.B.).

(2) A.I.R. 1933 Mad. 455; (1933) 64 M.L.J. 605.

(3) (1914) 27 M.L.J. 302.

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the sale" in Order XXI, rule 90. The use of the plural "interests" has generally been relied on as supporting the contention that what is referred to by that expression is not merely an interest in the property, but any kind of pecuniary benefit that the applicant is likely to have derived if the sale had not taken place or is likely to derive if the sale is set aside. This apparently is the basis of the decision in *Venkatesha v. Vitta Bhakta*(1).

In applying the rule to persons who had obtained an attachment before judgment, a distinction has been drawn between

(i) cases where the decree had been passed before the sale,

(ii) cases where the decree had been passed after the sale but before the application under Order XXI, rule 90, and

(iii) cases where no decree had been obtained even on the date of the application under Order XXI, rule 90 [cf. *Jogendra Nath Chatterjee v. Monmotha Nath Ghosh*(2), *Rameshwar v. Hari Prasad*(3); *Gopinath v. Kukari Pratap*(4); *Baidya Nath v. Hemlata Dasi*(5); *Bulanda Bashini v. Pran Gobinda*(6); and *Gobinda Prasad v. Brindaban Chandra*(7)].

It is not easy to reconcile the several dicta to be found in these cases. Whatever may be said of cases where before the decree is obtained, the property attached before judgment has survived to co-parceners in a joint Hindu family, I do not see sufficient basis for the distinction suggested in a case like the present between a person who has obtained a decree before the sale complained against and one who obtains a decree only after the sale but before he files the application under Order XXI, rule 90.

The question is one that arises frequently and involves a point of procedure on which a uniform and certain rule is desirable. In view of the conflict in the authorities, it is better that the matter is considered by a Division Bench and, if they agree, it will even be desirable that the matter is decided by a Full Bench.

(1) A.I.R. 1933 Mad. 455; (1933) 64 M.L.J. 605.  
(2) (1912) 17 C.W.N. 80. (3) A.I.R. 1933 Pat. 445.  
(4) A.I.R. 1934 Cal. 477. (5) (1935) 40 C.W.N. 759.  
(6) (1936) 40 C.W.N. 1334.  
(7) A.I.R. 1937 Cal. 7; (1936) 40 C.W.N. 1338.

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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. V. Sesha Ayyangar* for petitioner.—The crucial date for testing the qualification of an applicant under Order XXI, rule 90, Civil Procedure Code, is the date of the application and not that of the sale. Rights have to be adjudicated upon as on the date of filing a suit or an application. The use in Order XXI, rule 90, of the words "whose interests are affected by the sale" taken along with "may apply" support this contention. The word used is "interests" and not "interest". This shows that the interest need not always be an interest in the property sold. It may be a pecuniary interest. It has been held, for instance, that a Hindu reversioner, who cannot be said to have any present interest in the property sold, can apply. Attachment before judgment confers sufficient interest to have the attached property used for satisfaction of the claim for which it is attached. Where the Civil Procedure Code intends to restrict the right to apply to persons having an interest in the property it has used appropriate language (*vide* Order XXI, rule 89). Comparison may also be made with the language in Order XXI, rule 72, where the words are "person whose interests are affected by the sale" and with the language of section 311 of the old Civil Procedure Code.

[Reference was made to the following cases: *Kathiresan Chettiar v. Ramasami Chettiar*(1), *Narayanan v. Pappayi*(2), *Venkatesha v. Vitta Bhakta*(3), *Sankaralinga Reddi v. Kandasami Tevan*(4), *Dhirendra Nath Roy v. Kamini Kumar Pal*(5), *Ravinandan Prasad v. Jagarnath Sahu*(6), *Sachai Gopinath v. Firm of Kukari Pratap Chandra Saha*(7) and *Rameshwar v. Hari Prasad*(8).]

*A. Swaminatha Ayyar* for respondent.—There is no basis for suggesting that the word "interests" has got a meaning

(1) (1914) 27 M.L.J. 302. (2) (1927) 26 L.W. 164.  
(3) A.I.R. 1933 Mad. 455; (1933) 64 M.L.J. 605.  
(4) (1907) I.L.R. 30 Mad. 413.  
(5) (1924) I.L.R. 51 Cal. 495. (6) (1925) I.L.R. 47 All. 479.  
(7) (1933) 38 C.W.N. 172. (8) A.I.R. 1933 Pat. 445.

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different from "interest" The only persons not holding an interest in the property who can apply are those satisfying the description "persons entitled to share in a rateable distribution of assets". This phrase will be redundant if the word "interests" is interpreted widely as including pecuniary interests. [Reference was made to *Jogendra Nath Chatterjee v. Monmotha Nath Ghosh*(1), *Baidya Nath v. Hemlata Dasi*(2), *Bulanda Bashini v. Pran Gobinda*(3) and *Gobinda Prosad v. Brindaban Chandra*(4).]

An attaching creditor is not a secured creditor. Attachment before judgment does not create any right in the property. So he is not entitled to apply under Order XXI, rule 90, of the Code. The case of *Sankaralinga Reddi v. Kandasami Tevan*(5) refers to movable property and the attachment there was not before judgment but in execution. To file an application under Order XXI, rule 90, a person must have an interest on the date of the sale and not on the date of the application. An auction-purchaser, for instance, cannot apply under that rule. It has been so held by the High Courts other than Madras and Allahabad. In this case, the petitioner who obtained an attachment before judgment had no interest in the property on the date of the sale and so he cannot apply under Order XXI, rule 90. [*Kristnasawmy Mudaliar v. Official Assignee of Madras*(6), *Manikkam Chettiar v. Income-tax Officer, Madura South*(7), *Sewdnt Roy v. Sree Canto Maity*(8), *Gopalakrishnayya v. Sanjeeva Reddi*(9), *Mahadeo Ram v. Raja Mohan Vikram Sah*(10), *Nihal Chand-Gopal Das v. Pritam Singh*(11) and *K. V. A. L. Chettiar Firm v. M. P. Maricar*(12) were referred to.]

*Cur. adv. vult.*

#### JUDGMENT.

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LEACH C.J.—This petition raises the question whether a person who has obtained an attachment

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|------------------------------------------------|----------------------------------------|
| (1) (1912) 17 C.W.N. 80.                       | (2) (1935) 40 C.W.N. 759.              |
| (3) (1936) 40 C.W.N. 1334.                     |                                        |
| (4) A.I.R. 1937 Cal. 7; (1936) 40 C.W.N. 1338. |                                        |
| (5) (1907) I.L.R. 30 Mad. 413.                 |                                        |
| (6) (1903) I.L.R. 26 Mad. 673.                 |                                        |
| (7) I.L.R. [1938 Mad. 744 (F.B.).              |                                        |
| (8) (1906) I.L.R. 33 Cal. 639.                 |                                        |
| (9) (1919) 38 M.L.J. 228.                      | (10) (1933) I.L.R. 12 Pat. 665 (S.B.). |
| (11) (1932) I.L.R. 14 Lah 1.                   | (12) (1928) I.L.R. 6 Ran 621.          |

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before judgment is a person whose interests are affected within the meaning of Order XXI, rule 90, of the Code of Civil Procedure, when the property attached has been sold in execution of a decree obtained by another person. On 30th November 1932 the petitioner obtained an order for attachment before judgment in respect of certain immovable property belonging to the second and third respondents and on 3rd July 1933 a decree was passed in his favour. Some three weeks before the decree was passed the first respondent caused the attached property to be sold in execution of a decree which he had obtained against the second and third respondents. On 8th July 1933 the petitioner filed a petition in the Court which had ordered the sale (the Court of the District Munsif of Tuticorin) asking that the sale should be set aside on the ground that there had been material irregularity. The District Munsif held that the petitioner was not a person who came within the section and dismissed the application. The petitioner appealed to the Subordinate Judge of Tuticorin, who agreed with the District Munsif. The petitioner has now asked this Court to set aside the orders of the lower Courts under its revisional powers. It is not disputed that if the lower Courts erred in the interpretation of rule 90 this Court has power to interfere.

Rule 90 provides that where any property has been sold in execution of a decree the decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it. Section 311 of the Code of 1882 which is now rule 90 limited the right to apply to the decree-holder or any person whose immovable property

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had been sold. There has been much judicial discussion on the meaning of the words "whose interests are affected by the sale." Some Judges have expressed the opinion that these words must be taken to refer to a person having a proprietary or possessory title in the property, but the opinion which now prevails is that the words do not have this narrow implication and are intended to apply also to a person whose pecuniary interests are affected by the sale.

In *Kathiresan Chettiar v. Ramasami Chettiar*(1) a Division Bench of this Court composed of SADASIYA AYYAR and NAPIER JJ. held that a decree-holder who had not applied for execution, and, therefore, was not entitled to rateable distribution of the proceeds of the sale was not a person whose interests were affected by the sale within the meaning of the rule. They considered that the intention of the Legislature was to confine the word "interests" to an interest in the property sold. As I have indicated, this interpretation is not in accordance with later decisions. The meaning to be given to the words was fully discussed by SRINIVASA AYYANGAR J. in *Narayanan v. Pappayi*(2). In that case the Court directed that two items of property which were the subject-matter of a mortgage decree should be sold first and that only afterwards, if the sale proceeds proved insufficient, should another item of property which was covered by the same decree be sold. After the passing of the decree the fourth defendant in the suit purchased the item of property which was to be sold last. He died before the other two items were sold in execution of the decree. After they had been sold his legal representative applied for an order setting aside the sale on the ground of irregularity and fraud. The learned

(1) (1914) 27 M.L.J. 302.

(2) (1927) 26 L.W. 164.

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Judge held that the legal representative of the fourth defendant was a person whose interests were affected by the sale. He refused to accept the contention that the expression "whose interests are affected by the sale" should be construed as though it meant that the petitioner must have some interest in the property itself and observed that, when the Legislature intended that the petitioner should have some interest in the property itself, it has used apt language. He pointed in this connection to the provisions of Order XXI, rule 89, which limits an application under that rule to the judgment-debtor or any person deriving title from him or any person holding an interest in the property. The learned Judge considered that the Legislature intended to confer the right to apply on any one who is directly and immediately affected by the sale and with this opinion I am in entire agreement.

In *Venkatesha v. Vitla Bhakta*(1) BEASLEY C.J. and BARDSWELL J. held that a decree-holder who has obtained an attachment before judgment is a person whose interests are affected by the sale. It was there conceded that a person whose pecuniary interests are affected comes within the rule and that the words do not mean proprietary interests only. The case, however, differed from the present one in that the applicant had obtained a decree before the Court sale.

The extent of the interest of a plaintiff in property attached before judgment was discussed by BENSON and WALLIS JJ. in *Sankaralinga Reddi v. Kandasami Tevan*(2). In that case the question was whether the plaintiffs had sufficient interest in the property to support an action against persons who had wrongfully removed crops from the land attached and it was held

(1) A.I.R. 1933 Mad. 455; (1933) 64 M.L.J. 605.

(2) (1907) I.L.R. 30 Mad. 413.

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that they had. It was true that the plaintiffs did not, by attaching the crops, acquire any charge on the attached property which would give them priority over other decree-holders applying for rateable distribution or against the general body of creditors proving in an insolvency of the judgment-debtor, but none the less, by virtue of the attachment the plaintiffs acquired a right to have the whole of the attached property applied in satisfaction of their debt if no other creditor came forward, and in any case to have a rateable proportion so applied. In this sense the attaching creditor had a charge on the attached property. The right of a plaintiff who attaches before judgment does not go beyond this and there is a long line of cases which shows that he is not a secured creditor in the ordinary sense, but it is clear that he has some interest in the property.

In *Dhirendra Nath Roy v. Kamini Kumar Pal*(1) a Division Bench of the Calcutta High Court also held that the expression "whose interests are affected by the sale" is not limited to persons whose proprietary or possessory title is affected by the sale and that an attaching creditor comes within the rule. In *Jogendra Nath Chatterjee v. Monmotha Nath Ghosh*(2) the Calcutta High Court held that a person who attached before judgment had no present interest in the property and therefore was not within rule 90, but in *Sachai Gopinath v. Firm of Kukari Pratap Chandra Saha*(3) another Division Bench of that Court held that a person who has attached before judgment is a person within the purview of rule 90. In the last-mentioned case a decree had been obtained by the plaintiff before he made his application and it was on this ground that the earlier case was distinguished.

(1) (1924) I.L.R. 51 Cal. 495.

(2) (1912) 17 C.W.N. 80.

(3) (1933) 38 C.W.N. 172.

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As I have already indicated, in *Sankaralinga Reddi v. Kandasami Tevan*(1) this Court held that a person who has attached property before judgment has sufficient interest in the property itself to maintain an action against a trespasser, but it is sufficient to bring him within rule 90 if his pecuniary interests are directly and immediately affected by any irregularity or fraud in connection with the sale proceedings. I hold that a plaintiff who has obtained an attachment before judgment is directly and immediately affected in such circumstances, and therefore is within the rule. The fact that he has not obtained a decree at the time he filed his application does not in my opinion make any difference. If he obtains a decree before making the application his position is, of course, strengthened, but the attachment before judgment is sufficient in itself to bring him within the category of persons whose interests are affected by the sale. In the present case, the petitioner had obtained his decree before he applied and he applied within time. It follows from what I have said that I consider that *Kathiresan Chettiar v. Ramasami Chettiar*(2) was wrongly decided and should be overruled.

The decisions of the lower Courts being based on an erroneous view of the law their orders must be set aside with costs here and in the lower appellate Court. The District Munsif will now proceed to dispose of the application in accordance with law.

WADSWORTH J.—I agree.

KRISHNASWAMI AYYANGAR J.—I also agree.

V.V.C.

(1) (1907) I.L.R. 30 Mad. 413.

(2) (1914) 27 M.L.J. 302.



## APPELLATE CIVIL—FULL BENCH.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice Wadsworth and Mr. Justice Krishnaswami Ayyangar.*

SAMUEL KOILPILLAI SKINNER, PLAINTIFF,

*v.*

ARUNACHALAM PANDARAM AND TWO OTHERS,  
DEFENDANTS.\*

*Indian Stamp Act (II of 1899), arts. 30 (a) (viii) and 30 (a) (i) of Sch. I-A, as amended by Madras Stamp Act (Amendment) Act (VI of 1922)—Applicability—Lease for an indefinite term—Proper stamp to be affixed.*

The material portion of a document embodying the terms of a tenancy was as follows: "As I reside in the scheduled properties (house, shop and site) in your possession (as usufructuary mortgagee) from to-day agreeing to pay rent at Rs. 5 per mensem, I shall pay the said rent of Rs. 5 by the 30th of each month and obtain your receipt. In default of payment as aforesaid, I shall pay the arrear of a month's rent with interest at 4 pies per rupee per mensem together with the next month's rent. Any plea of payment without receipt shall not prevail. In case of default of even this, you shall evict me from the house at your pleasure and let in other persons as tenants."

*Held* that the document was a lease for an indefinite period which should be stamped under article 30 (a) (viii) of the Stamp Act of 1899 as amended by the Madras Stamp Act of 1922 and not a lease for a term of less than one year and therefore stampable under article 30 (a) (i) of Schedule I-A of the Stamp Act.

It does not follow that because a document is a monthly tenancy within the meaning of section 106 of the Transfer of Property Act it is a lease for less than one year. A lease for less than one year means a lease for some specified period which is less than twelve months.

\* Referred Case No. 1 of 1938.

*Reference under Stamp Act(1), In the matter of Burmah Shell Oil Storage and Distributing Company of India, Limited(2) and Mangal Puri v. Baldeo Puri(3) approved.* SKINNER v. ARUNACHALAM.

*Amolliu v. Ibrahim Ishak, In re(4) disapproved.*

CASE stated under section 60 of Act II of 1899 by the District Munsif of Srivaikuntam in Small Cause Suit No. 712 of 1937.

*Government Pleader (B. Sitarama Rao) for Government.*—The point for decision in this case is what is the proper value of the stamp that should be affixed to the lease in question. [Mulla's Commentary on the Stamp Act, Article 35, was referred to.] If the lease is to be construed as one for a term of less than one year then it falls under article 30 (a) (i) of Schedule I-A of the Madras Stamp (Amendment) Act, 1922, and the stamp already affixed, viz., twelve annas, is sufficient. *Amolia v Ibrahim Ishak, In re(4)* is an authority for that view, but no reasons are assigned for the decision. On the other hand, there is a Full Bench decision of the Madras High Court, *Reference Under Stamp Act(1)*, which supports the view that the lease in question should be interpreted as one for an indefinite period. The third lease mentioned in that case is on all fours with the present one. But that case was decided before the amendment was made. [In the matter of *Burmah Shell Oil Storage and Distributing Company of India, Limited(2)* and *Mangal Puri v. Baldeo Puri(3)* were referred to.] The first case does not give any reasons. The second one sets out the reasons for the decision, and the Calcutta case was considered and disapproved. The lease in this case cannot be one for less than a year as no specified term within one year is mentioned. Hence the proper construction would be that the lease is one for an indefinite period. If so, article 30 (a) (viii) of Schedule I-A of the Madras Stamp (Amendment) Act, 1922, applies and the proper value of the stamp should be Rs. 3 and not annas twelve.

The parties were not represented.

The JUDGMENT of the Court was delivered by LEACH C.J.—This reference arises out of a small cause

(1) (1902) I.L.R. 26 Mad. 473.  
(3) I.L.R. [1938] All. 481.

(2) (1933) I.L.R. 55 All. 874 (F.B.).  
(4) (1919) I.L.R. 46 Cal. 804.

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suit filed in the Court of the District Munsif of Sri-vaikuntam in which the plaintiff seeks to recover Rs. 35 as arrears of house and shop rent for a period of seven months. The terms of the tenancy are embodied in a document which is stamped with a stamp of the value of twelve annas, the appropriate amount if the document falls under clause (a) (i) of article 30 of Schedule I-A of the Stamp Act. Schedule I-A was added to the Stamp Act by the Madras Stamp (Amendment) Act, 1922. The question is whether it should be stamped under the provisions of article 30 (a) (viii) of the amended Act. Article 30 (a) (viii) requires the same duty to be paid as on a conveyance for a consideration equal to three times the amount or value of the average annual rent which would be paid or delivered for the first ten years if the lease continued so long. If article 30 (a) (viii) applies the appropriate stamp will be three rupees, not twelve annas.

The material portion of the instrument reads as follows :

"As I reside in the scheduled properties (house, shop and site) in your possession (as usufructuary mortgagee) from to-day agreeing to pay rent at Rs. 5 per mensem, I shall pay the said rent of Rs. 5 by the 30th of each month and obtain your receipt. In default of payment as aforesaid, I shall pay the arrear of a month's rent with interest at 4 pies per rupee per mensem together with the next month's rent. Any plea of payment without receipt shall not prevail. In case of default of even this, you shall evict me from the house at your pleasure and let in other persons as tenants."

In our opinion this is clearly a lease for an indefinite term and not one for a term of less than one year. The matter has, however, been referred to this Court as the result of the decision of the Calcutta High Court in *Amolia v. Ibrahim Ishak, In re*(1) where it was held

(1) (1919) I.L.R. 46 Cal. 804.

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that a lease of this description is a lease which purports to be for a term of less than one year and is therefore stampable under the article which now corresponds to article 30 (a) (i). The judgment in the Calcutta case is a short one and no reason is given for the decision. It is directly opposed to the decision of a Full Bench of this Court in *Reference under Stamp Act*(1) where it was held that an instrument of much the same nature should be stamped under article 35 (a) (iv), the article corresponding to article 30 (a) (viii) of the amended Stamp Act. The Calcutta decision is also in conflict with two decisions of the Allahabad High Court: *In the matter of Burmah Shell Oil Storage and Distributing Company of India, Limited*(2) and *Mangal Puri v. Baldeo Puri*(3). In the latter case the Court considered the Calcutta decision and gave its reasons for disagreeing with it. It was pointed out that it did not follow that because a document was a monthly tenancy within the meaning of section 106 of the Transfer of Property Act it was a lease for less than one year. A lease for less than one year meant a lease for some specified period which was less than twelve months. With these observations we are in entire agreement. Consequently we hold that the lease now under consideration was improperly stamped and should have been stamped under article 30 (a) (viii) with a stamp of the value of three rupees.

V.V.C.

(1) (1902) I.L.R. 26 Mad. 473. (2) (1933) I.L.R. 55 All. 874 (F.B.).  
(3) I.L.R. [1938] All. 481.

## INCOME-TAX REFERENCE.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice  
Madhavan Nair and Mr. Justice Varadachariar.*

1938,  
November 1.

THE COMMISSIONER OF INCOME-TAX, MADRAS,  
PETITIONER,

*v.*

VALLIAMMAI ACHI, wife of S. M. A. M. RAMASAMI  
CHETTIAR, PALLATHUR, RAMNAD DISTRICT,  
RESPONDENT.\*

*Indian Income-tax Act (XI of 1922), ss. 3, 4 (1) and 24 (1)—  
Assessment for 1937-38—Business of assessee in Burma—  
Loss sustained in, in year of account, 1936-37—Set off of,  
against assessee's income for that year consisting of interest  
received from investments—Assessee's right of—Burma,  
part of British India in year of account but not part of  
British India in year of assessment—"British India",  
if means what was British India in year of account or  
what is British India in year of assessment.*

The assessee who resided in British India owned a saw mill in Burma. In the account year, that is the year commencing from 1st April 1936, the saw mill business resulted in a loss and the assessee's income consisted solely of interest received from investments. Burma was part of British India in the account year but it ceased to be so on 1st April 1937. The question was whether the loss sustained by the assessee in the saw mill business in the year of account 1936-37 was allowable as a deduction in the year of assessment 1937-38.

*Held* that as when the assessee sustained the loss in the saw mill business in Burma, Burma was part of British India, the loss must, under section 3 and section 4 (1) of the Indian Income-tax Act of 1922 read together, be deemed to have been sustained in British India and that the assessee was entitled to set off the said loss against the profits from her investments.

\* Original Petition No. 105 of 1938.

Section 4 cannot be divorced from section 3 and, as section 3 charges the tax on the income of the previous year, it must be charged on the income received in what was British India during the previous year.

The Income-tax Act cannot be applied in any year until the Finance Act has been passed, but the Act cannot be treated as being a statute which is passed annually. It is a permanent enactment but it may not be enforced in any particular year until the Finance Act has been passed.

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

*Advocate-General (Sir A. Krishnaswami Ayyar, with him M. Subbaraya Ayyar) for assessee.*—Section 3 of the Indian Income-tax Act of 1922 charges the tax on the income, profits and gains of the previous year. Therefore under the Indian Act, unlike as under the English Act, it is the previous year's income that is the subject of the tax. Therefore what is British India is what was British India in the year for which tax was payable. The tax must be charged on the income received in what was British India during the previous year, i.e., the account year. In *Behari Lal Mullick, In re*(1) and *The Commissioner of Income-tax, Madras v. Karuppiiah Kangani*(2) it was held that under the Indian Act the income of the year previous to the year of assessment is to be taken not merely as a guide to the ascertainment of the income of the year of assessment but as the actual sum which is subject to taxation. [Reference was made to the Income-tax Manual, Part II (1), pages 76, 77, and Part III, page 79.]

*M. Patanjali Sastri for Commissioner of Income-tax.*—The fact that under the Indian Act the previous year's profits are the subject-matter of the tax payable for the succeeding year does not affect the question arising in the present case. Section 3 is merely a charging section. Section 4 does not impose a liability. It is the Finance Act of the particular year that imposes the liability. Until the Finance Act is enacted no liability is imposed.

[VARADACHARIAR J.—The Finance Act merely gives the rate for the particular year.]

(1) (1927) I.L.R. 54 Cal. 630.

(2) (1923) 55 M.L.J. 844 (F.B.).

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No; the liability of any income to income-tax is itself imposed by the Finance Act for the particular year. [Reference was made to section 7 of the Finance Act of 1937.] It is after this section is enacted that the liability to income-tax is imposed. On what is that liability to be imposed?—on income accruing, arising or received in British India; section 4 (1). Section 3 says what is British Indian income, i.e., British Indian income after the enactment of the Finance Act of 1937. The various steps are: the Finance Act, section 4 (1) and section 3. British India means what is British India in the year of assessment, in the year in which the liability is imposed or arises. Section 46 (1) of the Government of India Act, 1935, provides that Burma shall cease to be part of British India from 1st April 1937.

[THE CHIEF JUSTICE.—Your contention is that as the Income-tax Act does not come into operation until enacted in any year, until a Finance Act is enacted for that year, British India must mean British India in the year in which the Finance Act is passed, i.e., the year of assessment. The Finance Act cannot alter the operation of the Income-tax Act.]

That is pointed out by RANKIN C. J. in *Behari Lal Mullick, In re* (1) at page 640. "Received in British India" means received last year in British India of the year of assessment. [Gazette of India, page 360, was referred to as to the separation of India, Burma and Aden.]

LEACH C.J.—The JUDGMENT of the Court was delivered by LEACH C.J.—The assessee who is a resident of Pallathur in the Madras Presidency owns a saw mill at Gyobingauk in Burma. In the account year, that is the year commencing from 1st April 1936, the saw mill business resulted in a loss of Rs. 8,663 and her income consisted solely of interest received from investments. For the purpose of assessment to income-tax she sought to set off the loss sustained in the saw mill business against the profits from her investments. The Income-tax Officer refused to allow her to do so on the ground that on 1st April 1937

(1) (1927) I.L.R. 54 Cal. 630.

Burma had ceased to be part of British India, and the loss having been sustained outside British India it could not be set off. On these facts the Commissioner of Income-tax has referred to the Court the following question:

"Whether the decision of the Assistant Commissioner that the loss of Rs. 8,663 incurred by the petitioner in Burma in the year of account 1936-37 is not allowable as a deduction in the year of assessment 1937-38 is correct in law?"

In order to appreciate the arguments advanced on behalf of the income-tax authorities it is necessary to refer to the provisions of section 3 and of section 4 (1) of the Indian Income-tax Act. Section 3 is the charging section and it provides that where any Act of the Central Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at the rate or those rates shall be charged for that year, in accordance with, and subject to the provisions of, the Act in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals. Section 4 (1) states:

"Save as hereinafter provided, this Act shall apply to all income, profits or gains as described or comprised in section 6, from whatever source derived, accruing, or arising or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

It is said that as the Income-tax Act does not come into operation in any year until the Finance Act has been passed, the Income-tax Act must be treated as a statute which is passed every year, and the words "British India" must be deemed to mean British India as it stands at the time of the passing of the Finance Act and not what it was in the previous year. We do not accept this argument. It is true

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that the Income-tax Act cannot be applied in any year until the Finance Act has been passed, but the Act cannot be treated as being a statute which is passed annually. It is a permanent enactment, but it may not be enforced in any particular year until the Finance Act has been passed. Section 4 cannot be divorced from section 3, and as section 3 charges the tax on the income of the previous year it must, we consider, be charged on the income received in what was British India during the previous year. In *The Commissioner of Income-tax, Madras v. Karupiah Kangani*(1) a Full Bench of this Court held that under the Act the income of the year previous to the year of assessment is not to be taken as merely a guide to the ascertainment of the income of the year of assessment, but as the actual sum which is subject to taxation. This decision followed a decision of the Calcutta High Court to the same effect—*Behari Lal Mullick, In re*(2).

When the assessee in this case sustained the loss on the working of her saw mill in Burma, Burma was part of British India, and if section 3 and section 4 (1) are to be read together, as in our opinion they must be, the loss must be deemed to have been sustained in British India. Therefore the answer we give to the question referred is that the decision of the Assistant Commissioner in not allowing the deduction is not correct in law. The assessee is entitled to her costs, Rs. 250, and to the refund of her deposit of Rs. 100.

A.S.V.

(1) (1928) 55 M.L.J. 844 (F.B.).

(2) (1927) I.L.R. 54 Cal. 630.

## INCOME-TAX REFERENCE.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Madhavan Nair and Mr. Justice Varadachariar.

E. M. MUTHAPPA CHETTIAR, LEGAL REPRESENTATIVE  
OF E. M. VISWANATHAM CHETTIAR (DECEASED),  
PETITIONER,

1938,  
October 26.

v.

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

*Indian Income-tax Act (XI of 1922), sec. 34—Income which has escaped assessment—Assessment of—Facts coming to knowledge of Income-tax Officer after one year from end of year of assessment, if can be relied upon by him for purpose of.*

Where the Income-tax Officer has issued a notice under section 34 of the Indian Income-tax Act of 1922, he can, for the purpose of assessing income which has escaped assessment, rely on facts which come to his knowledge after one year from the end of the year of assessment.

There is nothing in section 34 that indicates that the inquiry is to be limited in time. To say that the Income-tax Officer shall be limited to facts discovered within a year of the year of assessment is to say something which the section does not say and which, if acted upon, would defeat the object of the section.

*Rajendranath Mukherji v. Commissioner of Income-tax, Bengal*(1) referred to.

IN the matter of the Indian Income-tax Act XI of 1922 and in the matter of the assessment of Messrs. E. M. Viswanatham Chettiar & Son, Pudukkottai.

*K. Rajah Ayyar and R. Sundaralingam* for assessee.  
*M. Patanjali Sastri* for Commissioner of Income-tax.

\* Original Petition No. 88 of 1937.

(1) (1933) I.L.R. 61 Cal. 285 (P.C.).

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The JUDGMENT of the Court was delivered by LEACH C.J.—On 18th November 1932 E. M. Viswanatham Chettiar was assessed to income-tax on an income of Rs. 8,277, in respect of the Tamil year ended 12th April 1932. The assessee was the managing member of an undivided Hindu family. The family carried on a money-lending business at Pudukkottai in British India, in the Federated Malay States, and in Burma. The year of assessment closed on 12th April 1933 and on 13th December 1933 the Income-tax Officer having reason to believe that income earned during the accounting period had escaped assessment issued a notice under section 34 of the Indian Income-tax Act. On 6th October 1934 the assessee filed a statement to the effect that no income had escaped assessment. On 25th February 1935 the Income-tax Officer issued a notice to the assessee under section 23 (2) to produce the evidence on which he proposed to rely. On 18th July 1936 the Income-tax Officer gave the assessee notice that on the 24th of that month he would commence an inquiry into the question of what income had escaped assessment and directed him to appear before him with all his account books and pass books. The inquiry in fact actually commenced on the 23rd July and continued on the 28th and the 29th when it was completed. On 30th July 1936 the Income-tax Officer re-assessed the assessee on an income of Rs. 55,000 which included the Rs. 8,277 already assessed.

The reasons for the delay which took place after the issue of the notice under section 34 on 13th December 1933 are apparent from the facts set out in the statement made by the Commissioner of Income-tax in making the reference now before us. Inquiries had to be made in Burma and there was lengthy correspondence with

the Income-tax officials in that country. It is clear that income which should have been assessed in the year of assessment did escape assessment. The assessee, however, contended before the Commissioner of Income-tax that the Income-tax Officer had no right in making the further assessment to take into consideration information which he had received after the expiration of one year from the end of the year of assessment. The Commissioner was asked to state a case on this point, but, as he refused, the assessee applied to this Court and the Commissioner was directed to refer the following question :

“ Where the Income-tax Officer has issued a notice under section 34, can he, for the purpose of assessing income which has escaped assessment, rely on facts which come to his knowledge after one year from the end of the year of assessment ? ”

As in our view the assessee wishes us to read into section 34 something which is not there I will set it out in full :

“ If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or re-assess such income, profits, or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be.”

It will be seen that all that the section says is that if for any reason income chargeable to income-tax has escaped assessment in any year or has been assessed

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at too low a rate the Income-tax Officer may within the time specified serve on the assessee the contemplated notice, and after having done so proceed to assess or re-assess such income. There is nothing in the section that indicates that the inquiry is to be limited in time.

The decision of the Privy Council in the case of *Rajendranath Mukherji v. Commissioner of Income-tax, Bengal*(1) has bearing on the question now before us. The assessee in that case were partners in a firm. After the year of assessment had expired but before the final assessment was made the Income-tax Officer discovered profits which had not been returned, and at a period considerably later than the end of the financial year made an assessment based on what he had discovered after its close. The appellants submitted that on a true construction of the Act an assessment must be completed within the year of assessment and, if it was not, the only remedy open to the Income-tax authorities was that provided by section 34. Their Lordships held that there was no limitation to the time in which the final assessment could be made and that as proceedings for the assessment of the assessee's income for a financial year were pending and no final assessment had been made, there was no question of income having escaped assessment within the meaning of section 34 so as to make the service of a notice within one year of the end of the year as therein required a condition of assessment.

In the present case, the notice required by section 34 was given within the period allowed and it was the duty of the Income-tax Officer to ascertain what income had in fact escaped assessment. The assessment was reopened so far as such income was concerned.

(1) (1933) I.L.R. 61 Cal. 285 (P.C.).

To say that the Income-tax Officer shall be limited to facts discovered within a year of the year of assessment is to say something which the section does not say and which, if acted upon, would defeat the object of the section. We have no hesitation in answering the reference in the affirmative.

The reference having been decided against the assessee he will pay the costs, Rs. 250.

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### INCOME-TAX REFERENCE.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice Madhavan Nair and Mr. Justice Varadachariar.*

PR. AL. M. MUTHUKARUPPAN CHETTIAR,  
PETITIONER,

v.

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

*Indian Income-tax Act (XI of 1922), sec. 13—Scope of—Rejection of assessee's books under, merely on ground of assessee's method of accounting not appealing to Income-tax Officer—Permissibility—British Indian assessee with headquarters in British India and having foreign businesses—Books of, if must include details of his businesses abroad—Books relating to transactions in respect of business at headquarters correct and complete—Rejection of, on ground of their not including entries relating to his foreign businesses—Propriety of—Sec. 10 (2), proviso (a)—Deduction—Claim to—Particulars required by proviso—Necessity.*

The assessee, who lived at a place in British India and had his headquarters there and who was a partner in money-lending firms carrying on business outside British India, was

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assessed in respect of his business at headquarters and on sums which were held to be remittances of profits from foreign business. The assessee returned a loss and in support of his return he produced the books which related to the transactions in respect of the business at headquarters and copies of the books of the firms abroad in which he was interested. The Income-tax Officer rejected the assessee's account books and made an assessment on an estimate. The books were admitted to be correct as far as they related to the business at headquarters. They were rejected because they did not include entries relating to foreign business which would have been convenient for the Income-tax authorities when estimating the profits made abroad. The rejection was attempted to be justified under the provisions of section 13 of the Indian Income-tax Act of 1922. The assessee was not asked to produce the originals of the books of the firms abroad in which he was interested, nor was it suggested that the copies produced by him were in any way inaccurate.

*Held* that the rejection of the account books was not justified and that the Income-tax Officer had therefore no right to make the assessment on an estimate.

Section 13 of the Act relates only to the method of accounting, and the books cannot be rejected merely because the method of accounting does not appeal to the Income-tax Officer. He may adopt the method of accounting which he prefers, but he cannot reject an assessee's books by reason of the provisions of section 13. Nor had the Income-tax Officer the right to reject the books in question because they did not relate to the foreign business. They related to the business which was being assessed, namely that at headquarters, and were not false or incomplete.

The Income-tax authorities cannot require the assessee to keep the books of his business in British India in a particular manner and they cannot require him to include in his books the details of his business abroad.

When claiming a deduction an assessee must give the particulars required by proviso (a) of section 10 (2) of the Indian Income-tax Act of 1922. If he fails to do so he cannot claim the deduction.

In the matter of the Indian Income-tax Act XI of 1922 and in the matter of the assessment of PR. AL. M. Muthukaruppan Chettiar.

*P. R. Srinivasan* for assessee.

*M. Patanjali Sastri* for Commissioner of Income-tax.

The JUDGMENT of the Court was delivered by LEACH C.J.—This reference relates to the assessment to income-tax of one Pr. Al. M. Muthukaruppan Chettiar for the year 1935–36. The assessee lives at Paganeri in Chettinad where he has his business headquarters. He is a partner in numerous money-lending firms carrying on business in Burma and the Federated Malay States and is the owner of a rice mill at Wakema in Burma. Until 1930 he had also a money-lending business in Colombo. He was assessed in respect of his business at headquarters and on sums which were held to be remittances of profits from foreign business. Four questions are embodied in this reference, namely :

“(i) Is there any evidence to support the rejection of the assessee's account books kept at his headquarters in British India ?

(ii) Is the assessee entitled in law to a deduction of Rs. 1,875 in respect of depreciation of machinery in the Wakema mill, he having leased the mill ?

(iii) Is the Income-tax Officer entitled in law to treat the remittance of Rs. 88,834 as representing a remittance of profits from a foreign business ?

(iv) Were there any materials before the Income-tax Officer from which he could hold that debts Nos. 23, 174, 42, 80, 145, 166, 39 and 147 should have been written off before 12th April 1931 ? ”

The first question relates to the assessment in respect of the assessee's business at headquarters. The assessee returned a loss, but the Income-tax Officer came to the conclusion that he had made a profit of Rs. 5,000. The assessment was made under

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section 23 (3) of the Income-tax Act after the Income-tax Officer had rejected the assessee's books. It is not suggested that the books are false; it is accepted that they are correct as far as they relate to the business at headquarters. The Income-tax Officer however rejected the books on the ground that they did not "record the capital invested in the various concerns both individually and in partnership in Burma and outside British India and therefore could not be held to be complete." On appeal the Assistant Commissioner concurred in the rejection of the books on the ground that "the appellant did not produce proper account books showing his total wealth and its distribution." The Income-tax authorities cannot require the assessee to keep the books of his business in British India in a particular manner and they cannot require him to include in his books the details of his business abroad. In addition to producing the books which related to the transactions in respect of the business at headquarters he produced copies of the books of the firms abroad in which he was interested. He was not asked to produce the originals, nor was it suggested that the copies were in any way inaccurate. It comes to this: the books were rejected because they did not include entries relating to foreign business which would have been convenient for the Income-tax authorities when investigating the profits made abroad. In his statement referring this case to the Court the Commissioner of Income-tax attempts to justify the rejection of the books under the provisions of section 13 of the Act. We have pointed out in another case, *Subb. yya v. Commissioner of Income-tax, Madras*(1), to-day that section 13 relates only to the method of accounting,

(1) I.L.R. [1939] Mad. 404.

and the books cannot be rejected merely because the method of accounting does not appeal to the Income-tax Officer. The Income-tax Officer may adopt the method of accounting which he prefers, but he cannot reject an assessee's books by reason of the provisions of section 13. Nor had the Income-tax Officer the right to reject the books in question because they did not relate to the foreign business. They related to the business which was being assessed, namely that at headquarters, and were not false or incomplete. It follows that there is no evidence to support the rejection of the account books and this being so the Income-tax Officer had no right to make the assessment on an estimate. He should have paid regard to the entries in the books. This is the answer to the first question.

With regard to the disallowance of the sum of Rs. 1,875 in respect of depreciation of machinery in the Wakema rice mill, the Income-tax Officer wrongly held that the deduction claimed was not allowable in law. It was disallowed because the mill had been worked by the lessee and not by the owner. The disallowance was nevertheless proper. When claiming a deduction an assessee must give the particulars required by proviso (a) of section 10 (2). This he admittedly failed to do and therefore he was not in a position to claim the deduction. The answer to the second question is that in the circumstances the assessee is not entitled in law to the deduction.

The Income-tax Officer has treated as a remittance of profits a sum of Rs. 88,834 which the assessee received from Singapore on 10th May 1934. The assessee closed his money-lending business in Colombo on 31st May 1930, having made a profit there of \$57,650. He then transferred this sum to Singapore,

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where he had carried on a money-lending business for several years previously in partnership with others. The original partnership in Singapore was wound up in 1930 and on the 8th August of that year the assessee entered into a new partnership there. To this new partnership he contributed three sums as his share of the capital, namely : (i) \$57,650, the profits which he had made in Colombo ; (ii) \$51,046, the profits which he had received from the earlier partnership in Singapore, and (iii) \$16,000 being the amount of the capital he had invested in the earlier Singapore partnership. These three sums were entered in separate accounts in the books of the new firm. The assessee says that the sum of Rs. 88,834 represents a withdrawal from the account relating to the profits made in Colombo. It is not disputed that if this sum in fact represents profits made in the Colombo business it is not assessable to Indian Income-tax, having been earned four years before the year of assessment. The onus of proving that this sum represented profits made in Colombo was on the assessee and the Income-tax authorities held that he had not discharged it, but this finding must be held to be without foundation in view of the following facts which are beyond dispute : (i) In 1930 the assessee remitted from Colombo to Singapore a sum representing profits which was more than sufficient to provide the remittance in question ; (ii) this money was kept in a separate account in Singapore ; (iii) the remittance in question was debited to this account ; (iv) specific instructions requiring the remittance to be debited to this account were given in a letter written by the assessee. But the matter does not end there. On 13th April 1934 the assessee received from Singapore a remittance of Rs. 15,000 which was debited to the account relating to

his profits in the previous partnership in Singapore and on 17th May 1934 he received a remittance of Rs. 20,000 which was also debited to this account. The Commissioner of Income-tax has recognised that these remittances of Rs. 15,000 and Rs. 20,000 do represent profits made in Singapore before 12th April 1931. In fact he reversed a decision of the Income-tax Officer holding that these remittances represented profits made subsequent to that date. There is no difference whatever between these remittances and the remittance of Rs. 88,834 and, if it was right — as it undoubtedly was — to treat the remittances of Rs. 15,000 and Rs. 20,000 as being remittances of old profits, it follows that the remittance of Rs. 88,834 must be treated in the same way. On the evidence before the Income-tax Officer he was bound to hold that the Rs. 88,834 represented a remittance of profits made in Colombo. It is not a question of the discharge of the burden of proof. There was very positive evidence on one side and no evidence at all on which the Income-tax Officer could base his decision. Therefore the answer to the third question must be in the negative.

The answer to the fourth question must also be in the negative. The debts here referred to represent moneys which the assessee had lent to various people before 1930, some on security and some without security. In cases where moneys were lent on securities they had been realised before 1930 or in the course of that year, but in all cases payments to account had been made in 1930. The debts were not written off as irrecoverable in the assessee's books until 1934. It is said that they should have been written off before 12th April 1931. There is nothing to warrant this assertion. It was not until after 12th April 1931 that the assessee was in a position to know whether the

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debts were irrecoverable or not. The Assistant Commissioner allowed sums to be written off as irrecoverable when payments had been made to account in January or March 1931, but he was not prepared to treat the loans in which part repayments had been made in 1930 as being on the same basis, which is illogical. We consider that there were no materials before the Income-tax Officer from which he could hold that these debts should have been written off before 12th April 1931.

As the assessee has succeeded in three out of the four questions, which refer to the main items, we consider that he is entitled to his costs and these we fix at Rs. 250.

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### INCOME-TAX REFERENCE.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice Madhavan Nair and Mr. Justice Varadachariar.*

GUNDA SUBBAYYA, PETITIONER,

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS.\*

*Indian Income-tax Act (XI of 1922), sec. 23 (3)—Assessee's failure to produce evidence on which Income-tax Officer can make proper assessment of his income—Procedure to be followed by Income-tax Officer in case of—Propriety of making assessment in such a case as in a case falling under sec. 23 (4)—Sec. 13 of Act—Effect of—Income-tax Officer making assessment under sec. 23 (3) on material gathered by himself—Disclosure of material to assessee—Necessity—Reference to such material in order of assessment—Desirability of.*

Where in a case falling under sub-section 3 of section 23 of the Indian Income-tax Act of 1922 the assessee fails to

\* Original Petition No. 126 of 1937.

produce evidence on which the Income-tax Officer can make a proper assessment of the assessee's income, the Income-tax Officer must himself take steps to procure material for the purpose if it is not already in his possession. He has power under section 37 to call witnesses and he can make his own inquiries. When he has material (which is not confined to what would be evidence in a Court of law) on which he can assess, he must consider it and make an assessment to the best of his judgment.

*Commissioner of Income-tax, Bihar and Orissa v. Maharajahdhiraj of Darbhanga*(1) relied upon.

Difference between an assessment under sub-section 3 of section 23 in a case where the assessee's books are rightly rejected as being unreliable and he fails to produce other evidence and an assessment under sub-section 4 of section 23, pointed out.

The view held in *Ganga Ram-Balmokand v. Commissioner of Income-tax, Punjab*(2) and *Chan Low Chwan v. The Commissioner of Income-tax*(3), that section 13 must be read in conjunction with section 23 (3) and that the effect of so doing is to bring sub-section 3 of section 23 in line with sub-section 4 of that section, dissented from.

All that section 13 says is that, if the method of accounting employed by the assessee is a method which does not properly disclose the income, profits and gains of the assessee, the Income-tax Officer can adopt his own method. But in doing so he must have reference to the accounts before him as section 13 does not contemplate the rejection of the accounts. Section 13 adds nothing to and takes nothing away from section 23 (3).

The Income-tax Officer when making an assessment on material which he himself has gathered should disclose it to the assessee before making his assessment and give him an opportunity to adduce material in rebuttal. The Income-tax Officer is not, however, bound to disclose the source of his information. It is desirable that the Income-tax Officer should in such a case indicate in his order of assessment the material on which he has made his assessment, but he cannot be compelled to do so.

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

(2) (1937) I.L.R. 19 Lah. 10: (3) (1929) I.L.R. 7 Ran. 281.

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In the matter of the Indian Income-tax Act XI of 1922 and in the matter of the assessment of Gunda Subbayya.

*Ram Mohan Rao* (with him, *S. Venkatesa Ayyangar*) for assessee.—“Best judgment” means a mere guess. The Income-tax Officer must have some data for disbelieving the evidence produced by the assessee. He may make a local inquiry or under section 37 of the Indian Income-tax Act of 1922 summon witnesses.

[THE CHIEF JUSTICE.—Let us look at *Gopinath Naik v. Commissioner of Income-tax*(1) which supports you.]

Against an assessment under section 23 (3) of the Act there is a right of appeal while there is none against an assessment under section 23 (4). Unless there is some record an appellate Court cannot find out whether the assessment is right or wrong.

[VARADACHARIAR J.—Suppose the Income-tax Officer records no evidence but merely says that his assessment is the result of inquiries made by him of several persons. Even then the appellate Court will have no material to go upon.]

[THE CHIEF JUSTICE.—Take a case in which an assessee submits a return and causes his account books to be produced but does not appear before the Income-tax Officer. What is the Income-tax Officer to do? He can only make such inquiry as he can and assess on the basis of the result of that inquiry. What is it that he is to put to the assessee in such a case?]

The Income-tax Officer can put to the assessee the points on which he requires to be satisfied as the result of the private inquiries made by him and require the production of any account books which the assessee can produce to clear up those points.

[THE CHIEF JUSTICE.—Is there anything in the Act to show that the Income-tax Officer is under a duty to put to the assessee the result of his private inquiries?]

Section 23 (3) does not provide for an arbitrary assessment. [Reference was made to *Muhammad Hayat-Haji Muhammad Sardar v. Commissioner of Income-tax*(2).]

(1) (1935) I.L.R. 58 All. 200.  
(2) (1930) I.L.R. 12 Lah. 129, 134 (F.B.).

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[THE CHIEF JUSTICE.—There is a substantial difference between section 23 (3) and section 23 (4). In the former case the Income-tax Officer must have some material upon the basis of which he can make an assessment. If necessary, he must make his own inquiries. The question however is whether he is bound to disclose the result of his inquiries.]

An appeal lies against an assessment under section 23 (3) and unless there is some material on which the Income-tax Officer has proceeded and there is a record of it, the appellate Court will have no material to go upon. The Income-tax Officer may make his own inquiries, avail himself of the provisions of section 37 of the Act or even of the powers conferred by section 23 itself and give the assessee an opportunity of clearing up points which the Income-tax Officer thinks require to be explained by the assessee. He cannot in any event proceed in an arbitrary manner. There must be a material difference between an assessment made under section 23 (3) and one made under section 23 (4). [Reference was made to *In re Binraj Hukumchand*(1) and *Muhammad Hayat-Haji Muhammad Sardar v. Commissioner of Income-tax*(2).]

*M. Patanjali Sastri* for Commissioner of Income-tax.—In ordinary cases no doubt there would be a substantial difference between an assessment under section 23 (3) and one under section 23 (4) because in the former case there must be material upon which the assessment is based. In certain cases however the position and powers of the Income-tax Officer under section 23 (3) will be assimilated to his position and powers under section 23 (4). If the assessee submits a return and produces certain account books which the Income-tax Officer considers to be unreliable, the position would be very much the same as under section 23 (4). The Income-tax Officer can assess according to his best judgment. The assessee can then appeal against the assessment and in the appeal try to displace the Income-tax Officer's estimate. That is a valuable right. [Reference was made to *Commissioner of Income-tax, Bihar and Orissa v. Maharajadhiraj of Darbhanga*(3) which was an

(1) (1931) I.L.R. 58 Cal. 1446, 1451.  
(2) (1930) I.L.R. 12 Lah. 129, 134 (F.B.).  
(3) (1933) I.L.R. 12 Pat. 318, 333-4 (P.C.).

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appeal from *Maharajadhiraja of Darbhanga v. Commissioner of Income-tax, Bihar and Orissa*(1).]

[THE CHIEF JUSTICE.—What do you say about the question of disclosure?]

The Income-tax Officer is not bound to disclose unless the assessee wants him to do so. As stated already, the Income-tax Officer's estimate can be displaced in appeal.

[*Ram Mohan Rao* intervening: Section 30 does not allow any additional evidence to be adduced.]

*Patanjali Sastri* continuing: On the other hand, section 31 (2) empowers the Assistant Commissioner to make a further inquiry or to cause a further inquiry to be made by the Income-tax Officer.

[THE CHIEF JUSTICE.—The sub-section merely says "may". It does not confer a right.]

"May" in the circumstances should be held to impose a duty. The Assistant Commissioner cannot arbitrarily decline to make or order a further inquiry. There is therefore no hardship at all. [Reference was made to section 121 of the English Act corresponding to section 23 (3) and (4) of the Indian Act.] Section 121 of the English Act clubs cases falling under section 23 (3) and section 23 (4) of the Indian Act together and a right of appeal is given in both cases.

[MADHAVAN NAIR J.—But the Indian Legislature has made a difference between cases under section 23 (3) and section 23 (4).]

In certain exceptional cases such as those referred to by me above there is really no difference between section 23 (3) and section 23 (4) except as to the right of appeal.

[THE CHIEF JUSTICE.—The three points are: (i) whether there is any difference between section 23 (3) and section 23 (4); (ii) whether there must be some material upon which the Income-tax Officer can act and whether it should appear on the record; and (iii) whether he should disclose the material to the assessee so as to give him an opportunity of meeting the points relied upon against him. "Judgment" implies the consideration of some material.]

[*Ram Mohan Rao* intervening: Material under section 23 (3) means something different from material under section

(1) (1929) 4 I.T.C. 283; I.L.R. 9 Pat. 240 (S.B.).

23 (4). Material under section 23 (3) means material on record.]

*Patanjali Sastri* continuing: The next question is whether the materials collected by the Income-tax Officer should be disclosed in his order of assessment itself.

[THE CHIEF JUSTICE.—It is in accordance with natural justice that the assessee should be given an opportunity of rebutting the materials collected by the Income-tax Officer. Further, there being a right of appeal the material should be disclosed so as to enable the appellate authority to judge whether the Income-tax Officer was right or not.]

There are cases conceivable in which the position under section 23 (3) will be parallel to that under section 23 (4).

[THE CHIEF JUSTICE.—If the Income-tax Officer proposes to act upon information collected by himself he should disclose to the assessee the nature of that information though not the source of it.]

That position is conceded by the Commissioner. Though there is no statutory provision imposing such a duty on the Income-tax Officer, fairness to the assessee requires him to do so; *Chan Low Chuan v. The Commissioner of Income-tax*(1).

[*Ram Mohan Rao* intervening referred to *Duni Chand-Dhani Ram v. Commissioner of Income-tax*(2) at page 204 for the position that the material should be put to the assessee and he should be given an opportunity to rebut it.]

[THE CHIEF JUSTICE.—That case is different.]

[*Ram Mohan Rao*: I rely upon the observation at page 207.]

*M. Patanjali Sastri* continuing: It is not necessary for the Income-tax Officer to deal with the material at any length in his order. No hard and fast rule should be laid down as to the extent to which he should deal with the material in his order. The assessment order would not be invalidated on the ground that the Income-tax Officer did not refer in his order to the material on which he acted provided he discloses the information at some stage, though a later stage.

[THE CHIEF JUSTICE.—Section 13 of the Indian Income-tax Act does not enlarge the powers of the Income-tax Officer under section 23 (3).]

(1) (1929) I.L.R. 7 Ran. 281, 287.

(2) (1926) I.L.R. 7 Lah. 201.

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It has been held that section 13 applies also to cases in which the assessee's account books are incomplete and considered unreliable by the Income-tax Officer. [Reference was made to *Chan Low Chuan v. The Commissioner of Income-tax*(1) and *Ganga Ram-Balmokand v. Commissioner of Income-tax, Punjab*(2).]

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—In accordance with the direction of the Court given under section 66 (3) of the Indian Income-tax Act the Commissioner of Income-tax has referred the following question for the Court's decision :

"When there is evidence on which the Income-tax Officer can base a finding that the assessee's books are unreliable and consequently rejects them and the assessee fails to produce other evidence, can the Income-tax Officer assess under section 23 (3) of the Act to the best of his judgment ? "

The words "to the best of his judgment" are used only in sub-section 4, which requires the Income-tax Officer to make the assessment to the best of his judgment when there has been a default of the nature contemplated by the sub-section. Sub-section 3 directs the Income-tax Officer to make the assessment after hearing such evidence as the assessee may produce and such other evidence as the Income-tax Officer may require him to produce on specified points. No direction is given to the Income-tax Officer when assessing under sub-section 3 and the assessee fails to produce evidence or produces evidence which the Income-tax Officer considers unreliable or incomplete. The question is whether in such a case the Income-tax Officer should proceed to assess as he would do in a case falling under sub-section 4.

The provisions of the two sub-sections have been frequently debated in the Courts, but it is not necessary for the purpose of deciding the question referred to

(1) (1929) I.L.R. 7 Ran. 281, 286-7. (2) (1937) I.L.R. 19 Lah. 10, 19.

enter upon a discussion of the reported cases. When assessing under either of the two sub-sections the Income-tax Officer must have material on which to base his assessment. An order of assessment made under sub-section 3 is appealable, whereas an order made under sub-section 4 is not, but this does not mean that the Income-tax Officer can make an assessment under sub-section 4 capriciously. The assessment must be to the best of his judgment, and the word "judgment" itself implies consideration of something. Here it must be the consideration of facts relating to the income of the assessee. And the same principle applies when the Income-tax Officer is acting under sub-section 3. Where in a case falling under that sub-section the assessee has failed to produce evidence on which the Income-tax Officer can make a proper assessment of the assessee's income, the Income-tax Officer must himself take steps to procure material for the purpose if it is not already in his possession. He has power under section 37 to call witnesses and he can make his own inquiries. When he has material on which he can assess, he must consider it and make an assessment to the best of his judgment. I use the word "material" advisedly because the Income-tax Officer is not confined to what would be evidence in a Court of law. The only difference between an assessment under sub-section 3 in a case like the one mentioned in the reference and an assessment under sub-section 4 is that the Act contemplates a more summary method when the Income-tax Officer is acting under sub-section 4 and this is by reason of the deliberate default of the assessee.

The interpretation to be placed on sub-section 3 is to be gathered from the judgment of the Privy Council in the case of the *Commissioner of Income-tax*,

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*Bihar and Orissa v. Maharajahdiraj of Darbhanga*(1). In that case the assessee stated that he had an income of Rs. 4,364 from a certain source. The Income-tax Officer did not accept this figure, and passed an order assessing him on an income from this particular source of Rs. 1,04,364. In due course the Commissioner of Income-tax referred the following question to the Patna High Court for its decision :

"Whether the assessing Officer was right in making an estimate of Rs. 1,04,364 under this head as he has done?"

The High Court answered this question in the affirmative and TERRELL C.J. in the course of his judgment observed:

"Learned counsel for the assessee has argued that the Officer is not entitled to make a guess without evidence and I agree with that contention, but in this case the state of affairs in the previous years, coupled with the fact that the assessee had a large mortgage loan business and must have enforced mortgages by sale on many occasions, afford ample material for the assessment made."

The other Judges concurred and the Privy Council also agreed,

"adding only that, if the assessee wished to displace the taxing officer's estimate, it was open to him to adduce evidence of all his purchase transactions during the year and of the financial results thereof, which he apparently made no attempt to do".

The Income-tax Officer had assessed the assessee to the best of his judgment on the material before him and the material was sufficient for the purpose.

There are two other questions which are bound up with the question under discussion, namely, whether the Income-tax Officer when making an assessment on material which he himself has gathered should disclose it to the assessee before making his assessment and give him an opportunity to adduce material in

rebuttal and whether the Income-tax Officer should in his order of assessment set out the facts which he has taken into consideration when estimating the assessee's income for the year. There is nothing in the Act itself which requires the Income-tax Officer to disclose to the assessee the material on which he proposes to act or to refer to it in his order but natural justice demands that he should draw the assessee's attention to it before making the order. Information which the Income-tax Officer has received may not always be accurate and it is only fair when he proposes to act on material which he has obtained from an outside source that he should give the assessee an opportunity of showing, if he can, that the Income-tax Officer has been misinformed, but the Income-tax Officer is obviously not bound to disclose the source of his information.

An order made by an Income-tax Officer under section 23 (3) is appealable. When considering whether an order is right, the appellate authority must, of course, know on what it is based and if the basis of the order is not disclosed in the order itself it means that the appellate authority will have to refer the matter back to the Income-tax Officer in order to find out what the position is. Moreover, this Court has often to consider an order of an Income-tax Officer and it is convenient to this Court to know from the order itself why it was passed. From every point of view it is desirable that the Income-tax Officer should indicate in his order the material on which he has made his assessment, but I realize that he cannot be compelled to do so.

In the reference made by the Commissioner of Income-tax and also in the course of the arguments, mention has been made of section 13. The Commissioner of Income-tax suggests that section 13 can be

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



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read in conjunction with section 23 (3) and that the effect of so doing is to bring sub-section (3) of section 23 in line with sub-section (4). In *Ganga Ram-Balmokand v. Commissioner of Income-tax, Punjab*(1) the Lahore High Court appears to have read the section in this way and the Rangoon High Court appears to have done the same in *Chan Low Chwan v. The Commissioner of Income-tax*(2). I find myself unable to take the same view. Section 13 reads as follows :

"Income, profits and gains shall be computed, for the purposes of sections 10, 11 and 12, in accordance with the method of accounting regularly employed by the assessee ;

Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine."

It seems to me that all the section really says is that, if the method of accounting employed by the assessee is a method which does not properly disclose the income, profits and gains of the assessee, the Income-tax Officer can adopt his own method. But in doing so he must have reference to the accounts before him as section 13 does not contemplate the rejection of the accounts. Section 13 adds nothing to and takes nothing away from section 23 (3).

The reference will be answered in the sense I have indicated and the Income-tax authorities will carry out the assessment in the light of the observations made in this judgment. We consider that this is a case in which there should be no order as to costs, but we direct that the deposit made by the assessee be returned to him.

A.S.V.

(1) (1937) I.L.R. 19 Lah. 10, 13. (2) (1929) I.L.R. 7 Ran. 281.

## APPELLATE CIVIL.

Before Mr. Justice Varadachariar and  
Mr. Justice Abdur Rahman.

NINKILERI LAKSHMIKUTTY KETILAMMA  
(THIRD RESPONDENT), APPELLANT,

1938,  
December 8.

v.

THEKKE MADATHIL VISHNU NAMBISAN  
(PETITIONER), RESPONDENT.\*

*Insurance policy—Endowment insurance policy payable on a specified date or earlier on assured's death—Assignment of—Present transfer of amount due under policy in favour of assignee with provision for reverter to assignor in certain contingencies—Assignment when amounts to.*

V, who had in 1927 obtained an endowment insurance policy payable in 1952 or on his death earlier, assigned the policy to his wife (appellant) in July 1933 by an endorsement on the policy itself. The assignment was duly communicated to the insurance company. V died subsequently in 1933 and after his death a decree was passed against the appellant as his legal representative. The question was whether the policy amount constituted "assets" of V in the hands of the appellant and could therefore be attached in execution of the said decree or whether by reason of the assignment the policy amount belonged to the appellant and was therefore not attachable in execution of the said decree. The endorsement ran as follows :

" . . . I do hereby assign the benefit of all moneys to become payable under the policy . . . to my wife and declare that her receipt shall be a sufficient discharge to the company for the same, provided however that in the event of my wife predeceasing me or in the event of my surviving the date on which the said policy, if so expressed, would mature, the benefit of the policy and the right to receive

\* Appeal Against Appellate Order No. 56 of 1935.



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*Held* that on its true construction the endorsement operated as a present transfer in favour of the assignee, though provision was also made for a reverter to the assignor in certain contingencies, and that in the events that had happened the policy amount belonged to the appellant and did not constitute "assets" of her husband in her hands and that it could not therefore be attached in execution of the said decree.

APPEAL against the order of the District Court of North Malabar at Tellicherry, dated 24th September 1934 and made in Appeal Suit No. 111 of 1934 preferred against the order of the Court of the District Munsif of Kuthuparamba in Register Execution Petition No. 791 of 1933 (Summary Suit No. 544 of 1933, District Munsif's Court, Cannanore).

*O. T. G. Nambiar* and *N. T. K. Nambiar* for appellant.

*P. Govinda Menon* for respondent.

VARADACHARIAR J.—The only question for decision in this miscellaneous appeal is whether a certain insurance policy amount which has been sought to be attached by the respondent, decree-holder, can be held to be "assets" of the late Kerala Varma Raja in the hands of the appellant.

The appellant is the widow of Kerala Varma Raja. The policy in question was an endowment policy obtained by the deceased in 1927 and was payable on 5th April 1952 or on the death of the assured earlier. On 3rd July 1933 the assured assigned this policy by an endorsement on the policy itself. This assignment was duly communicated to the insurance company and there registered, though as usual the

company guarded itself from admitting the validity of the assignment. The assured died in 1933 and the decree under execution was passed against the appellant as his legal representative. The question does not now arise between the company and the assignee but between the assignee and a person who has obtained a decree against the assets of the assured.

The Court of first instance released the policy amount from attachment on the ground that by reason of the assignment the policy amount belonged to the assignee and did not form part of the estate of the assured at his death. The learned District Judge reversed this decision on the ground that the assignment was not an absolute or outright assignment taking effect at once but was only contingent; he thought it followed that the amount due to the assured under the policy formed part of the estate of the deceased. The decision of the learned District Judge is opposed to the judgment of this Court in *Yacoob Sahib v. Pacha Bibi*(1). The only other reported decision on the point which has been brought to our notice is a decision of the Sind Judicial Commissioners' Court in *Shamdas v. Savitribai*(2) and the principle of that decision is also in favour of the appellant's contention.

Learned Counsel for the respondent has contended that the endorsement on the policy is no more than a mandate or at best it operates only as a testamentary transfer and that no interest in the policy passed to the assignee during the lifetime of the assignor. He also repeated the argument which had found favour with the lower Court that the words of transfer did not amount to an absolute interest. The endorsement,

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(1) (1917) 38 I.C. 248.

(2) A.I.R. 1937 Sind. 181.

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CHARIAR J. which appears in a usual form suggested by the company, runs as follows :

"In consideration of natural love and affection, I do hereby assign the benefit of all moneys to become payable under the policy (reserving to myself the right to receive in cash or apply in reduction of premia any bonuses that may be declared upon such policy from time to time) to my wife and declare that her receipt shall be a sufficient discharge to the company for the same, provided however that in the event of my wife predeceasing me or in the event of my surviving the date on which the said policy, if so expressed, would mature, the benefit of the policy and the right to receive moneys thereunder shall revert to me as if this assignment has not been made."

In support of the first contention, the respondent's learned Counsel relied upon the judgment of the Court of Appeal in England, *In re Williams. Williams v. Ball*(1), and on some observations of the Rangoon High Court in *Ma Nu v. Ma Gun*(2). The language of the document which the Court had to construe in the English case was quite different, the very point made in that connection in the English case was that the endorsement relied on did not purport to assign at all but only purported to authorise the named person to draw the insurance amount in the event of the assured predeceasing her. It was significant that no notice of the so-called assignment had even been given to the insurance company in that case. ASHBRUY J. held that there were no words of present gift at all. In the Court of Appeal, the learned Judges were inclined to construe the so-called endorsement as a mere power of attorney. Alternatively, they added that at best it might have operated to give to the named person an interest on the death of the assured if it had complied with the

(1) [1917] 1 Ch. 1.

(2) (1924) I.L.R. 2 Ran. 388.

formalities required by law for a will. No help can be derived from that judgment in the construction of the terms of the endorsement in the present case, because the words here used are that the assured doth "hereby assign the benefit of all moneys, etc., to the wife". On these words it cannot be said that the endorsement amounted to a mere power of attorney or that the transfer was one *in futuro*. In the Rangoon case, *Ma Nu v. Ma Gun*(1), the argument turned on the effect of a mere nomination. Reliance was placed by learned Counsel before us on the way that the observations in *In re Williams. Williams v. Ball*(2) had been understood by the learned Judges of the Rangoon High Court. As we have dealt with the English case ourselves, the observations of the Rangoon High Court on that case cannot carry the matter further.

It was next argued that because in certain contingencies the assignee will not on the terms of the endorsement be entitled to receive the policy amount or the assignor might become entitled to recover the same, the transaction was revocable only and in that sense the disposition, if any, was only testamentary. This argument seems to us to confound a contingent transfer with a revocable transfer. Even this distinction is immaterial here, because on its true construction the endorsement in this case operates in our opinion as a *present* transfer in favour of the assignee though provision has also been made for a reverter to the assignor in certain contingencies. The provision for reverter only emphasises the immediate operative-ness of the transfer. If the events that have happened have brought the reverter clause into operation, the creditors of the assured would no doubt be entitled

(1) (1924) I.L.R. 2 Ran. 388.

(2) [1917] 1 Ch. 1.

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to treat the policy amount as having become part of the estate of the assured. But it cannot be disputed that in the events that have happened the assignee is entitled to recover the policy amount and there is no scope for the operation of the reverter clause.

It was finally contended that an assignment of an actionable claim within the meaning of section 130 of the Transfer of Property Act must be "absolute" and that the assignment in the present case is not absolute. Reliance was placed in this connection on the observations of BEAMAN J. in *Haridas Lalji v. Narotam*(1). The learned Judge has not expressed any final opinion on this point in the case referred to. The question of the "absolute" character of the transfer may be material when there is a dispute as to the transferee's right to sue the insurance company; no such question arises here. We may however observe that there is no possibility in this case of the assignor and the assignee having fractional rights in the policy amount *at one and the same time*. The only qualification on the rights of the transferee (apart from the bonus amount with which we are not now concerned) is by way of a defeasance clause (cf. section 31 of the Transfer of Property Act and section 134 of the Indian Succession Act). The result is that so long as the transferee's interest exists, she has the whole interest and when the defeasance clause comes into operation the interest of the person who takes under the defeasance clause is equally an absolute interest. We do not find anything in the terms of section 130 of the Transfer of Property Act or in the principle underlying it that excludes a transfer of this kind from its scope.

(1) (1911) 14 Bom. L.R. 237, 245.

As desired by Mr. Govinda Menon, the learned Counsel for the respondent, we wish to make it clear that this judgment will not apply to any amount that the deceased might be entitled to receive by way of bonus in respect of the policy, because the endorsement expressly reserves to the assignor the right to the bonus, so that he may, if he so desired, apply it in reduction of premia. If the bonus has been appropriated by the assured himself towards premia due on the policy, there will be nothing left for the assured or his creditors to claim. If, on the other hand, there is any sum remaining payable by way of bonus, that cannot be held to have passed under the assignment.

We set aside the decision of the learned District Judge and restore that of the District Munsif with costs here and in the Court below.

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## APPELLATE CIVIL.

Before Mr. Justice Pandrang Row and Mr. Justice  
Krishnaswami Ayyangar.

1938,  
October 24.

NACHIMUTHU GOUNDAN AND ANOTHER (DEFENDANTS  
3 AND 6), APPELLANTS,

v.

BALASUBRAMANIA GOUNDAN, MINOR, BY MOTHER AND  
NEXT FRIEND KALIYAMMAL (PLAINTIFF), RESPONDENT.\*

*Hindu law—Debt—“Rina”—Meaning of—Liability of surviving partners to account for deceased partner's share—If a “debt” according to Hindu law antecedent to mortgage executed in discharge of same.*

A joint Hindu family consisted of two brothers and their descendants. They started a business and carried it on for some years with the aid of family funds. Later on they took a stranger partner who paid a substantial sum by way of capital. Some time later he died leaving a son and the accounts of the business were looked into and upon the settlement of such accounts, the two brothers executed, *inter alia*, a mortgage of their family property towards a portion of their liability. Their sons and grandson contended that their shares in the mortgaged property were not liable because the mortgage was not executed to discharge an antecedent debt but only in respect of the amount due on the settlement of partnership accounts which was practically simultaneous with the mortgage.

*Held:* The term “rina” in Sanskrit is not synonymous with “debt”. It includes all varieties of obligations and debts as well, though it has been loosely translated as “debt” in English and appears in that sense in modern text-books and decisions of Courts.

The unascertained liability of the two brothers was “rina” according to Hindu law. It was incurred by them in favour of the deceased partner from the time when the latter brought

\* Appeal No. 235 of 1934, Appeal Against Appellate Order No. 312 of 1935 and Civil Miscellaneous Petition No. 4443 of 1938.

capital into the partnership subject to its being returned with a reduction in case of loss or an addition on account of profit. It was both antecedent in time and independent in origin from the mortgage which could not have been in the contemplation of the parties when the capital was brought in.

Case-law discussed.

APPEAL against the decree of the Court of the Subordinate Judge of Coimbatore in Original Suit No. 183 of 1932.

*K. Rajah Ayyar and M. Krishna Bharathi* for appellants.

*T. R. Venkatarama Sastri and N. Somasundaram* for respondent.

*Cur. adv. vult.*

The JUDGMENT of the Court was delivered by KRISHNASWAMI AYYANGAR J.—The question for decision in this appeal is whether the mortgage sued on is binding on the undivided sons of the mortgagors. The argument against it is that there was neither an antecedent debt nor a justifying necessity and in its absence the father had no authority to bind by his act the interest of his sons in the joint property. No new principle of law is therefore involved in the decision of this appeal; for the doctrine of antecedent debt is at least as old as *Suraj Bansi's* case(1) if not older still and has now been finally and authoritatively declared by the Privy Council. Though the rule itself in this form does not find express mention in the texts of Hindu law or the commentaries, there can be no doubt that it is but the logical outcome of the fundamental principle stated in the *Mitakshara*, Chapter 1, sections 27 and 28. The author says:

“Therefore it is a settled point that property in the paternal estate is by birth, although the father has independent

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(1) (1879) I.L.R. 5 Cal. 148 (P.O.).

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power in the disposal of effects other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law as gifts through affection, support of the family, relief from distress and so forth, but he is subject to the control of his sons and the rest in regard to immovable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained that though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born and they who are yet unbegotten and they who are yet still in the womb require the means of support; no gift or sale should therefore be made. Even a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress for the sake of the family, and especially for pious purposes."

The underlying object of the restriction is plain enough, namely, the conservation of the family substance for the benefit of the existing and future members of the family. In a loose though not in a strict legal sense the family property in the hands of the father or the manager may perhaps be termed a trust for the family itself conceived as a continuing unit. It was in this sense that in *Sahu Ram Chandra v. Bhup Singh*(1) Lord SHAW observed as follows:

"In short, it may be said that the rule of this part of the Mitakshara law is that the joint family estate is in this position: Under his management he (the father) can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain, and it might be, a deliberate breach of trust. The Mitakshara law does not warrant or legalise any such transaction."

Once it is realised that it is a kind of trust that lies at the foundation of the restriction, see also *Venkataramaswami v. Imperial Bank of India*(2), it will be

(1) (1917) I.L.R. 39 All. 437, 447, 448 (P.C.).

(2) I.L.R. [1939] Mad. 7 (F.B.).

easy to understand its scope as well as its applicability. At first sight it may look as if there is very little purpose in requiring that there should not only be a debt but that it must also be an antecedent one. According to Hindu law it is equally the pious obligation of the son to discharge the father's debt, whether it had been antecedently or was concurrently incurred. Both have to be met from out of the family estate, and there is no escape from either except by the practice of fraud or dishonesty. If accordingly the family property is the fund out of which both classes of debts have to be met, no rational distinction could be made between the two, and this indeed was the view of such eminent Hindu Judges as BHASHYAM AYYANGAR J. in *Chidambara Mudaliar v. Koothaperumal*(1) and BANERJI J. in Allahabad in *Chandradeo Singh v. Mata Prasad*(2), and it was not till the Privy Council finally pronounced against it that the true basis of the principle emerged into view; see *Sahu Ram Chandra v. Bhup Singh*(3), *Brij Narain v. Mangal Prasad*(4), *Venkataramanaya Pantulu v. Venkataramana Doss Pantulu*(5) and *Arumugham Chetty v. Muthu Koundan*(6). What appears to be a cogent explanation is given by AIKMAN J. in *Chandradeo Singh v. Mata Prasad*(2) where he has observed as follows:

"At first sight it seems that there is little distinction in principle between a mortgage given for an antecedent debt, and a mortgage for a debt incurred for the first time when the mortgage is executed. But if the distinction is observed, it will tend to preserve the property in the family as it will render it more difficult for a Hindu father to incur debts which might ultimately have the effect of dissipating that property."

(1) (1903) I.L.R. 27 Mad. 326. (2) (1909) I.L.R. 31 All. 176 (F.B.).  
(3) (1917) I.L.R. 39 All. 437 (P.C.). (4) (1923) I.L.R. 48 All. 95 (P.C.).  
(5) (1905) I.L.R. 29 Mad. 200 (F.B.).  
(6) (1919) I.L.R. 42 Mad. 711 (F.B.).

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In other words the creditor will have one more hurdle to jump and the family will have a little more time to avert the threatened danger. At this time of day it is perhaps pointless to enter into a discussion of the reason of the rule, for the rule itself has now been clearly and unequivocally settled by the decisions of the highest tribunal. It is with the application of that rule or rather the meaning of the word "debt" in the phrase "antecedent debt" that we are concerned in this appeal, remembering that the corresponding term in the Sanskrit text is ऋण (rina).

The facts of this case lie in a narrow compass. Two brothers who had themselves started a mill business and carried it on for some years, presumably with the aid of family funds, were obliged in April 1925 to take a new partner whose contribution by way of capital enabled them to meet the debts then owing and to continue the business itself. The new partner was the plaintiff's father who paid a sum of Rs. 20,000 towards his share of the capital, an equal sum represented by the value of the business premises and the plant and machinery therein belonging to the brothers being treated as their contribution. The partnership was to run for a period of five years and the profits and losses were to be shared equally between the plaintiff's father on the one hand and the two brothers together on the other. Clause 4 of the partnership deed which is the only relevant clause is as follows :

"It was agreed that we should conduct the business . . . up to the said period and, at the end of the period, compare the purchase, etc., and all accounts duly maintained and divide the net profit and, or loss in equal shares, one half for the individual No. 1 (the plaintiff's father) and the other half for the individuals Nos. 2 and 3 (the two brothers). So, if any of us is willing to separate himself from us before the due date, such person should forfeit the profit relating to his

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share and receive the balance of principal after deducting his loss therefrom after the expiry of the period of the partnership."

Long before the period expired, and indeed within four months after the new partnership, the plaintiff's father died, and the partnership became dissolved. The plaintiff being a minor, his mother wisely decided not to continue the partnership any longer and desired that the partnership accounts should be taken, the share of the deceased partner ascertained and paid over to her. The accounts were accordingly taken with the assistance of certain mediators and a sum of Rs. 30,294-13-4 was found due. For a portion of that amount, namely Rs. 14,732-13-4, outstandings of the business were assigned to her, and for the balance of Rs. 15,562 the suit mortgage was executed. The assignment is Exhibit B, dated 1st September 1925, and the mortgage, Exhibit A, dated 30th August 1925. Both these documents were in fact parts of one transaction and were brought into existence close upon the settlement of the partnership accounts, and in order to implement it. Subsequent to the mortgage one of the brothers, Krishnaswami Goundan, died within a few months leaving four sons, defendants Nos. 2 to 5, and a grandson, defendant No. 7. The other brother, Vellai Goundan, is the first defendant, and his son is defendant No. 6. The main defence to the suit was that pleaded by these sons and the grandson, namely, that the mortgage as such could not affect their shares in the mortgaged property as until the settlement of the partnership accounts, which was practically simultaneous with the mortgage, there was no debt as such in law but merely a duty to account. It was accordingly urged that the requisite conditions of an antecedent debt were not present in this case as the mortgage was not really or sufficiently disconnected

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from the precedent debt in point of fact or time. In the Court below it appears to have also been urged that the business in question was in the nature of a speculative trade and that a debt incurred in it, even regarding the deceased partner's interest in the partnership assets as a debt, should be held to be of an immoral or illegal nature. But this contention was rightly and summarily overruled, and has not been repeated before us.

The only question then is whether the consideration for the mortgage was an antecedent debt in the sense in which that expression is understood in Hindu law. The argument for the appellant is that until the accounts are taken and the liability ascertained, it is impossible to postulate that there is or will be a debt due by one partner to the others or *vice versa*. The liability to account of a partner or partners in a running or even a dissolved partnership does not, it was argued, amount in law to a debt in being, but was merely the possibility or contingency of a debt to arise in the future. Till it is known how the accounts stood, it was urged, there could be no debt and no partner liable for it. The appellant's learned Advocate was not prepared to go the length of saying that in no case of unsettled accounts could there be a debt in law even if there remained nothing more than a purely arithmetical calculation to arrive at the correct figure. What he did urge was that, so long as there was no debtor and creditor relationship established, no debt could come into existence and that in a partnership there is no such relationship until the business is dissolved and until the liability of the partners *inter se* is ascertained by the taking of the usual accounts.

There may be some support for this argument if one confines one's attention to the meaning of the

word "debt" according to its common law acceptance. Jenks's definition is that it is

"a definite sum of money recoverable from one person (the 'debtor') by another person (the 'creditor') by means of a common law action; whether payment can be claimed immediately or not."

See Jenks, Digest of English Civil Law, Book III, Title V, section 1620. The action of debt lay according to Anson (*see* Anson's Law of Contract, Seventeenth Edition, page 53, and also Pollock's Principles of Contract, Tenth Edition, pages 135 and 136)

"for liquidated or ascertained claims arising either from breach of covenant, or from non-payment of a sum certain due for goods supplied, work done, or money lent".

The qualification that the claim in respect of a debt so called, should be *definite, ascertained or liquidated*, has its roots in the old common law action of debt which was proprietary in character, and was in fact a claim for the recovery of money by way of restitution rather than the enforcement of an obligation arising out of contract; *see* Pollock and Maitland's History of English Law, Second Edition, Vol. II, pages 203 to 207. Its supersession by *assumpsit* or the *indebitatus* count, the practical abolition by the Common Law Procedure Act, 1852, of the distinction between debt and *assumpsit*, and the doing away altogether with the formal pleadings of the Common law Courts by the Judicature Act, 1873, are familiar knowledge to the student of English legal history; *see* Holdsworth's History of English Law, Vol. II, pages 366, 367, and Vol. III, pages 420, 421, 442, 443, and Anson's Law of Contract, Seventeenth Edition, page 44. The distinction between debt and damages, the former relating to a liquidated claim and the latter generally to an unliquidated demand, still clings to English legal phraseology and still exerts a limited, but none the less

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real, influence on modern English jurisprudence. With that technical narrow meaning of the word we are not here concerned. For we are not considering a proposition of English law or the provisions of a Statute based on that law. We have on the contrary to deal with a totally different subject and a totally different system of law. We have in fact to assign a meaning to the word "rina" according to the sense in which that word has been used in the texts of Hindu law. To such a word and in such a context, are we to apply the English common law meaning of the word or are we to go back to those texts themselves and to the language in which they have been clothed, in order to ascertain the true meaning of the word "rina" indifferently rendered as debt in English and occurring in modern text-books and in decisions of the Courts when defining the obligation of a Hindu son to relieve his father from the sin of his undischarged debt?

The narrower interpretation will at once lead to obvious and startling consequences. The larger and more numerous obligations arising out of contracts and quasi-contracts, trusts and other fiduciary relationships, though leading to monetary liability and without the slightest taint of immorality or illegality in any of them, will fall outside the pious duty. And yet we find the texts full of passages [see *Garuda Sanyasayya v. Nerella Murthenna*(1)] and the reports full of cases, in which obligations which are far removed from debt in the narrow sense have been clearly recognised. Brihaspathi in describing the fate of a debtor who dies without having discharged a debt refers to him as one who received a sum *lent* or *the like*; see Colebrooke's Digest I, 228, attributed also to Katyayana. According to Katyayana, the son is bound

(1) (1918) 9 L.W. 1, 3.

to carry out what an ancestor has *promised* for religious purposes; see Colebrooke's Digest I, 206. Usanas obviously understands "rina" in the wider sense, though of course he excludes certain categories as falling outside the limits of the obligation, being "avyavaharika" in nature or origin. According to the texts, a surety debt, commercial tolls, debts due for spirituous liquors, for lustful pleasures, gambling debts, unpaid fines, promises without consideration had in terms to be excluded, as otherwise, being "rinas", the sons would be bound to discharge them by reason of their pious obligation; see the texts collected in *Chhakauri Mahton v. Ganga Prasad*(1). The words, "dhana" and "rina"\*, "riktha" and "rina" §, coupled together in the texts, seem to have been so used in a comprehensive sense for describing all varieties of divisible assets and liabilities. Otherwise, obligations other than debts strictly so called would bind only the man who incurred them while he is alive and will die with him when he dies and, though alive or dead, the family assets in his hands will be divisible among the sons, while the liabilities will be left unprovided for. Such an absurdity could not have been in the contemplation of the authors of the texts and we at any rate do not feel justified in attributing it to them, in the absence of clear and definite words to the contrary. If "dhana" includes in its connotation all varieties of property and assets, we see no reason why "rina" should not be held to include all varieties of obligations and debts as well. Apart from the texts of Hindu law, the word has been

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\* Manu (Sanskrit) ऋणे बनेच.

§ Yagnavalkya, Chap. II, 119 (Sanskrit) ऋक्यमृणम्.



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frequently used in the wider sense in Sanskrit literature. Witness, for instance, the well-known Vedic text referring to the triple debt which attaches to a Brahmin at birth \*. Such instances could be easily multiplied.

Coming to the decided cases on the point, in *Garuda Sanyasayya v. Nerella Murthenna*(1) the sons were held liable for the unaccounted collections made by a father out of the trust estate under his charge and the learned Judges, WALLIS C.J. and SESHAGIRI AYYAR J., refused to recognize the subtle distinction, as they called it, between accountability and debt. In a later case, *Muthammal v. Sivakami Ammal*(2), in which the point was more directly raised, the learned Judges considered the question of the liability of the sons to pay mesne profits decreed against the father and held that their pious obligation extended to it. The case is instructive for the collection of cases in which the liability was established against the sons in respect of a variety of causes of action far removed from debt in the limited sense. In none of them, it is noteworthy, was it disputed that there was a debt but only that the debt was not of a nature which would bind the son's interest. VENKATASUBBA RAO J. explained the position in these words :

"It was contended that the obligation to pay mesne profits is not in the nature of a debt, that it is not in fact 'rina' which means strictly 'what is taken under a promise to repay'. We agree with MOOKERJEE J. [see *Chhakauri Mahton v. Ganga Prasad*(3)] that the word 'rina' as used in the texts has a much wider application than a mere debt

\* (Sanskrit) जायमानो वै ब्राह्मणस्त्रिभिः ऋणैः ऋणवान् जायते ।

ब्रह्मचर्येणार्धम्यः यज्ञेन देवेभ्यः प्रजया पितृभ्यः ॥

(1) (1918) 9 L.W. 1, 3.

(2) (1925) 21 L.W. 608.

(3) (1911) I.L.R. 39 Cal. 862, 877.

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or loan. I am prepared to go further than merely hold that, at any rate, a judgment debt comes within the expression 'rina' for, if this narrow construction be adopted, a son can be held liable only after a decree is passed against the father ; whereas, if he is originally impleaded in the suit for damages, he can resist it on the ground that there has been no debt, as there has not been a judgment. This would be a clear anomaly."

The other learned Judge, MADHAVAN NAIR J., was also of the same opinion. See also *Natasayyan v. Ponnusami*(1). Quite recently in *Chatar Sen v. Raja Ram* (2) a Bench of the Allahabad High Court has expressed a definite preference for the wider interpretation of the word as including a liability for unliquidated damages arising on a breach of contract by the father. We are in entire agreement with the observations of the learned Judges who declined to accept the stricter meaning of the word "rina". They said :

"If we carry it to its logical conclusion, the liability of a son to pay the antecedent debts of his father would not extend to any liability incurred otherwise than by the advancing of a sum in cash to the father. We cannot believe that this was the intention of the author of the text (Brihaspathi, Vol. 33, Max Muller's Sacred Books of the East, page 319). We cannot believe, for instance, that a son would not be liable to pay the unpaid price of a commodity which had been bought by his father or to pay rent due by his father as a tenant (according to English law an action of debt lay at Common Law). We think that the son is bound to pay any sum which is lawfully due from the father provided that the father's liability is not in any way tainted with immorality."

These authorities are sufficient to negative the appellant's contention. It may, however, be observed

(1) (1892) I.L.R. 16 Mad. 99, 104. (2) I.L.R. [1939] 22, 52, 53, 58.

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that even if the word "rina" in Sanskrit is to be understood as meaning a debt, there is no warrant for importing into it the technical sense in which the word debt has become wrapped up by the peculiarities of the old English common law and procedure. Almost every English dictionary includes "obligation" among the meanings of the word "debt", though ordinarily the word does mean that which is due from one person to another or what is owed. We even speak, metaphorically perhaps, of owing a debt of gratitude. But whatever may be the meaning which a layman or a lawyer speaking the English language may attach to it, we are unable to say that the word "debt" is the exact equivalent of "rina" in Sanskrit, at any rate with all the technical import that that word carries. Moreover, the word "rina" has passed into colloquial use in the wider sense in most of the vernaculars of the Presidency. It is not capable of being fully or definitely expressed in any single English word. Like the words, "satya" or "dharma", which are but imperfectly translated as truth or duty, the word "rina" also is often rendered loosely as debt, though such a rendering is sufficient for practical purposes. But, when it becomes necessary to ascertain its significance for apportioning rights or liabilities, we must determine it not by reference to its English equivalent but by reference to the original Sanskrit word itself, giving to it just the meaning in which it is used or understood in the parent language in its literal or even colloquial sense. What we cannot agree to is the attempt first to regard debt as a perfect synonym and then to understand it in the archaic sense in which the word was understood in the now obsolete old forms of common law actions. We must accordingly hold that the unascertained liability of the two brothers was a debt according

to Hindu law incurred by them in favour of the plaintiff's father from the time when the latter brought into the partnership the sum of Rs. 20,000 subject to its being returned with a reduction in case of loss or an addition on account of profit. It was thus both antecedent in time and independent in origin from the mortgage which, it is plain, could not have been in the contemplation of the parties when the capital was brought in. What was in fact contemplated was, as appears from the partnership deed, something totally different from what actually led to the execution of the mortgage. The test must therefore be held fully satisfied, antecedency in time and dissociation in fact being thus established.

It was urged that the word "debt" has been defined in some Indian cases in such a way as to exclude a liability for an amount to be yet ascertained by the taking of accounts. Two cases were cited, both of which proceeded on the meaning of the word as used in two different statutes, and it was held that such a liability cannot be regarded as a debt within the meaning, in one case, of section 4 (1) (a) of the Succession Certificate Act (VII of 1889), and in the other, of section 25 of the Contract Act (IX of 1872). In *Sabju Sahib v. Noordin Sahib*(1) SUBRAMANIA AYYAR J., to whom the case was referred on a difference of opinion between SHEPHARD Offg. C.J. and BENSON J., held, relying on *Johnson v. Diamond*(2), that the liability arising from such an obligation could not be held to be a debt in the accepted legal sense of the term for the obvious reason that the liability was not in respect of a liquidated sum. It is not without interest that BENSON J., who took what may be called a common sense view of the matter, dissented, holding that,

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(1) (1898) I.L.R. 22 Mad. 139. (2) (1855) 11 Ex. 73; 156 E.R. 750.

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when the accounts are taken and the sum due is ascertained, that sum while yet it remained unascertained was a debt within the Act. In *Doraisami Padayachi v. Vaithilinga Padayachi*(1) a promise to pay the amount which might be found due by an arbitrator on the taking of accounts between the parties was held not to amount to a promise to pay a debt within the meaning of section 25 of the Contract Act, the amount not being a liquidated sum. These decisions, whatever their value may be in the construction of the statutes which have employed the English legal terminology, have no bearing on the meaning to be given to the expression in a different context, in a different language and for a principle of law altogether alien to the English system. The decision in *Thirunavukarasu Chetti v. Muthukrishnan*(2) is, however, directly in point, and is not to be distinguished in this way, though it was sought to distinguish it from the present case on the facts. The mortgage in that case was given by one partner to the other in a running partnership, for the amount due on an investigation of the accounts necessitated by the bad faith of the mortgagor. The learned Judges who decided the case held that, until the settlement of the partnership account as such was arrived at, the relationship of creditor and debtor did not exist between the parties, and there could not be said to have been any debt existing antecedently to the mortgage. With respect, we find ourselves unable to accept this dictum as a correct statement of the Hindu law on the point. Their attention does not appear to have been called to the meaning of the word "rina" as explained in the cases cited above, nor was the rule of the Hindu law on this point put specifically before them. We therefore

(1) (1916) I.L.R. 40 Mad. 31 (F.B.).

(2) 1931 M.W.N. 467.

feel that we are at liberty to come to an independent conclusion for ourselves on a consideration of the relevant material which, we may observe, had not been placed before them, and we think that our interpretation is more consistent with the texts and the principles of Hindu law.

A word about the distinction that was sought to be made on behalf of the respondent. It was urged that whether or not the liability of some partners to the other or others in an undissolved partnership is a debt, the moment a dissolution takes place there arises in law a debt properly so called, as there could be no more fluctuation and uncertainty about the rights of partners as by reason of the dissolution all further transactions necessarily stop. Reliance was placed on section 43 of the English Partnership Act, 1890, which runs as follows :

"Subject to any agreement between the partners, the amount due from surviving or continuing partner or partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death."

It was argued that this statutory provision is merely a declaration of the common law on the point, and hence, in the case on hand, unlike as in the case referred to above, the partnership became dissolved on the death of the plaintiff's father, an event which took place an appreciable time before the mortgage. We may observe that no such provision is found in the Indian Act and, even according to English law, it would seem that partners stand in a fiduciary relation to each other (see Lewin on Trusts, 13th Edn., page 253) whether or not they are trustees in the full and proper sense of the word [see *Knox v. Gye*(1) per Lord WESTBURY ;

(1) (1872) L.R. 5 H.L. 656, 675.

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cf. the observations of Lord HATHERLEY at page 678. See also section 29 of the English Partnership Act, 1890, and *Vyse v. Foster*(1)]. Out of this relation arises in favour of the representative of a deceased partner not necessarily a debt, but a right to an account of the property, of its collection and application, and to receive that portion of the clear balance that accrues to the deceased's share and interest in the partnership. The representative of a deceased partner has no specific interest in or claim upon any particular part of the partnership estate. The whole property therein accrues to the surviving partner. Whether the effect of section 43 of the English Act is anything more than the putting to an end of all difficulties in the way of the application of the rule of limitation to such a cause of action, it is not easy to determine. It is however not necessary to pursue the matter, as, in our view, there was in this case an antecedent debt according to Hindu law, and the mortgage was executed to discharge it.

The appeal accordingly fails and is dismissed with costs subject to the decision of the lower Court on the petition presented by the appellants under Madras Agriculturists Relief Act (IV of 1938), which will be sent to the lower Court for disposal. The court-fee on the memorandum of appeal must be paid by the appellants.

In the connected Civil Miscellaneous Appeal No. 312 of 1935, it is stated that in view of the dismissal of the main appeal no orders are necessary. It is also accordingly dismissed but without costs.

G.R.

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(1) (1874) L.R. 7 H.L. 313.

## APPELLATE CRIMINAL.

Before Mr. Justice Pandrang Row.

IN RE D. S. RAJU GUPTA (ACCUSED), APPELLANT.\*

*Code of Criminal Procedure (Act V of 1898), sec. 476-B—Complaint by a civil Court under sec. 476—Appeal to the High Court against—If to be filed on the civil or criminal side—Criminal Rules of Practice and Orders (Madras), 1931—Rule 37 of—Validity of.*

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The jurisdiction that is exercised by a civil Court in filing a complaint under section 476, Criminal Procedure Code, is a jurisdiction exercised under that Code and is therefore of a criminal nature. An appeal preferred to the High Court under section 476-B, Criminal Procedure Code, against the order of a civil Court directing a complaint to be lodged by the person against whom the complaint has been ordered to be lodged, should therefore be filed on the criminal side of the High Court and not on its civil side.

*Janardana Rao v. Lakshmi Narasamma*(1), *Dhanpat Rai v. Balak Ram*(2) and *Emperor v. Bhatu Sadu*(3) relied upon.

Rule 37 of the Criminal Rules of Practice and Orders, 1931, is not in consonance with law and cannot affect a right given by a statute.

APPEAL against the order of the Court of Session of the Vizagapatam division, dated 10th November 1938 and made in Original Petition No. 99 of 1938.

*Kasturi Seshagiri Rao* for appellant.

## ORDER.

PANDRANG ROW J.—The District Judge of Vizagapatam made an order under sections 476 and 195 of the Criminal Procedure Code directing that a complaint

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\* Criminal Appeal No. 80 of 1939.

(1) (1933) I.L.R. 57 Mad. 177 (F.B.). (2) (1931) I.L.R. 13 Lah. 342 (F.B.).  
(3) I.L.R. [1938] Bom. 331 (F.B.).

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should be preferred charging one D. S. Rajugupta, Managing Director, Bharathamatha Commonwealth Insurance Bank, Ltd., Vizagapatam, with offences punishable under sections 465 and 467 read with sections 109 and 471, Indian Penal Code. The person against whom the complaint has been ordered to be lodged presents an appeal from the order. A right of appeal is given by section 476-B, Criminal Procedure Code, from the order in question, but it has been objected to by the office that the appeal should be filed on the civil side of this Court and not on the criminal side, in view of rule 37 of the Criminal Rules of Practice and Orders, 1931. The Advocate for the appellant insists that he is entitled to file an appeal on the criminal side. The question is whether his contention is right. The learned Advocate has referred me to several important decisions which bear on the point, namely, *Janardana Rao v. Lakshmi Narasamma*(1), *Dhanpat Rai v. Balak Ram*(2) and *Emperor v. Bhatu Sadu*(3). These Full Bench decisions (and it is unnecessary for me to go beyond them in dealing with a matter of this kind) make it clear that the jurisdiction that is exercised by a Court in filing a complaint under section 476 is a jurisdiction exercised under the Criminal Procedure Code and is therefore of a criminal nature. There is no rule that everything done by a civil Court should be regarded as being of a civil nature. The Civil Procedure Code does not empower a civil Court to file a complaint and the present complaint is directed to be made ostensibly under a provision of the Criminal Procedure Code. It appears to me that the order of the Court which is now sought to be challenged in a superior Court is an order passed in the exercise of criminal jurisdiction ;

(1) (1933) I.L.R. 57 Ma.1. 177 (F.B.). (2) (1931) I.L.R. 13 Lah. 342 (F.B.).  
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the right of appeal is also provided by another provision in the Criminal Procedure Code. The appeal therefore has to be presented under the Criminal Procedure Code and there is no reason why the appeal which is presented under the Criminal Procedure Code from an order passed in the exercise of a jurisdiction conferred by the Criminal Procedure Code should not be treated as an appeal on the criminal side of this Court. It may be that the rule quoted by the office prescribes a different procedure, but I am not satisfied that that rule is in consonance with law or can affect a right given by a statute, namely, the right of appeal from an order made under section 476, Criminal Procedure Code, to the Court to which that Court is subordinate. The powers of a Court of appeal in criminal matters are governed by different provisions than in the case of civil appeals, and it is desirable in my opinion that any doubt which remains on the subject should be removed. I am satisfied that cases of this kind including revisions preferred from appellate orders made under section 476-B of the Criminal Procedure Code are proceedings of a criminal nature and should be therefore filed on the criminal side of this Court and not on the civil side. It is obvious that in the case of revision petitions the powers of the Revisional Court would be materially different in criminal cases than in civil cases. What should really count in matters of this kind is not the designation of the Court which makes the order but the character of the jurisdiction exercised in making the order that is sought to be taken to a higher Court in appeal or revision—whether it is of a criminal nature or of a civil nature. It cannot for a moment be maintained that an order directing a criminal complaint to be made is one made in the exercise of civil

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jurisdiction. It is not part of the jurisdiction of civil Courts as such to prefer criminal complaints. The power to make a complaint is given by the provisions of the Criminal Procedure Code and that shows to my mind that when this power is actually exercised by civil Courts under section 476, Criminal Procedure Code, they are really acting in the exercise of criminal jurisdiction. The appeal should therefore be entertained on the criminal side of this Court.

V.V.O.

## PRIVY COUNCIL.

ULAGALUM PERUMAL SETHURAYAR, APPELLANT,

v.

RANI SUBBULAKSHMI NACHIAR, RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

*Hindu law—Mitakshara school—Impartible ancestral estate in Madras—Deed of settlement executed before Impartible Estates Act, (Madras Act II of 1902) came into force—Estate taken by settlor's son under deed—Character of estate.*

The son of a Hindu governed by the Mitakshara law who succeeds to an ancestral impartible estate in Madras under a vested interest in a deed of settlement executed by his father while his elder brother was alive and before the coming into force of the Madras Impartible Estates Act takes the estate as self-acquired property. On his death intestate, his widow would, therefore, succeed to the estate in preference to his half-brother.

[*Sartaj Kuari v. Deoraj Kuari*(1), *Lal Ram Singh v. Deputy Commissioner of Partabgarh*(2), *Konammal v. Annadama*(3), *Shibaprasad Singh v. Prayagkumari Debee*(4), *Collector of Gorakhpur v. Ram Sundar Mal*(5) and *Raja Ajai Verma v. Musammat Vijai Kumari*(6), referred to.]

APPEAL (No. 79 of 1936) from a decree of the High Court (March 19, 1935) which modified a decree of the Subordinate Judge of Tinnevely (April 23, 1931).

S. Kotilinga, a Hindu governed by the Mitakshara, was the owner of an ancestral impartible estate in the Madras Presidency. Having at the time a son, K. Kotilinga, living whom he wished to exclude from the

\* Present: LORD ROMER, LORD PORTER and SIR GEORGE RANKIN.

(1) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.

(2) (1923) L.R. 50 I.A. 265, 275; I.L.R. 45 All. 596.

(3) (1927) L.R. 55 I.A. 114; I.L.R. 51 Mad. 189.

(4) (1932) L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399.

(5) (1934) L.R. 61 I.A. 296; I.L.R. 56 All. 468.

(6) (1939) 43 C.W.N. 585 (P.O.).

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A male child, Minakshi Sundara, was born to the settlor's second wife on 13th August 1902. In 1903, the settlor's first son, K. Kotilinga, died. In 1904, his second wife died. In 1906, a third son, Ulagalum, was born to the settlor by a third wife. On 7th January 1907, the settlor died and Minakshi Sundara, his son by his second wife, succeeded to the estate. Minakshi Sundara died intestate in 1929, leaving him surviving his widow (the appellant) and no issue. The widow claimed the estate as heir to her husband against his half-brother, Ulagalum (the respondent), on the ground that her husband took the estate under the deed of settlement as self-acquired property. She also alleged that her husband had separated from his half-brother.

The Subordinate Judge found in her favour on both grounds.

On appeal by Ulagalum, the High Court reversed the finding of the Subordinate Judge as regards the separation of Minakshi Sundara and Ulagalum but affirmed his findings that Minakshi Sundara took the estate as self-acquired property and that his widow was entitled to the estate.

*Cornish* for appellant.—It is not disputed that the owner of an impartible estate can dispose of it without reference

to his sons, but the property, being ancestral, cannot be converted into separate property and the sons acquire by birth a right in the property by survivorship. That right remains, subject to alienation by the owner.

Here, when the settlor died, the property still remained joint family property though only a single heir could succeed. The eldest son might be excluded, but the property still retained its character as joint family property.

If the father gave the property to a stranger, the stranger would take an absolute interest in it as separate property, but if the property is given to a son, the son takes it as joint family property. The right by birth in joint family property is beyond the father's control; *Shibaprasad Singh v. Prayag-kumari Debee*(1).

The owner of an impartible estate can alienate it; *Sartaj Kuari v. Deoraj Kuari*(2), *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards*(3), *Bajnath Prasad Singh v. Tej Bali Singh*(4) and *Collector of Gorakhpur v. Ram Sundar Mal*(5). But the right of survivorship is a consequence of joint status which can be got rid of only by severance in one of the ways recognized by Hindu law.

Though an impartible estate can be alienated to a stranger so as to give him an absolute right, it cannot be alienated to a member of the family so as to effect a change of status; *Lal Ram Singh v. Deputy Commissioner of Partabgarh*(6).

The right of survivorship is a real right of property which should not be whittled away. It may be defeated by the owner of an impartible estate alienating the estate. The status of the family remains. In an ordinary joint family under the Mitakshara, a member may obtain partition and take away his share or a father may partition the property. Partition may be division of estate or of status; *Girja Bai v. Sadashiv Dhundiraj*(7).

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

(2) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.

(3) (1899) L.R. 26 I.A. 83; I.L.R. 22 Mad. 383.

(4) (1921) L.R. 48 I.A. 195; I.L.R. 43 All. 228.

(5) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.

(6) (1923) L.R. 50 I.A. 265, 274; I.L.R. 45 All. 596.

(7) (1916) L.R. 43 I.A. 151, 159; I.L.R. 43 Cal. 1031.

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In an impartible estate there can be no division of the estate. Apart from alienation to a stranger there can be only relinquishment or surrender. The estate can cease to be joint family property only if the other members relinquish their rights. Alienation to a member of the family cannot change the nature of the estate. The father cannot sever the status of the family by giving the estate to son A. in preference to son B.

Here, if the eldest son had survived his father, he would have taken the estate notwithstanding the settlement.

[Reference was made to *Konammal v. Annadana*(1), *Collector of Gorakhpur v. Ram Sundar Mal*(2) and *Rani Jagadamba Kumari v. Wazir Narain Singh*(3).]

There is no suggestion of surrender by the eldest son. The onus is on the widow to prove severance of the joint family. In this she has failed.

*Dunne K. C. and Chinna Durai* for respondent.—*Sartaaj Kuari's* case(4) laid down the rule that the owner of an impartible estate has an absolute right to alienate it, and that is now the rule. The basis of the rule is that the owner is the absolute owner. No one has any interest in the estate except the impartible holder. If he dies intestate, the succession is according to custom. There is no co-parcenership.

There is no doubt as to what was intended by the deed of settlement here. The property is given "absolutely". The holder had the right to alienate absolutely and he has done so. [Reference was made to *Sartaaj Kuari v. Deoraj Kuari*(4), *Baijnath Prasad Singh v. Tej Bali Singh*(5) and *Protap Chandra Deo v. Jagadish Chandra Deo*(6).] Survivorship imports co-ownership. If there is no co-ownership, there cannot be survivorship. The appellant's argument is that there is co-ownership during the life of the impartible holder though the holder has the absolute right to dispose of the estate, but what was decided in *Protap Chandra's* case(6) is

- (1) (1927) L.R. 55 I.A. 114; I.L.R. 51 Mad. 189.
- (2) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.
- (3) (1922) L.R. 50 I.A. 1, 6; I.L.R. 2 Pat. 319.
- (4) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.
- (5) (1921) L.R. 48 I.A. 195; I.L.R. 43 All. 228.
- (6) (1927) L.R. 54 I.A. 289; I.L.R. 54 Cal. 955.

that there is no co-ownership. [*Raja Ajai Verma v. Musamat Vijai Kumari*(1) was referred to.]

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The holder of the impartible estate, if and when he disposes of the property, gives, not the joint family title, but his own title; *Rama Rao v. Rajah of Pittapur*(2).

*Cornish* in reply.—The father cannot, as here, in the case of an impartible estate, divide the estate and accelerate the succession. *Mayne's Hindu Law* (10th edition), page 849.

The JUDGMENT of the Judicial Committee was delivered by SIR GEORGE RANKIN.—This appeal concerns the succession to the impartible estate of Urkad in the district of Tinnevely and is brought from a decree, dated 19th March 1935, of the High Court of Madras affirming, upon the question now in dispute, the decree (23rd April 1931) of the Principal Subordinate Judge of Tinnevely. Both Courts in India have held that, upon the death in 1929 of Minakshi Sundara, the estate of Urkad devolved upon his widow, Rani Subbulakshmi Nachiar, who was plaintiff in the suit and is respondent upon this appeal. The appellant is Ulagalum Perumal, the younger half-brother of Minakshi Sundara, who was the first defendant in the suit. It is not now contended that the appellant and Minakshi Sundara, were divided. The trial Court held that there had been a partition of the partible property of the joint family, but this finding was reversed by the High Court and is not appealed from.

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In 1902 the zamindar was S. Kotilinga Sethurayar (hereinafter called the settlor) a Hindu governed by the Mitakshara. He held the impartible estate as ancestral property belonging to the joint family of which he was a member, and not as his separate property. His first wife had died, but he had married

- (1) (1938) 43 C.W.N. 585 (P.O.).
- (2) (1918) L.R. 45 I.A. 148, 153; I.L.R. 41 Mad. 778.



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again. By his first wife he had a son, K. Kotilinga Sethurayar. His second wife was enceinte. Being displeased with his son he desired to defeat his son's prospect of succession to the estate by making use of the power of alienation recognized as belonging to owners of impartible estates by the decision of this Board in the case of *Sartaj Kuari v. Deoraj Kuari*(1). His power of alienation was however in danger of becoming restricted by legislation so as to become no greater than the power of a managing member of a joint Hindu family to alienate ancestral property. A few days before 2nd June 1902, when the Madras Impartible Estates Act, 1902 (Madras Act II of 1902), came into force, he executed a deed of settlement, dated 29th May 1902, in respect of the impartible zamindari. By that deed he declared that he was dissatisfied with the character and conduct of his son and was desirous that the son should not succeed to the zamindari. He settled the zamindari upon himself for life and subject thereto granted it absolutely to the child with whom his second wife, Thanga Pandichi, was then enceinte, if such child should be born alive and a male. If the child should not be born alive and a male or being born alive and a male should die before the settlor without leaving male issue the zamindari was to go to his wife Thanga Pandichi absolutely. His son was given a maintenance allowance and a house. The settlor appointed himself trustee of the settled property.

Thereafter on 13th August 1902 Minakshi Sundara was born of the second wife Thanga Pandichi. In 1903 the settlor's first-born son, K. Kotilinga Sethurayar, died. In 1904 the second wife died, and the settlor having married a third time the appellant

(1) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.

Ulagalum Perumal was born to him by his third wife in June 1906. On 7th January 1907 the settlor died and Minakshi Sundara succeeded to the zamindari, the estate being managed on his behalf by the Court of Wards till 1923, when he came of age. He died in July 1929 and as the Collector proposed to recognize his half-brother, the appellant, as entitled to succeed to the impartible estate, the widow brought her suit on 1st October 1929 to establish her right to succeed. Her case is that when in 1902 her husband took a vested interest in the estate by virtue of his father's exercise of his unfettered right of alienation, the estate ceased to be property of the joint Hindu family as truly and completely as if it had been granted to a stranger to the family. Accordingly, that the principle of survivorship cannot on his death be applied to carry the estate to the eldest member of the senior branch of the family; and that it descends to her according to the rules which govern succession to separate property.

The High Court was careful to point out that the present case raises no question such as might have arisen had Minakshi Sundara died leaving sons—whether the estate in his hands was ancestral as having come to him from his father in the sense that a son would have taken an interest therein at birth. On this subject there has been much divergence of opinion in India and it was left unsettled by the judgment of the Board in *Lal Ram Singh v. Deputy Commissioner of Partabgarh*(1).

It is clear that Minakshi Sundara did not take his interest under the deed of 1902 under any contract or

(1) (1923) L.R. 50 I.A. 265, 275; I.L.R. 45 All. 595.

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bargain made by him or on his behalf or by any other persons so as to bind him. The settlor was disposing of the estate in full appreciation of his power to alienate, and there is no room for suggestions as to family arrangement or mere relinquishment by the settlor or mere supersession of the eldest son. Indeed, if the settlor's intention be supposed to govern the matter, the provisions of the deed of 1902 indicate, as the High Court notice, an intention that the estate should not continue to be joint family property; as otherwise in certain quite probable events the deed would not effectively exclude the eldest son. In particular should the son to be born die in the lifetime of his elder brother leaving sons the elder brother would succeed as senior to any of such sons if the property were to pass by survivorship as joint family property.

The able argument of learned Counsel for the appellant was of a far-reaching character. He contended that it was not competent in law for the settlor to advantage one member of the family by terminating the right which other members of the family had in the estate. Or, putting the same matter in another form, that it was not competent for Minakshi Sundara to take the estate as self-acquired property. Learned Counsel contended that while an alienation to a stranger would defeat the rights of all the members of the family, the result of an alienation in favour of one member could not in law be to defeat the rights of the other members. For this contention he relied upon decisions of the Board to the effect that as the right of partition does not exist in the case of an impartible estate, junior members of the family will not be taken to have given up their interest in such an estate or their claim to succeed thereto unless they can be

proved to have surrendered it [*Konammal v. Annadana*(1); *Shibaprasad Singh v. Prayagkumari Debee*(2); *Collector of Gorakhpur v. Ram Sundar Mal*(3)]. He argued that a settlor having no right to partition the estate or to claim as against the eldest son or other members to hold it as his separate property, he cannot by an alienation compel a severance between one son and another. In the absence of surrender or relinquishment by a member of his interest, partition, it is said, is the only way by which joint family property can become the separate property of a member; and this result is contrary to the custom of impartibility.

Their Lordships have given full consideration to this argument but do not consider that it can be sustained. No doubt joint property cannot if governed by a custom of impartibility be converted into separate property by any exercise of the right to call for a partition as the existence of such a right is inconsistent with the custom. But it does not follow that by no other way can the same result be arrived at. Admittedly it can be achieved by surrender or relinquishment. And it would seem that the right of any given person to succeed by survivorship to any given property must depend both upon the person continuing to be a member of the joint family and also upon the property continuing to belong to the family. If the zamindar has a power of alienation which is not limited by legal necessity nor liable to be controlled by any other member of the family, so that he can squander the property or give or sell it to a stranger, thereby defeating the rights of other members, there would

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(1) (1927) L.R. 55 I.A. 114; I.L.R. 51 Mad. 189.  
(2) (1932) L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399.  
(3) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.

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not seem to be great force in the reflection that when he transfers to a member of the family he is effecting a result similar to that produced by partition without having the power to compel partition. The status of an individual as a member of a Hindu joint family is in no way inconsistent with his owning separate property; and the right of unfettered alienation affirmed in *Sartaj Kuari's* case(1) may well produce results, when exercised in favour of a member, which are as favourable or more favourable to him than those which partition would have produced. If the property ceases to be the property of the joint family there is nothing to which the right by survivorship can attach and there is no added difficulty in its becoming the separate property of an individual member. The right of alienation was held to belong to the holder of an impartible estate because the other members of his family, having no right to call for partition, were thought to have no right to control him: if in some cases the result of this doctrine upon the rights of the other members is to defeat them altogether, the right of alienation cannot, in their Lordships' opinion, be limited in other cases merely by reason that the holder had no right to call for partition.

If then there be no rule of law to prevent the settlor from giving or Minakshi Sundara from taking the estate as self-acquired or separate property, it remains to consider whether the interest given to Minakshi Sundara under the deed should be regarded as joint family property and not as his separate property by reason that the transfer to him was voluntary and not for valuable consideration and that the interest transferred was an interest in the whole

(1) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.

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of the zamindari estate and not only in a part thereof. Assuming without affirming that such considerations might in certain circumstances lead to the conclusion that the property was taken as joint family property, their Lordships cannot in the present case attribute to them any cogency in that respect, in view of the fact that Minakshi Sundara took a vested interest at a time when his elder brother was alive, and under a provision which was intended to defeat the ordinary course of succession to the estate. It so happened that at the time of the settlor's death Minakshi Sundara was his eldest surviving son, but this accident cannot retrospectively affect the operation of the deed of 1902.

In the case of *Raja Ajai Verma v. Musammat Vijai Kumari*(1), Raja Fateh Singh, a Hindu governed by the Mitakshara and owner of an impartible estate in the Shahjahanpur district of Agra, had made a will whereby half the estate was left to his eldest son and half to his second son, Vijai Verma. The will was challenged, but the High Court of Allahabad upheld it on appeal. The younger son had died leaving an only daughter, Vijai Kumari. In the view of the High Court she was entitled to succeed to half of the estate, though the Board held on appeal that she was excluded by a custom in this Rajput family which disinherited daughters. The learned Judges of the High Court (MUKERJI and BENNET JJ.) said in their judgment:

"The third issue is as follows:—'Whether in the case of it being found that the property is impartible and Vijai Verma got a half share in it under his father's will the property taken by Vijai Verma would descend by way of inheritance to a

(1) (1938) 43 C.W.N. 585 (P.C.).

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single male heir by the rule of lineal primogeniture and whether, therefore, Vijai Kumari will be excluded from inheritance ?

"The question raised in this issue is not free from difficulty, and there is no clear decided authority either way. On principle, however, we think the issue ought to be answered in favour of Vijai Kumari.

"The argument on behalf of the defendant is fairly summarised in the issue itself. It is urged that by virtue of family custom the property of the Raja of Pawayan is an impartible estate descendible in a particular way and the mere fact that a portion of it is given away to one of the members of the family will not change the character of the property and make its mode of descent different from the original method. But this argument overlooks the fact that Vijai Verma is not entitled to inherit any portion of the property in suit. He is as much a stranger for the purposes of inheritance as one who has nothing to do with the family. He gets the property by virtue of the 'gift' made by his father in his favour under the will. It matters little whether the gift is in favour of a stranger or in favour of a person belonging to the same stock as the defendant. The property in the hands of Vijai Verma must be treated as self-acquired property for the purposes of descent to his heirs."

At the hearing before the Board this view was not challenged, and in the judgment delivered on 19th December 1938 by Sir GEORGE LOWNDES, it was stated :

"Assuming, as their Lordships do in this judgment, that a moiety of the estate passed by the will of Raja Fateh Singh to Vijai Verma, it is admitted that it would be partible property in his hands and would descend as such on his death."

While their Lordships do not doubt that the High Court of Allahabad rightly held in that case that the property in question, if it passed under the will to Vijai Verma, became his self-acquired property, they are not to be taken as affirming that any different result would have ensued had Vijai Verma been the

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person entitled to inherit. They say nothing here as to family arrangement or the power of a grantor to impose conditions, but otherwise, so far as regards the joint family, they see considerable difficulty in giving different effect to an alienation made under the power declared to exist in *Sartaj Kuari's* case(1) according as the grant be made voluntarily or for consideration, comprises the whole or only part of the estate, is in favour of a member of the family or a stranger, or in favour of the person entitled to succeed or of some other member of the family. They recognize, however, that as between the grantee and his sons questions may arise upon which these considerations, or some of them, may have importance.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Nehra & Co.*

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

C.S.S.

(1) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.

## APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Wadsworth  
and Mr. Justice Krishnaswami Ayyangar.

K. V. KRISHNA AYYAR (PLAINTIFF), APPELLANT,

v.

K. G. SUBRAMANIA AYYAR (SECOND DEFENDANT),  
RESPONDENT.\*

1938,  
December 13.

*Code of Civil Procedure (Act V of 1908), sec. 47—Sale of im-  
movable property in execution of decree of Court—Judgment-  
debtor not in possession of property—What passes to  
purchaser at such sale—Purchaser getting sale certificate  
in his name—Sale by purchaser of the property to another  
who in turn sold it to another—None of the purchasers  
getting actual or symbolical possession of the property—  
Judgment-debtor getting possession from his tenant and  
letting it to others—Sale by judgment-debtor of the property—  
Suit by successors in title from the original purchaser for  
recovery of possession of the property from persons in  
possession—If barred by sec. 47.*

In execution of a decree against S his property was pur-  
chased in 1917 by K, to whom the usual sale certificate was  
issued. K conveyed the property to two persons in 1918.  
In 1927 they sold the property to K.V.K. Neither K nor  
K.V.K. ever obtained actual or symbolical possession of  
the property. At the date of the Court sale in 1917 the pro-  
perty was in the possession of L, a sister of S, as his tenant.  
In 1919, L *bona fide* surrendered the possession of the property  
to S who thereupon granted a monthly tenancy of it to  
K.P., who assigned his rights to K.G.S. in 1923. K.G.S.  
remained in possession as tenant of S until 1927 when he  
purchased the property from S. In 1927 a suit for possession  
of the property was filed by K.V.K. against S and K.G.S.  
The suit was resisted on the ground, *inter alia*, that section 47  
of the Code of Civil Procedure was a bar to the suit.

\* Letters Patent Appeal No. 108 of 1935.

*Held by the Full Bench.*—At the time of the auction sale  
in 1917 S was seized of the property but was not in possession  
of it and the auction sale took away from him his seisin and  
gave it to the auction purchaser. The moment the sale took  
place his rights in the property ceased and, when his sister  
put him in possession in 1919, he went into possession without  
any rights unless in the circumstances he could be deemed  
to be assignee of the tenancy. So far as the property was  
concerned the execution was complete and he was no longer  
the judgment-debtor. As such the suit does not fall within  
the purview of section 47 of the Code of Civil Procedure.

Case-law reviewed.

APPEAL under Clause 15 of the Letters Patent  
against the judgment and decree of VENKATA-  
RAMANA RAO J. passed in Second Appeal No. 1542  
of 1931 preferred to the High Court against the  
decree of the Court of the Subordinate Judge of  
South Malabar at Palghat in Appeal Suit No. 129 of  
1929 (Appeal Suit No. 336 of 1929, District Court)  
preferred against the decree of the Court of the District  
Munsif of Palghat in Original Suit No. 319 of 1927.

*P. S. Narayanaswami Ayyar and P. S. Ramachandra Ayyar*  
for appellant.—When the property was sold in Court auction  
it was in the possession of a tenant of the judgment-debtor.  
Under section 65 of the Code of Civil Procedure the title to  
the property vested in the purchaser. No doubt he did not  
obtain symbolical possession under Order XXI, rule 96, of the  
Code. Nevertheless a suit for possession could be filed by the  
purchaser or his assignees; see *Hussan Ammal Bibi v. Ismal*  
*Moideen Rowther*(1). Section 47 of the Code is not a bar  
since the matter is not one relating to execution, discharge  
or satisfaction of the decree. The fact that after the sale the  
tenant surrendered possession to the person who let her into  
possession does not make any difference. Her landlord's  
title had been terminated by the Court sale. Under section  
109 of the Transfer of Property Act the only right that is  
saved to him is a right to recover rent from his tenant if the  
latter was not aware of the auction sale. An ex-landlord has

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(1) (1915) 28 M.L.J. 642, 645.

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no right to take possession from his tenant; see *Ramachandra v. Shaikh Hussan*(1) and Mulla's Transfer of Property Act, page 603. Even if possession is given to an ex-landlord his possession will not clothe him with higher right than those of a trespasser.

[KRISHNASWAMI AYYANGAR J.—Surrender can only extinguish rights but cannot create rights.]

The facts in *Sandhu Taraganar v. Hussain Sahib*(2) are similar to the facts of the present case except as regards the point about lease and surrender.

[THE CHIEF JUSTICE.—We cannot go back on the decisions of this Court and hold that an auction purchaser is not a representative of the judgment-debtor within the meaning of section 47 of the Code.]

*Veyindramuthu Pillai v. Maya Nadan*(3) holds that the Courts, before coming to the conclusion that section 47 is a bar, should come to the conclusion that the matter comes within the purview of the section. The present suit being one for possession, a matter not contemplated by section 47, is not hit by the section. See also *Venkatakrishnayya v. Venkatanarayana*(4) and *Kailash Chandra Tarapdar v. Gopal Chandra Poddar*(5). No doubt the other High Courts take a different view.

Surrender by the tenant to his ex-landlord cannot have the effect of curtailing the twelve years limitation which the purchaser had against the tenant under article 138 of the Indian Limitation Act to the three years limitation against the ex-landlord who was the judgment-debtor.

[WADSWORTH J.—Article 180 is the general article and article 138 is a special one covering a single case.]

Articles 138 and 180 are couched in the same language with respect to the persons covered by the articles. So far as article 180 is concerned a stranger purchaser and a decree-holder purchaser are on the same footing; see *Jainulabdin Sahib v. Krishna Chettiar*(6).

[THE CHIEF JUSTICE.—What is the article of the Limitation Act applicable to the present case?]

(1) (1901) 3 Bom. L.R. 679.

(2) (1904) I.L.R. 28 Mad. 87.

(3) (1919) I.L.R. 43 Mad. 107, 116 (F.B.).

(4) A.I.R. 1936 Mad. 733.

(5) (1926) I.L.R. 53 Cal. 781 (F.B.).

(6) (1921) 41 M.L.J. 120.

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It is either article 139 or article 144. After the surrender, the ex-landlord will be reduced to either the position of a representative of the tenant or that of a trespasser. See Mulla's Transfer of Property Act, page 632, last paragraph.

K. V. Ramaseshan for respondent.—Under section 65 of the Code, the title of the judgment-debtor is transferred to the purchaser. He also gets a right to possession. When the property is in the possession of a tenant, possession will be transferred to the purchaser if the procedure prescribed by Order XXI, rule 96, is followed. No such procedure was followed in the present case. The procedure is intended to give notice to the tenant. Until such notice is given, surrender of possession by the tenant to the person who let him into possession is lawful. The landlord was in possession through his tenant. That possession was not lost by the sale. Possession of the judgment-debtor could be determined only by the modes known to law. The sort of possession (actual or symbolical) which a purchaser is entitled to is determined with reference to the date when he seeks possession and not with reference to the date of sale or attachment.

[KRISHNASWAMI AYYANGAR J.—Do you contend that in spite of the Court sale the relationship of landlord and tenant continued between the judgment-debtor and his tenant?]

For the purpose of this case it is unnecessary to go so far. Possession continued in the judgment-debtor even after sale until formal possession is given to or taken by the purchaser according to the procedure prescribed by the Code. See *Juggobundhu Mukerjee v. Ram Chunder Bysack*(1) which is approved in *Thakur Sri Radha Krishna v. Ram Bahadur*(2).

[THE CHIEF JUSTICE.—When property is in the hands of a tenant, the landlord has only a right to possession after the term though the landlord, under a fiction, is supposed to be in possession through his tenant. The fiction changes with the title to property. When such a property is sold, the right to possession is lost with the loss of title and the assignee gets the right to possession from the tenant after the term. When a tenant is in possession the landlord has seisin of the property and that is described as the landlord remaining in possession through the tenant who has actual possession.]

(1) (1880) I.L.R. 5 Cal. 584, 588 (F.B.).

(2) (1917) 34 M.L.J. 97 (P.C.).

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The Transfer of Property Act is not *per se* applicable to Court sales though the general principles are applicable. Rightly or wrongly the landlord (judgment-debtor) got possession.

[WADSWORTH J.—When the property was surrendered to the ex-landlord he got possession under a new right and not as judgment-debtor or as the person who let the tenant into possession.]

Execution is not complete until the purchaser gets possession in execution. So a matter contemplated by section 47 was outstanding between the purchaser and the person in possession of the property. So section 47 is a bar to the institution of the suit.

*Cur. adv. vult.*

### JUDGMENT.

LEACH C.J.

LEACH C.J.—This appeal adds another case to the long list of cases which have reference to the effect of section 47 of the Code of Civil Procedure. The facts of the present case are of an unusual nature and there is no reported decision which directly covers it. In execution of a small cause decree passed by the Court of the District Munsif of Palghat the property which is the subject-matter of this appeal was purchased on 17th September 1917 by one Krishnier to whom was issued the usual sale certificate. On 7th January 1918 Krishnier conveyed the property to two persons, Krishna Pattar and Subbalakshammam, who by a deed dated 3rd February 1927 sold it to K. V. Krishna Ayyar, the present appellant. At the time of the sale the property was in the possession of Lakshmi Ammal, a sister of Sankaranarayana Ayyar, the judgment-debtor. She held the property as a monthly tenant of her brother. In 1919 she surrendered the possession of the property to Sankaranarayana Ayyar, who thereupon granted a monthly tenancy of it to a person named Kuppiah Pattar. In 1923 Kuppiah Pattar assigned his rights to one

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K. G. Subramania Ayyar who remained in possession of the property as a monthly tenant of Sankaranarayana Ayyar until 1927 when he purchased the property from Sankaranarayana Ayyar. Neither Krishnier nor the appellant ever obtained actual or symbolical possession of the property. The suit out of which this appeal arises was filed by the appellant against Sankaranarayana Ayyar and K. G. Subramania Ayyar for possession. In his plaint the appellant treated the surrender of the property by Lakshmi Ammal to Sankaranarayana Ayyar as an assignment to him of her tenancy and Sankaranarayana Ayyar and K. G. Subramania Ayyar as successive holders of the tenancy. One line of defence was that the appellant had acquired no interest in the property. It was said that the transfer by Krishnier to Krishna Pattar and Subbalakshammam was a *benami* transaction and that the real title remained with Krishnier. The main contention, however, was that section 47 of the Code of Civil Procedure barred the suit. The District Munsif found against the plaintiff on both issues and dismissed the suit. On appeal to the Subordinate Judge of South Malabar the decree of the trial Court was reversed, the Subordinate Judge holding that the transaction was not *benami* and that section 47 did not apply. A second appeal to this Court followed and was heard by VENKATARAMANA RAO J., who agreed with the District Munsif on the question of the application of section 47, but granted him leave to file an appeal under Clause 15 of the Letters Patent. The decision of the Subordinate Judge was final on the question whether the transaction between Krishnier and Krishna Pattar and Subbalakshammam was of a *benami* nature.

The question which falls for decision is, in what capacity did Sankaranarayana Ayyar obtain possession

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of the property from his sister? If he obtained possession of the property in the same capacity as he held at the time of the sale in execution, the appeal fails; but if he obtained it in another capacity, the appeal succeeds. As VENKATARAMANA RAO J. has pointed out in his judgment, so far as this Court is concerned, it is well settled that proceedings by a decree-holder who has become the auction-purchaser for delivery of possession must be deemed to relate to the execution or discharge or satisfaction of the decree within the meaning of section 47 of the Code of Civil Procedure. It is considered that the section bars a suit by a decree-holder for possession of the property purchased by him in execution of his own decree not only against the judgment-debtor or any one claiming under him but the bar is equally applicable to a purchaser from the decree-holder. The learned Judge referred in this connection to the decisions of this Court in *Sandhu Taraganar v. Hussain Sahib*(1) and *Sornam Pillai v. Tiruvazhiperumal Pillai*(2). In *Veyindramuthu Pillai v. Maya Nadan*(3) it was held by a Full Bench that a purchaser at a Court auction who is a stranger to the suit comes within the purview of section 47 as the representative of the judgment-debtor. There are numerous earlier decisions which support the judgments in the cases just cited. The Calcutta High Court shares the view of this Court; *Kailash Chandra Tarapdar v. Gopal Chandra Poddar*(4). Other High Courts have, however, interpreted section 47 in a different sense. The effect given to section 47 by this Court has not been accepted without criticism by all the learned Judges who have had to consider the question. In *Kattayat*

(1) (1904) I.L.R. 28 Mad. 87. (2) (1926) 51 M.L.J. 126.  
(3) (1919) I.L.R. 43 Mad. 107 (F.B.). 4) (1926) I.L.R. 53 Cal. 781 (F.B.).

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*Pathumayi v. Raman Menon*(1) BENSON and BHASHYAM AYYANGAR JJ. doubted whether proceedings taken by a decree-holder who had purchased property to obtain possession did relate to the execution, discharge or satisfaction of the decree, but in view of the earlier decisions they felt constrained to follow them. In *Sandhu Taraganar v. Hussain Sahib*(2) WHITE C.J. observed that, if the matter were *res integra*, he would be disposed to hold that the right to sue for possession was not a question relating to the execution, discharge or satisfaction of the decree, where the plaintiff represented a decree-holder who had purchased land in execution of the decree. It has, however, been the practice of this Court for over fifty years to treat section 47 as having the application which I have indicated and in my opinion it is now far too late in the day to re-open the question. This appeal must, therefore, be decided on the basis that a decree-holder who purchases property in execution cannot institute a suit to recover possession from the judgment-debtor or some one who stands in the shoes of the judgment-debtor and his remedy is confined to an application where the period of limitation is only three years.

As I have already pointed out, the appellant's case is based on the assumption that Sankaranarayana Ayyar got possession of the property in 1919 as the assignee of the tenancy. It is common ground that a suit for possession will lie if this was the position, as a tenant cannot be regarded as a representative within the meaning of section 47 where, as in this case, the tenancy had commenced before the attachment. In the plaint it was alleged that Lakshmi Ammal fraudulently colluded with Sankaranarayana Ayyar in surrendering

(1) (1902) I.L.R. 26 Mad. 740. (2) (1904) I.L.R. 28 Mad. 87.



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the property to him, but no attempt was made to prove this and for the purposes of this appeal it must be taken that her action was *bona fide*. The appellant contends that a tenant can only surrender his tenancy to the landlord or if the landlord has parted with his rights in the property to the person who has acquired the landlord's rights and as by reason of the provisions of section 65 of the Code of Civil Procedure the property in suit vested in Krishnier from the time he bought it at the Court auction, Lakshmi Ammal could not in law surrender the tenancy to her brother. At the time she purported to do so he had no interest in the property. It is said that at the most her action put Sankaranarayana Ayyar in the position of an assignee of the tenancy. There is substance in the argument, but it is not necessary for the purpose of deciding this appeal to pause to inquire whether there is any flaw, because if Sankaranarayana Ayyar cannot in law be deemed to have entered into possession of the property in 1919 as the assignee of the tenancy he entered into possession without right and was, therefore, in the eye of the law a trespasser. A trespasser clearly cannot rely on section 47 to support his possession.

The fact that Krishnier did not apply for and obtain symbolical possession of the property under the provisions of Order XXI, rule 96, of the Code of Civil Procedure, could not affect his right to the property. The property vested in him absolutely, with or without symbolical possession, as soon as he became the auction purchaser. Rule 96 is there to assist an auction purchaser to secure recognition of rights already acquired. VENKATARAMANA RAO J. considered that it was obligatory on the part of the appellant to obtain symbolical possession, and that Lakshmi Ammal was bound in law to surrender the property to the person who had granted her the tenancy, but the learned

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Judge overlooked the provisions of section 65. The fact that Lakshmi Ammal was unaware of the Court auction would excuse her from liability in surrendering possession of the property to her brother, but the surrender could not put him in any better position. It must be remembered that there is a great difference between possession and seisin. The owner of property who has created a tenancy is seised of the property but the possession is with his tenant. In *Doe v. Finch*(1) DENMAN C.J. observed that where it is said that the possession of a tenant for years is the possession of the party entitled to the freehold, that imports that such person is seised of the estate of freehold. At the time of the auction sale Sankaranarayana Ayyar was seised of the property but was not in possession of it and the auction sale took away from him his seisin and gave it to the auction purchaser. The moment the sale took place his rights in the property ceased, and when his sister put him in possession in 1919 he went into possession without any rights unless in the circumstances he could be deemed to be assignee of the tenancy. So far as the property was concerned the execution was complete and he was no longer the judgment-debtor.

For the reasons indicated I am firmly of the opinion that the case does not fall within the purview of section 47 of the Code of Civil Procedure and I would allow the appeal with costs throughout.

WADSWORTH J.—I agree.

KRISHNASWAMI AYYANGAR J. —I also agree.

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(1) (1832) 4 B. & Ad. 283; 110 E.R. 462.

## APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice  
Madhavan Nair and Mr. Justice Gentle.

1938,  
November 16.

P. S. TULAJARAMA RAO, APPLICANT,

v.

SIR JAMES TAYLOR AND OTHERS, RESPONDENTS.\*

*Contempt of Court—Case sub judice—Comment on, or suggestion as to the course to be adopted by Court in—Contempt—Honesty of motive, no excuse—Comment on proceedings which are imminent but not yet launched in Court with knowledge of the fact constitutes contempt of Court—Discussion in newspaper of rights and wrongs of a pending case constitutes contempt—Difference between discussion of a pending case on the one hand and reference to same and giving items of news connected with pending case on the other—Latter permitted—Power to commit for contempt of Court, not to be lightly used but should be reserved where contempt is deliberate and of such a nature that committal is called for.*

*Held by the Full Bench.*—(i) To comment on a case which is *sub judice* or to suggest that a Court should take a certain course in respect of a matter before it constitutes contempt and honesty of motive cannot remove it from this category. The criterion is not whether the Court will be influenced, but whether the action complained of is calculated to prejudice the course of justice.

(ii) To comment on proceedings which are imminent but not yet launched in Court with knowledge of the fact is as much a contempt as comment on a case actually launched.

*Rex v. Parke*(1) and *Rex v. Daily Mirror. Ex parte Smith*(2) referred to.

(iii) A discussion in a newspaper of the rights and wrongs of a case when pending before a Court is improper and constitutes contempt of Court. But this does not mean that reference cannot be made to pending cases or that items of

\* Application No. 1854 of 1938 in Original Petition No. 158 of 1938.  
(1) [1903] 2 K.B. 432, 437.

(2) [1927] 1 K.B. 845.

news which are connected with pending cases should not be published.

(iv) The power to commit for contempt of Court is not to be lightly used and should be reserved for cases where the contempt is deliberate and of such a nature that committal is called for.

In the matter of the Indian Companies Act (VII of 1913) and in the matter of the Travancore National and Quilon Bank, Ltd. (in Liquidation).

*K. Krishnaswami Ayyangar* and *A. Seshachari* for applicant.—Comment on a case which is *sub judice* constitutes contempt and honesty of motive is no defence; see *Raja of Venkatagiri v. Rama Naidu*(1), *Bapayya Naidu v. Bapayya*(2) and *Rex v. Parke*(3). *Sub-judice* means “not disposed of” and does not mean “actually pending”. In *re Crown Bank. In re O'Malley*(4), which is on all fours with the present case, is disapproved in *The Queen v. Payne*(5) and *New Gold Coast Exploration Company, In re*(6). See also Halsbury's Laws of England, Hailsham Edition, Vol. 7, page 10, note (n). *The William Thomas Shipping Co., Ltd., In re. H.W. Dillon & Sons, Ltd. v. The Company. In re Sir Robert Thomas*(7), which is followed in *Raja of Venkatagiri v. Rama Naidu*(1), distinguishes *The Queen v. Payne*(5). The defence of fair comment on a matter of public interest does not extend to matters *sub judice* and the fact that the publication was made *bona fide* will not take the case out of the category of contempt of Court, since the publication is calculated to prejudice the course of justice; see *Tichborne* case cited as footnote to *Daw v. Eley*(8). Even mere publication of a winding-up petition *in extenso* amounts to contempt of Court; see *In re Cheltenham and Swansea Railway Carriage and Wagon Co.*(9).

The scheme for reconstruction of the Bank was one that was imminent on 22nd July 1938 and comment on the same amounts to contempt of Court; see *Rex v. Parke*(3), *Rex v. Daily Mirror. Ex parte Smith*(10) and Halsbury's Laws of England, Hailsham Edition, Vol. 7, pages 7 and 9.

(1) I.L.R. [1938] Mad. 545.  
(3) [1903] 2 K.B. 432, 437.  
(5) [1896] 1 Q.B. 577.  
(7) [1930] 2 Ch. 368, 375, 376.  
(9) (1869) L.R. 8 Eq. 580.

(2) (1938) 2 M.L.J. 520.  
(4) (1890) 44 Ch.D. 649.  
(6) [1901] 1 Ch. 860.  
(8) (1868) L.R. 7 Eq. 49.  
(10) [1927] 1 K.B. 845.

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*Nugent Grant* for respondents 1 to 3.—If the facts constitute punishable contempt the respondents tender their apology. Contempt jurisdiction is jealously guarded but sparsely exercised. There was no proposal under section 153 of the Indian Companies Act pending before STODART J. on 22nd July 1938. The opposition to adjudication had been by that time withdrawn. In *Rea v. Parke*(1) the matter had been placed before the Petty Sessions and it was only a question of time when the matter would be referred to the Assizes. In that interval the publication was made and it was under these circumstances the matter was held to be imminent. Whether a particular matter was imminent or not has to be judged with reference to the facts of each particular case. The publication of the letter complained of was not calculated to interfere with the course of justice. If at all, the present case came under the third category of contempts mentioned in *The William Thomas Shipping Co., Ltd., In re. H. W. Dillon & Sons, Ltd. v. The Company. In re Sir Robert Thomas*(2), viz., that it prejudices mankind against parties to a cause before it is heard.

[THE CHIEF JUSTICE.—The scheme for reconstruction was referred to by STODART J. in his order for appointing provisional liquidators.]

At the worst that matter might have been in the contemplation of parties but it was not a matter that was imminent.

[THE CHIEF JUSTICE.—How can you say that a letter which says that an order for liquidation should be made does not constitute contempt of Court?]

It is not punishable contempt; see *Ex parte Gaskell & Chambers Ltd.*(3). As a fact no damage has been done and the course of justice has not been interfered with.

*T. R. Venkatarama Sastri and P. R. Srinivasan* for the Editor of the "Hindu".—The scheme for reconstruction was not pending before Court. There was a possibility of the same coming up before Court in a contingency. The creditors and share-holders must make up their minds and then apply for reconstruction. Under those circumstances the opinion of the Reserve Bank was sought.

(1) [1903] 2 K.B. 432, 437.  
(2) [1930] 2 Ch. 368.

(3) [1936] 2 K.B. 595.

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[The CHIEF JUSTICE.—The first respondent might offer his opinion to the Premier but he cannot ventilate it in the press. What do you say to *Rex v. Editor of the Daily Mail. Ex parte Factor*(1)?]

The Bank had branches throughout British India and the Native States and the share-holders were spread over the whole of India. The method of making the affairs of the bank known to them through the press was adopted since that was the surest and speediest method. It was not with a view to interfere with the course of justice. If it is technical contempt it ought not to have been brought up before Court. *Plating Company v. Farquharson*(2) deals with a case of publication in the press by advertisement and not by a circular; see also *The Queen v. Payne*(3), *Rex v. Tibbits*(4), *Legal Remembrancer v. Matilal Ghose and Others*(5) and *The Government Advocate, Burma v. Saya Sein*(6).

*V. C. Gopalaratnam and V. K. Tiruvengkatachari and K. R. Vepa* for other respondents.

*Advocate-General (Sir A. Krishnaswami Ayyar)* for the Provincial Government.—The act of releasing the letter was an act of the Provincial Government. They take the full responsibility for the publication. Under the circumstances they would have been failing in their duty if the letter had not been released for the information of the share-holders and creditors of the Bank.

*Cur. adv. vult.*

The JUDGMENT of the Court was delivered by LEACH C.J.—The petitioner in this case applies for the committal of Sir James Taylor, the Governor of the Reserve Bank of India, Mr. M. M. Bhargava, the manager of the Madras Branch of that Bank, and Mr. G. A. Johnson, the acting editor of the "Madras Mail" for alleged contempt of Court. The action of the first respondent complained of is that he procured the publication of a letter dated 22nd

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(1) (1928) 44 T.L.R. 303.

(3) [1896] 1 Q.B. 577.

(5) (1913) I.L.R. 41 Cal. 173 (S.B.).

(2) (1881) 17 Ch. D. 49.

(4) [1902] 1 K.B. 77.

(6) (1929) I.L.R. 7 Ran. 844.

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July 1938, written by him to the Prime Minister of the Madras Government with reference to a petition then before this Court for the compulsory winding-up of the Travancore National and Quilon Bank, Ltd. The letter was published in the local press on 9th August at the request of the first respondent conveyed in a letter by the second respondent to the Secretary of the Government of Madras, Development Department. The complaint against the acting editor of the "Madras Mail" is that he published the letter and also published a leading article commenting on a scheme for reconstruction which was about to be placed before the Court and a letter from "A creditor" commenting on the same matter. The application came on for hearing before this Bench on 19th October. In the course of the arguments it appeared that the first respondent's letter had been published in other Madras papers, namely, the "Hindu", "Indian Express", "Dinamani", "Swadeshmitran" and "Andhra Patrika". As the petition which had been filed showed a *prima facie* case of contempt, the Court directed that the editors of these newspapers should also be called on to show cause and the hearing was adjourned in order that notices might be served upon them. This has now been done and the editors of these newspapers have entered appearances.

The Travancore National and Quilon Bank (which I shall hereafter refer to as "the Bank") suspended payment on 21st June 1938. The head office of the Bank was in Madras and it had many branches inside and outside the Presidency. The suspension of payment was therefore a matter of great public and private concern. On 22nd June a petition for the winding up of the Bank was presented to the Bombay High Court and on the same day a similar petition was

filed in the District Court of Quilon, which is in the State of Travancore. The next day a petition for its winding-up was also presented to this Court. A run on the Bank commenced on 15th March and as it continued to grow in intensity the Bank was compelled to close its doors. Before suspending payment the directors applied to the Reserve Bank of India for financial help. The Reserve Bank naturally wished to investigate the affairs of the Bank before committing itself and on 20th June an investigation was commenced, but before it could be completed the suspension of payment took place. The directors of the Bank then wanted the Reserve Bank to take charge of its assets and conserve them pending further investigation. Discussions took place between the Minister for Industries, the Officials of the Finance Department of the Government of Madras and the Deputy Governor of the Reserve Bank on 27th June and between the Prime Minister and the Deputy Governor on 29th June. On 30th June the Government of Madras issued a communication to the press stating that the Government had anxiously considered all possible steps that could be taken to meet the situation and, in consultation with the authorities of the Reserve Bank, it was suggested that the Bank should apply to the Reserve Bank to undertake an immediate and thorough investigation through competent auditors and accountants appointed by them into the affairs of the Bank and agree to act according to such advice as might be tendered as a result of the investigation "for the continuation, reorganization, or liquidation of the Bank, whichever course was finally suggested". The Reserve Bank estimated that the expenses of the investigation would amount to Rs. 10,000 and intimated its willingness to undertake the investigation

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if this sum were forthcoming. On 2nd July the Bank asked the Court to appoint provisional liquidators and to sanction the payment of the Rs. 10,000 out of the assets of the Bank. The application was heard by STODART J. who granted the first part of the application the same day, but by an order delivered on 5th July dismissed the application for the payment out of the Rs. 10,000 on the ground that he had no power to grant it. The hearing of the winding-up petition was then adjourned to 28th July.

On 8th July the Reserve Bank intimated its willingness to undertake the investigation at its own expense and the next day appointed a special officer for the purpose, but when he went to the premises of the Bank in Madras he met with some opposition from the Bank officials. It would appear that the opposition was subsequently withdrawn because on 17th July the special officer was in a position to make a preliminary report. On 18th July the first respondent came to Madras and on his arrival the preliminary report of the special officer was handed to him. The first respondent remained in Madras for two days during which time he had an interview with the Prime Minister and received a deputation from a committee of creditors who were interested in the reconstruction of the Bank. On 22nd July the first respondent wrote to the Prime Minister the letter complained of in the petition. In it he expressed the opinion that the only conclusion to be drawn from the material so far available was that the interest of the depositors would best be served by allowing the liquidation proceedings to take their course without further postponement and it seemed to him that it would be in the best interest of the depositors that the liquidation should be carried out for the Bank as a whole, as from the preliminary

figures furnished to him it would appear that the proportion of the assets to the liabilities was considerably larger in Travancore than in British India. The letter recommended that no further attempt should be made to postpone liquidation proceedings and concluded with the statement that the writer had no objection to the publication of the contents of this letter if the Prime Minister so desired.

On 27th July an application was made to the appellate side of this Court for an order staying the proceedings in the winding-up petition pending the hearing of the appeal which had been filed against the order of STODART J. refusing to allow the Rs. 10,000 to be paid out of the assets of the Bank for the purposes of the investigation by the Reserve Bank. That this appeal should have been persisted in seeing that the Reserve Bank had agreed to undertake the investigation at its own expense is a matter of some surprise. The Court refused an order of stay, but heard the appeal itself on 9th August and by an order dated 12th August dismissed it. On 28th July by an order of VENKATARAMANA RAO J. the hearing of the winding-up petition was further adjourned to 18th August. On 9th August the second respondent wrote a letter to the Secretary to the Government of Madras, Development Department, forwarding a copy of the preliminary report of the special officer appointed to investigate the affairs of the Bank together with other documents and in the course of this letter said :—" I am directed by the Governor of the Bank to intimate to you that we consider it would be very helpful if the Madras Government would release to the press the Governor's official letter dated 22nd July 1938 addressed to the Prime Minister." As the result of this letter the Government of Madras issued to the press for publication the first respondent's letter and it was published

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in the local press the same day. The petition for the winding-up of the Bank was then pending and was not dealt with until 5th September when VENKATARAMANA RAO J. passed an order for compulsory winding-up. A scheme of reconstruction of the Bank had in the meantime been presented on behalf of certain creditors. In his order granting the winding-up petition, the learned Judge directed the official liquidators to report on the scheme, and that is how the matter stands at present.

The petitioner complains that the letter of the first respondent constitutes contempt of Court inasmuch as it expresses an opinion that the winding-up petition should be granted. There is much force in this contention. In asking the Government of Madras to release the letter for publication we are convinced that the first respondent had no intention to act in contempt. His intention was merely to inform the creditors and shareholders of the Bank what he considered should be the proper attitude to adopt with regard to the winding-up petition. The intention of the first respondent and the *bona fide* nature of his action have an important bearing on the question whether the Court should take action on the petition, but good intention is not the deciding factor in a matter of contempt. To comment on a case which is *sub judice* or to suggest that the Court should take a certain course in respect of a matter before it undoubtedly constitutes contempt and honesty of motive cannot remove it from this category. If this were to be allowed persons in a position to assist the Court by their evidence might be prevented from coming forward, and persons appearing as witnesses might be influenced in their testimony. The criterion is not whether the Court will be influenced but whether the action complained of is calculated to prejudice the course of

justice. In the present case it has been shown that one creditor at least was influenced by the letter of the first respondent. We refer to the letter which appeared in "The Madras Mail". In this letter which is dated 16th August and was published on 19th August the writer says :

"After reading that opinion (that of the first respondent expressed in his letter of 22nd July) I am strongly for the immediate liquidation of the Bank and probably many other depositors have changed their minds after knowing the statement of the Reserve Bank".

and concludes :

"For the reconstruction of the Bank it is necessary to create confidence and I fail to see how this can be done if the scheme is not backed by the Reserve Bank. I think that, in the absence of higher and more reliable authority, the creditors must believe the Reserve Bank, whose opinion is that 'no useful purpose would now be served by postponing liquidation proceedings'."

At the time when the first respondent's letter was published the reconstruction scheme had not been placed before the Court, but it was known that a committee of creditors proposed to put forward a scheme. The matter was in fact mentioned in the course of the arguments heard by STODART J. at the beginning of August. To comment on a case which is about to come before the Court with knowledge of the fact is in our opinion just as much a contempt as comment on a case actually launched. In *Rex v. Parke*(1) WILLS J. in the course of his judgment observed :

"Great stress has been laid by Mr. Danckwerts upon an expression which has been used in the judgments upon questions of this kind—that the remedy exists when there is a cause pending in the Court. We think undue importance has been attached to it. It is true that in very nearly all the cases

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which have arisen there has been a cause actually begun so that the expression, quite natural under the circumstances, accentuates the fact, not that the case has been begun, but that it is not at an end. That is the cardinal consideration. It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased."

The question whether there can be contempt of Court when proceedings are imminent but not yet launched was also discussed in *Rex v. Daily Mirror. Smith, Ex parte*(1), but as the question did not call for a decision no decision was given. Lord HEWART C.J., however, quoted the passage which has just been cited from the judgment of WILLS J. and as there was no indication of disapproval it may, we think, be taken that the leaning was in the same direction.

As we have already indicated the Court does not in any way doubt that the first respondent was actuated by the best motives, but inasmuch as he publicly advised the acceptance of the petition for winding up, a matter which the Court was being called upon to decide, and as a reconstruction scheme was about to be put before the Court, we are constrained to hold that there was in law contempt of Court. The second respondent played a less important part in the matter and in writing to the Prime Minister on 9th August he was acting on the instructions of the first respondent. He, however, shared in securing the release for publication of the letter complained of and while the Court acquits him also of any intention to act in contempt and accepts that he acted in good faith, he did in fact share in the contempt.

We will now turn to the position of the editors of the respective papers. As we have mentioned they all

(1) [1927] 1 K.B. 845.

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published the first respondent's letter of 22nd July and the "Madras Mail" published a leading article on the proposed reconstruction scheme and the letter from "A creditor". The "Hindu" published a statement from the "Secretary, Central Committee of Creditors, Travancore National and Quilon Bank, Madras," and a statement from the managing editor of "Indian Finance" strongly recommending the acceptance of the scheme. The "Indian Express" published a leading article, and the statement from the Secretary, the Committee of Creditors. The "Swadeshmitran" published a shorter statement from the Secretary of this Committee. The "Dinamani" and the "Andhra Patrika" merely published the first respondent's letter.

As the publication of the letter of the first respondent constitutes contempt of Court, the editor of each paper in which it appeared must be deemed to share in the contempt. We do not think it is necessary to enter upon a detailed discussion of the other matters which appeared in these papers relating to the affairs of the Bank. The Court regards the publication by the "Madras Mail" of the leading article of 22nd July and the letter from "A creditor" and the publication by the "Hindu" of the statement of the managing editor of "Indian Finance" as also constituting contempt of Court but will treat the other published statements as not being in contempt. As in the case of the first and second respondents, the Court accepts the statement that the editors had no intention of acting in contempt and that their *bona fides* is not in any way in question. The fact that the first respondent's letter was sent to them by the Government led them to publish it without pausing to consider its effect. The editor of the "Andhra

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Patrika " states the position very well in his affidavit showing cause. He there says : " The very responsible and eminent character of the source from which the communique was issued, misled me into publishing the letter, without scrutinising its contents in a more searching manner than I did."

The Court has been asked to give an indication of what may and what may not be published in circumstances such as these. It is impossible for the Court to do so. It would mean traversing a very long distance and even then it would not lead to a complete statement. It is, however, fundamental that a discussion in a newspaper of the rights and wrongs of a case when pending before a Court is improper and constitutes contempt of Court. This does not mean that reference cannot be made to pending cases or that items of news which are connected with pending cases should not be published. No objection could for instance be taken to the publication in the press of a statement that the creditors of a company in respect of which a winding-up order has been passed have put forward a scheme for reconstruction, but what cannot be permitted is a discussion of the attitude which the Court should adopt when considering the scheme.

The power to commit for contempt of Court is not to be lightly used and should be reserved for cases where the contempt is deliberate and of such a nature that committal is called for. In the present case all that can be said is that the respondents acted without due consideration. They have all expressed their regret to the Court and we think that the matter may be left there. Sufficient has probably been said to prevent a similar situation arising in future.

At the conclusion of the arguments the learned Advocate-General addressed the Court on behalf of

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the Government of Madras. He stated that the Government accepted the responsibility for the publication of the letter of the first respondent, and that the Government felt it would be failing in its duty to the share-holders and depositors scattered in different parts of India and Ceylon if it did not release the letter of the first respondent. There can be no duty to release for publication in the press a letter advising on a matter which is *sub judice* and the release itself constituted a technical contempt, but no complaint has been made of this and we, of course, accept the learned Advocate-General's statement that the Government felt it its duty to publish the letter.

The learned Advocate for the petitioner has left the question of costs entirely to the Court. Had he pressed for costs, we should not have made an order for their payment. We consider that the petitioner who was obviously in possession of the full facts was not justified in proceeding against one newspaper alone. What his motives were it is unnecessary to inquire, but he was obviously not impartial in his action. In these circumstances, there will be no order for costs.

Solicitors for respondents 1 to 3 : *King and Partridge.*

G.R.



## INCOME-TAX REFERENCE.

Before Sir Lionel Leach, Chief Justice, Mr. Justice  
Madhavan Nair and Mr. Justice Varadachariar.

1938,  
November 1.

M. S. S. CHIDAMBARAM CHETTIAR AND ANOTHER,  
PETITIONERS,

v.

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

*Indian Income-tax Act (XI of 1922), sec. 4 (2)—Foreign business  
—Immovable properties taken over in satisfaction of debts due  
to, value of said properties being treated as representing  
in part return of capital and in part profits—Profits available  
for remittance from foreign business—Assessee's right to  
exclusion from, of sum representing immovable properties  
taken over by him from his debtors.*

The assessee, the members of an undivided Hindu family and carrying on a money-lending business at a place in British India where they had their headquarters, were partners in various money-lending firms in the Federated Malay States and in Burma. One of their foreign firms did business at Ipoh in the Federated Malay States. That firm took over in satisfaction of debts due to it immovable properties which had been mortgaged as security for debts, the values of the said properties being treated as representing in part the return of capital and in part profits. The total profits of the firm were on calculation found to amount to \$127,806 of which \$74,570 was represented by land. The assessee's share in the sum of \$74,570 was \$53,264. During the year of account (1933-34) the assessee remitted from Ipoh to Rangoon, which was then in British India, sums amounting in the aggregate to Rs. 99,279. Those remittances the Income-tax authorities treated as being remittances of profits. The question was whether in computing the profits available for remittance from the Ipoh firm the Income-tax Officer should have excluded the

\* Original Petition No. 176 of 1937.

sum of \$53,264. The total profits of the assessee for the years 1930-31 to 1933-34 were found to be \$119,647.

Held that the case came within the principle stated in *Scottish Provident Institution v. Allan*(1) and that in computing the profits available for remittance from the Ipoh firm the Income-tax Officer was not bound to exclude the sum of \$53,264.

The assessee could not be allowed to withdraw money from the firm and treat their interest in the immovable properties as representing their profits. They accumulated profits to the extent of \$119,647 and out of the common funds of the firm they made the remittances. The withdrawals from the firm must therefore be treated as withdrawals of profits.

In the matter of the Indian Income-tax Act XI of 1922 and in the matter of the assessment of M. S. S. Chidambaram Chettiar and Meyyappa Chettiar, Karaikudi.

P. R. Srinivasan for petitioners.

M. Patanjali Sastri for Commissioner of Income-tax.

The JUDGMENT of the Court was delivered by LEACH C.J.—This reference arises out of an assessment of an undivided Hindu family the members of which are M. S. S. Chidambaram Chettiar and Meyyappa Chettiar. The assessee are partners in various money-lending firms in the Federated Malay States and in Burma, and carry on the same kind of business at Karaikudi where they have their headquarters. One of their foreign firms does business at Ipoh in the Federated Malay States. Owing to the financial depression which existed there this firm was compelled to take over in satisfaction of debts due to it immovable properties which had been mortgaged as security for debts. The values of these immovable properties were treated as representing in part the

(1) [1903] 4 T.C. 591.

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return of capital and in part profits. The total profits of the firm were calculated and it was found that they amounted to \$127,806 of which \$74,570 was represented by land. The assessee's share in the sum of \$74,570 was \$53,264. During the year of account (1933-34) the assessee remitted from Ipoh to Rangoon, which was then in British India, sums amounting in the aggregate to Rs. 99,279. These remittances the Income-tax authorities treated as being remittances of profits. The assessee objected to this, their objection being that the profits represented by immovable properties were not capable of remittance. The Court directed the Commissioner of Income-tax under section 66 (3) of the Act to refer the following question for decision :

"The total profits of the assessee for the years 1930-31 to 1933-34 having been found to be \$119,647 of which \$74,570 represents immovable properties taken over by the assessee from their debtors, should the Income-tax Officer in computing the profits available for remittance from the Ipoh firm have excluded the sum of \$74,570 ? "

The Commissioner of Income-tax rightly points out that there is an error in the wording of the question. The sum of \$74,570 was the total interest of the firm in immovable properties, and the assessee's share, as I have already said, was only \$53,264.

In our opinion the question referred must be answered in the negative. The assessee cannot be allowed to withdraw money from the firm and treat their interest in the immovable properties of the firm as representing their profits. They accumulated profits to the extent of \$119,647 and out of the common funds of the firm they made the remittances. The withdrawals from the firm must therefore be treated as withdrawals of profits. The effect was to turn the immovable properties representing such profits into

capital assets. The case comes within the principle stated by the House of Lords in *Scottish Provident Institution v. Allan*(1).

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As the answer is against the assessee they must pay the costs of the Commissioner of Income-tax, Rs. 250.

A.S.V.

### APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Madhavan Nair.*

RAI SAHIB C. MADURANAYAKAM PILLAI  
(PLAINTIFF), APPELLANT,

1938,  
November 7.

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL  
(DEFENDANT), RESPONDENT.\*

*Water—Madras Presidency—Rights and obligations of Government as regards regulation and distribution of water in respect of lands in the old and new ayacuts.*

Before 1870 the water in two tanks near the city of Madras, viz., Red Hills tank and Cholavaram tank, was used merely for the purpose of irrigating lands in their vicinity and the water in the Red Hills tank was sufficient in a normal year for the cultivation of one crop at least in an ayacut of over 5,000 acres. In 1870 the Government undertook a scheme to increase the storage capacity of these tanks with the primary object of supplying water to Madras. It contemplated the storage of sufficient water to bring under cultivation a further area, as well as supplying the old ayacut and Madras. The scheme was completed in 1872 and an additional area was brought under cultivation as the result of the increased water

(1) (1903) 4 T.C. 591.

\* Original Side Appeal No. 71 of 1936.

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supply. The owner of certain lands in the old ayacut filed a suit against the Secretary of State for India in Council for a declaration that he was entitled to have sufficient water each year for the cultivation of two crops on his lands without regard to the needs of Madras and for damages on the ground that in certain faslis the crops on his lands were damaged as the result of the Government withholding from him the water to which he was entitled. The suit was resisted on the following grounds : (i) The Government had an absolute right to regulate the distribution of water or to withhold it both with regard to the lands in the old ayacut and those brought under cultivation subsequent to the carrying out of the scheme. (ii) As the primary object of the scheme was to provide a water supply for Madras, any rights which the plaintiff had before the scheme came into operation had been put an end to by the project, the ryots having taken the risk of the water supply being restricted in return for the benefit to be derived from the scheme.

*Held* : (i) In the Madras Presidency a ryot is entitled to receive the water which his lands have been accustomed to for irrigation purposes without interference by the Government or anyone else. The Government cannot be required to supply water when none is available and it has a right of conserving and distributing the water available in the interests of the particular ayacut. In years of shortage the only obligation of the Government is to make an equitable distribution of water. The ryot has a claim against the Government when it withholds from him the water which he had a right to demand taking into consideration the supply available. The Government is not entitled to economise water in seasons or months of shortage in order that a perennial supply may be available for the city of Madras, if this economy meant that the ryots in the old ayacut would have their customary supply diminished.

(ii) The plaintiff is entitled to have a declaration that he is entitled to sufficient water for the cultivation of one crop per annum without reference to the needs of the city of Madras, subject to the power of the Government to control the distribution of available water in the interests of the landholders whose lands comprised the old ayacut.

The plaintiff was awarded damages for the infringement of his right by the Government.

APPEAL from the judgment of WADSWORTH J., dated 15th September 1936 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 371 of 1929.

*T. R. Venkatarama Sastri and Srinivasaraghavan and Thyagarajan* for appellant.

*Advocate-General (Sir A. Krishnaswami Ayyar)* for respondent.

*Cur. adv. vult.*

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises a question of great public importance. The Court is called upon to decide what the powers of the Government are with regard to the distribution of water in two reservoirs, or tanks as they are usually called in India, from which the city of Madras receives its water supply. One tank is known as the Cholavaram tank, and the other as the Red Hills tank. They lie close to one another, some fifteen miles from the city of Madras. Before 1870 when the Government undertook a scheme to increase the storage capacity of these tanks with the primary object of supplying water to Madras, the water in the tanks was used merely for the purpose of irrigating lands in the vicinity. Near to the tanks is the river Cortelliar, but before the scheme was carried out there was no connection between the river and the tanks and the level of the water in them depended on the rain which fell in the catchment area. The evidence, however, discloses that the water in the Red Hills tank was sufficient in a normal year for the cultivation of one crop at least in an ayacut of over 5,000 acres. The scheme provided for the damming of the Cortelliar river, the diversion of water impounded by this dam into a channel in the Cholavaram tank and the construction of another

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channel connecting the Cholavaram tank with the Red Hills tank. The scheme was a costly one, but as it contemplated the storage of sufficient water to bring under cultivation a further area, as well as supplying the old ayacut and Madras, the Government anticipated meeting the cost out of the increase in land revenue which would follow from an extension of the irrigated area. The scheme was completed in 1872 and an additional area was brought under cultivation as the result of the increased water supply. The Government has, however, always regarded the scheme as being in the first instance for the benefit of Madras, and the question which falls for decision is whether the Government is entitled to supply Madras with water without regard to the rights of the cultivators in the old ayacut as they existed in 1870.

The suit out of which the appeal arises was filed on the Original Side of this Court by the appellant against the Secretary of State for India in Council. The appellant is the owner of some 43·44 acres of lands in the old ayacut. The fact that the lands fell within the old ayacut was denied, but it was held that they did and this finding has not been challenged before us. The appellant asserted that he was entitled to have sufficient water each year for the cultivation of two crops on his lands and this without regard to the needs of Madras. He complained that in faslis 1336 and 1337 (1926-27 and 1927-28) the crops on his lands were damaged as the result of the Government withholding from him the water to which he was entitled. He assessed the total damage at Rs. 5,523-7-6 and asked for a decree for this amount. He also asked for a declaration of his rights. In the written statement filed on behalf of the Secretary of State it was denied that the appellant had the right to be supplied with any definite quantity of water or

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to claim damages on the ground that water had been withheld from him. It was said that the Government had an absolute right to regulate the distribution of water or to withhold it both with regard to the lands in the old ayacut and those brought under cultivation subsequent to the carrying out of the scheme. It was also said that, as the primary object of the scheme was to provide a water supply for Madras, any rights which the appellant had before the scheme came into operation had been put an end to by the project, the ryots having taken the risk of the water supply being restricted in return for the benefit to be derived from the scheme. The respondent put the appellant to strict proof that certain of his lands were "wet" lands pertaining to the old ayacut and denied that he was in any event entitled to water for the cultivation of a second crop. The case was tried by WADSWORTH J. who held that the appellant was entitled to sufficient water for the cultivation of one wet crop a year on his lands, but subject to the power of the Government to control the distribution of water with reference to (i) the need for conserving water in the interests of the whole ayacut, and (ii) the need for economising water in seasons or months of shortage in order that a perennial supply might be available in the tank for the use of the municipality. On this basis the claim for damages was dismissed.

With regard to the nature of the appellant's lands the respondent has contended that 38·87 acres out of the total area of 43·44 acres are not really wet lands, that is, lands which are entitled to the supply of water for cultivation purposes. It is said that they are "wet waste lands" and as such have no right to water from the channels under the control of the Government. This contention is based on a deed of conveyance,

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dated 7th August 1866, in which the lands are described as being "wet waste lands". Before us the learned Advocate-General has conceded that the 38.87 acres must be classified either as wet lands or as dry lands, there being no intermediate classification. We consider that all the lands must be classified as wet lands. They were so classified in the settlement of 1875 and have since been so classified. The paimash accounts of 1840 which would have shown the classification in that year were destroyed by an order of the Government, dated 26th March 1938, and cannot be referred to, but there is no reason to believe that the classification then was different. On the question whether before the scheme the appellant's lands carried with them the right to sufficient water for the cultivation of two crops, the learned trial Judge held that the evidence established that except in years of unusually small rainfalls the lands on the ayacut received a regular supply of water for the irrigation of the first crop and a somewhat precarious supply of water for a second crop over a portion of the area. In the minutes of the proceedings of the Madras Government, Public Works Department, dated 26th April 1870, it is stated that the Red Hills tank as it stood before the scheme was carried out would probably suffice for the whole area for the first crop and for a good deal of second crop cultivation. In subsequent official reports reference is made to the fact that lands in the old ayacut were well irrigated before the scheme, but there is no statement to be found which indicates a right to water for a second crop. We concur in the finding of the learned Judge and hold that before the scheme was carried into effect the appellant's lands were in a normal year entitled to receive from the Red Hills tank sufficient water for the cultivation of one crop.

In carrying out the scheme the engineers placed the level of the municipal sluice at 31.31 feet above mean sea level, but in order to avoid pumping and to allow water to reach Madras by gravitation it was necessary to have at least six feet of water always stored in excess of requirements. In 1892 the Chief Engineer for Irrigation pointed out that the supply by gravitation to Madras could not be well assured till the level was plus 38, and on his recommendation the Government directed that this level should be maintained. In 1908 it was ordered that there should be a complete stoppage of the issue of water for irrigation purposes during the months of July and August, even if the level was in excess of plus 38. In the year 1926 the rainfall was below normal and on 30th November 1927 the Government ordered that no water should be withdrawn for irrigation from either tank till the level of the water in the Red Hills tank had reached plus 44.67, which meant a full tank. On 22nd August 1928 the rules for the issue of water were again changed. It was then ordered that, so long as the level of water in the tank was at plus 38 or lower, no water would be issued for irrigation. If the level rose above plus 38, water would be issued for irrigation from 1st September to 14th October (inclusive), but the supply was liable to be cut off, if in the meantime the water level in the tank fell to plus 38. During the north-east monsoon, the issue of water for irrigation would be stopped from 15th October and would not be resumed till 15th December or until the full tank level (plus 44.67) was reached, whichever date was later. After 15th December the issue of water would be continued till 31st January, if in the meantime the level did not fall to plus 38, but if it did fall to that level the issue would be stopped. In pursuance of the policy

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of safeguarding the supply of water to Madras the supply to the appellant was cut off altogether in the year 1926-27 and in 1927-28 no water was supplied to him in the months of August, September, October and November. In these years the water in the Red Hills tank was far in excess of what it was when the project was undertaken and no attempt has been made by the learned Advocate-General to show that the rainfall in 1926 was so small that the appellant would not have received sufficient water for the cultivation of one crop if the Red Hills tank had not been improved, but had remained as it was in 1870, and it must be taken, at any rate so far as the year 1926-27 is concerned, that the appellant's rights, assuming them to be the same as they were in 1870, were disregarded.

This brings me to the question whether the appellant's rights have undergone a change by reason of the scheme and the answer entails an examination of the authorities. I may say at once that the contention that the ryots in the old ayacut undertook a risk and that for benefits to be derived from the scheme they surrendered their rights cannot be sustained. So far as the Court is aware the ryots were not even consulted with regard to the scheme, and far from surrendering their rights they have from time to time protested against the preference given to Madras.

In *Kristna Ayyan v. Vencatachella Mudali*(1) it was held that the Government had an undoubted right to distribute the water of Government channels, but that power did not include the power to disturb existing arrangements to the prejudice of any tenant during the continuance of the tenancy, and this decision was quoted with approval in *Ramachandra v.*

(1) (1872) 7 M.H.C.R. 60.

*Narayanasami*(1), which was a suit between ryots holding lands under the Government in which the Collector was joined as a defendant. With the sanction of the Collector the first defendant had opened a new irrigation channel, thereby diminishing the supply of water necessary for the cultivation of the plaintiff's land. The trial Court held that the Collector's order was in excess of his powers and issued an injunction directing the channel to be closed. The plaintiff was also granted a decree for damages. This decision was upheld on appeal. In *Sankaravadivelu Pillai v. Secretary of State for India in Council*(2) WHITE C.J., as the result of the decisions in *Kristna Ayyan v. Venkatachala Mudali*(3) and *Ramachandra v. Narayanasami*(1), considered it to be settled law that the Government had the right to distribute the water of Government channels for the benefit of the public, subject to the right of a ryotwari land-holder, to whom water had been supplied by the Government, to continue to receive such supply as would be sufficient for his accustomed requirements. The question was again considered by WHITE C.J. sitting with PINHEEY J. in *Fischer v. The Secretary of State for India*(4) which concerned the rights of riparian owners. It was held that the Government had power, by the customary law of India, to regulate in the public interests, in connection with the collection, retention and distribution of waters of rivers and streams flowing in natural channels, and of waters introduced into such rivers by means of works constructed at the public expense, and in the public interests, for purposes of irrigation, provided that they did not thereby inflict sensible injury on other riparian owners and diminish the supply they

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(1) (1892) I.L.R. 16 Mad. 333.  
(3) (1872) 7 M.H.C.R. 60.

(2) (1904) I.L.R. 28 Mad. 72.  
(4) (1908) I.L.R. 32 Mad. 141.

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had hitherto utilized. The decision in *Fischer v. The Secretary of State for India*(1) was referred to in the judgment of the Privy Council in *Prasad Row v. The Secretary of State for India*(2) and with apparent approval, as their Lordships observed that the law of the Madras Presidency as to rivers and streams was certainly different in some respects from the English law.

In *Basavana Gowd v. Narayana Reddi*(3) WALLACE and KRISHNAN PANDALAI JJ. were called upon to state the legal position where the ryots of wet lands in two Government ryotwari villages, situated on opposite sides of a Government river, drew water for irrigation from channels under the control of the Government which were taken off at particular points in the river bed, and the ryots of one village moved the head of one of the channels to the detriment of the ryots of the other village. The Court held that a ryot of a ryotwari village acquired a legal right to the water when it reached his customary channel for the irrigation of his lands, and not merely when the water had reached his fields. It was open to the Government to alter at any time the manner and method by which it supplied the necessary water to a ryot, but by undertaking the obligation to supply him with water the Government also undertook that it should be at his disposal by the usual and customary method, that is by a channel constructed either by the Government or by the ryot or both, until and unless some other method was adopted. The ryot could not insist as against the Government that he had any right to have his supply carried by any

(1) (1908) I.L.R. 32 Mad. 141. (2) (1917) I.L.R. 40 Mad. 886 (P.C.).  
(3) (1930) I.L.R. 54 Mad. 793.

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particular channel and could not object to the Government altering the channel of supply, but he had a right as against the other ryots and even, subject to the Government's right to give him an equally efficient supply, as against the Government to the protection of law for that supply once it had passed into the channel earmarked for his supply. If the customary supply and manner of supplying according to the contractual or proprietary right were interfered with by private parties, such interference was an invasion of the ryot's rights and would give rise to a cause of action. The most recent decision by a Bench of this Court is that given in the case of *Secretary of State for India in Council v. Nageswara Iyer*(1). This appeal was heard by VARADACHARIAR and MOCKETT JJ. who accepted as correct the statement of the law in *Sankaravadivu Pillai v. Secretary of State for India in Council*(2). They pointed out that the rights and obligations as between the State and the ryot in this country, so far as supplying water for irrigation purposes was concerned, rested largely on unrecorded custom and practice. The ryotwari holder was ordinarily spoken of as entitled to the customary supply of water, but the obligation of the Government was not to find the required supply of water, but only not to interfere with the necessary supply if and so far as water was available.

The effect of these decisions is that in the Madras Presidency the ryot is entitled to receive the water which his lands have been accustomed to for irrigation purposes without interference by the Government or any one else. The Government cannot be required to supply water when none is available and it has a

(1) 1936 M.W.N. 684.

(2) (1904) I.L.R. 28 Mad. 72.

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right of conserving and distributing the water available in the interests of the particular ayacut. In years of shortage the only obligation of the Government is to make an equitable distribution of water. The ryot has a claim against the Government when it withholds from him the water which he has a right to demand taking into consideration the supply available. In the face of the authorities the plea advanced on behalf of the Government that it has the right in law to supply Madras with water without regard to the claims of the ryots in the old ayacut cannot be accepted. It is, of course, manifest that the needs of the city of Madras are of very great importance and in the absence of rights in others no one could reasonably complain of the policy of the Government in giving this large city a preference in the supply of water, but when others have acquired rights the law requires that they shall be respected. It follows that in our opinion the declaration granted to the appellant does not do justice to the appellant. The Government is not entitled to economize water in seasons or months of shortage in order that a perennial supply may be available for the use of Madras, if this economy means that the ryots in the old ayacut will have their customary supply diminished. The appellant will have a declaration that he is entitled to sufficient water for the cultivation of one crop per annum without reference to the needs of the city of Madras, subject to the power of the Government to control the distribution of available water in the interests of the landholders whose lands comprise the old ayacut. This declaration is not to be deemed to confer on the appellant greater rights than those which existed in 1870 or to diminish the powers of Government with regard to the distribution of the supply.

The position of the ryots in the area which has been brought under wet cultivation since the inauguration of the scheme does not call for discussion in this case. The ryots in the new area are in a different position to the ryots in the old area, and it may very well be that their rights to water are subject to the requirements of the city of Madras.

It is clear that, as the result of the Government cutting off the supply of water for irrigation purposes altogether during 1926-27, the appellant suffered damage, and it is agreed that the damages shall be assessed at Rs. 450. No loss has been proved in respect of the following year and the claim for damages in respect of that year will be dismissed.

The result of the appeal is the appellant will have a declaration in the terms indicated in this judgment and a decree for damages in the sum of Rs. 450. As the appellant has succeeded on the main point he will be awarded costs here and below.

Solicitor for Government: *H. M. Small.*

G.R.

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## APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Madhavan Nair.

1938,  
November 7.

KHADER MOHIDEEN SAHIB (APPLICANT),  
APPELLANT,

v.

C. NAGU BAI *alias* SEETHA BAI AND TWO OTHERS  
(RESPONDENTS 1 AND 3), RESPONDENTS.\*

*Receiver—Money decree—Person appointed receiver of properties in execution of—Appointment of, subsequently as receiver in a suit on equitable mortgage of the same properties—Right of mortgagee to preferential payment of profits of mortgaged properties from date of later appointment—Neglect of mortgagee in bringing the properties to sale—Effect of, on mortgagee's right—Mortgagee, when entitled to payment of profits of mortgaged property.*

When a person was appointed a receiver of certain properties at the instance of the holder of a money decree in execution proceedings and, some time later, he was also appointed to act as a receiver in a suit instituted by an equitable mortgagee of the said properties to enforce his mortgage, the equitable mortgagee is entitled to preferential payment of the profits of the mortgaged properties as against the holder of the money decree from the date of the later order. The fact that the equitable mortgagee had neglected to exercise his right to bring the mortgaged properties to sale could not destroy his right, though he would be entitled to withdraw the profits from the Court only when it was clear that the mortgaged properties were not sufficient to pay the mortgage debt.

APPEAL from the judgment and order of GENTLE J. dated 11th October 1937 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 865 of 1936 in Civil Suit No. 422 of 1929.

\* Original Side Appeal No. 74 of 1937.

A. C. Sampath Ayyengar for T. K. Subramania Pillai for appellant.

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G. Lakshmananna and K. V. Rangachari for first respondent.

K. Narasimha Ayyar for second respondent.

S. Murugesu Mudaliar for third respondent.

*Cur. adv. vult.*

## JUDGMENT.

LEACH C.J.—This appeal raises the question whether the holder of a money decree or an equitable mortgagee has preferential rights in the profits of mortgaged properties when a receiver has been appointed at the instance of the holder of the money decree in execution proceedings and also appointed to act in a suit instituted by the mortgagee to enforce his mortgage. In order to understand the position it is necessary to state the facts in some detail. In Civil Suit No. 422 of 1929 on the Original Side of this Court the first respondent obtained a decree on a promissory note against the members of a joint Hindu family consisting of two brothers, Aiya Mudaliar and Muthu Mudaliar, and Sambanda Mudaliar, the son of Aiya Mudaliar. On 16th March 1929 certain immovable properties belonging to the defendants in the suit were mortgaged to the Mercantile Bank of India, Limited, by the deposit of the title deeds. In 1930 the bank sued in Civil Suit No. 537 of 1930 on the Original Side of this Court to enforce its mortgage and on 5th August 1931 it obtained a preliminary mortgage decree for Rs. 1,04,888-2-4. On 24th November 1931 the Court passed a final decree in the mortgage suit and on 3rd February 1933 the bank assigned its decree to the appellant. On 6th November 1930 the first respondent applied for the appointment

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of a receiver of the rents and profits of the mortgaged properties on the ground that it was considered more than doubtful that a sale of the properties would be sufficient to discharge the mortgage debt and on 15th December 1930 the application was granted. On 14th August 1931 the bank applied for the appointment of a receiver in the mortgage suit in order to safeguard its own interests. This application came before STONE J. who on 16th October 1931 passed an order the effect of which was to make the receiver in Civil Suit No. 422 of 1929 also the receiver in the mortgage suit. The learned Judge directed that the rents and profits of the properties should be paid into Court to the joint credit of the decree-holders, that is, to the credit of the first respondent and the bank, and that the money should not be paid out without the further direction of the Court. The learned Judge gave no decision on the question of the rights of the parties with regard to the receiver's collections. He reserved this question for consideration until an application for payment out was made.

On 30th March 1931 Muthu Mudaliar, the second brother, was adjudicated an insolvent, and on 10th November 1931 an order for adjudication was made against Aiya Mudaliar, the elder brother. On 27th November 1933 the first respondent applied for payment out to her of a sum of Rs. 7,376 which the receiver had paid into Court. Notice of this application was given to all parties interested in the matter. On 12th October 1934 LAKSHMANA RAO J. directed that the first respondent should be paid a sum of Rs. 1,737-10-9, representing the monies collected by the receiver before 16th October 1931, the date on which the receiver was also appointed to act as the receiver in the mortgage suit. The learned Judge

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held that the Official Assignee was entitled to the amount representing the share of the second brother in the money collected between 30th March 1931, the date when the younger brother was adjudicated, and 10th November 1931, the date on which the elder brother was adjudicated. No appeal was preferred against this order.

On 20th December 1934 the first respondent applied to the Court for payment to her of a sum of Rs. 3,454-6-0 which was said to represent the share of Sambanda Mudaliar, the son of the elder brother, in the monies lying in Court. The Master granted the application to the extent of Rs. 3,148-2-7 and his order was confirmed by GENTLE J. on appeal. The present appeal is from the order of GENTLE J. The learned Judge considered that the appellant was not justified in standing by for six years and allowing the rents and profits to be accumulated and relied on an observation of REILLY J. in *Ponnu Chettiar v. Sambasiva Ayyar*(1) to the effect that in this country a simple mortgagee cannot by getting a receiver appointed in the course of a suit enlarge his security or enlarge his rights to the prejudice of third parties in the equity of redemption.

In order to realize his security an equitable mortgagee must in India bring a suit on his mortgage and obtain a decree for sale. In England it has long been recognized that when an equitable mortgagee takes action to enforce his security he is entitled in certain circumstances to the appointment of a receiver in respect of the rents and profits of the mortgaged property. The Court has a discretion in the matter but ordinarily when there has been default in the

(1) (1932) I.L.R. 56 Mad. 546.

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payment of interest, or the security is likely to be insufficient to discharge the mortgage debt or is in jeopardy a receiver is appointed as a matter of course. Where a receiver has been appointed at the instance of a puisne mortgagee he will only act for the benefit of the puisne mortgagee if the prior mortgagee does not himself apply for the appointment of a receiver. If the prior mortgagee does apply for the appointment of a receiver he will be entitled to an order in supersession of the order obtained by the puisne mortgagee; see *Metropolitan Amalgamated Estates, Limited, In re. Fairweather v. The Company*(1). The holder of a money decree who has obtained an order for the appointment of a receiver does not become a secured creditor merely because a receiver has been appointed, and the order, unless it creates a charge, will not prevail against a trustee in bankruptcy; *In re Dickinson. Ex parte Charrington & Co.*(2), *In re Potts. Ex parte Taylor*(3), *In re Marquis Anglesey. Countess De Galve v. Gardner*(4) and *In re Pearce. Ex parte The Official Receiver, The Trustee*(5).

The principles on which the Courts in England have acted have been recognized in this country. In *Maharajah of Pittapuram v. Gokuldoss Goverdhandoss*(6) my learned brother, MADHAVAN NAIR J., held that where a receiver has been appointed at the instance of an equitable mortgagee, the mortgagee possesses a preferential right in the rents and profits as against the ordinary creditors of the mortgagor. This decision was quoted with evident approval by a Full Bench of this Court in *Paramasivan Pillai v. Ramasami Chettiar*(7) where it was held that the Court

(1) [1912] 2 Ch. 497.

(3) [1893] 1 Q.B. 648.

(5) [1919] 1 K.B. 354.

(2) (1888) 22 Q.B.D. 187.

(4) [1903] 2 Ch. 727.

(6) (1931) 1 L.L.R. 54 Mad. 565.

(7) (1933) 1 L.L.R. 58 Mad. 915 (F.B.).

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had jurisdiction to order the appointment of a receiver in a suit to enforce a simple mortgage. In *Rameshwar Singh v. Chuni Lal Shaha*(1) a Bench of the Calcutta High Court accepted the principle laid down in *Penney v. Todd*(2) that the possession of a receiver in a mortgage suit is *prima facie* for the benefit of the party who has obtained the appointment. The Court considered that a receiver who was appointed at the instance of a party must hold the property for his benefit alone and was bound to make over to him the entire income in discharge of his dues. The Rangoon High Court has also recognized the rights of an equitable mortgagee to the rents and profits of the mortgaged property after action has been taken; see *Aga G. Ally Ramzan Yezdi v. Balhazar & Son, Ltd.*(3) and *S. C. Venkanna v. Mangammal*(4).

As an equitable mortgagee is entitled as against the mortgagor to the rents and profits of the mortgage security if it is insufficient for the discharge of the mortgage debt and as the holder of a money decree who obtains the appointment of a receiver is not in the position of a secured creditor I am of the opinion that the equitable mortgagee has the better title when there is a contest between the two. I am, of course, referring to a case where the order of appointment contains no charge and the creditor merely stands in the shoes of his judgment-debtor. If the law requires a puisne mortgagee to give way to a prior mortgagee when the latter applies for the appointment of a receiver it seems to me that an ordinary judgment-creditor must give way to one who has a charge on the property, and this is the effect of the

(1) (1919) 1 L.L.R. 47 Cal. 418.

(3) (1936) 1 L.L.R. 14 Ran. 292.

(2) (1878) 28 W.R. 502.

(4) (1936) 1 L.L.R. 14 Ran. 308 (S.B.).

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decision in *Maharajah of Pittapuram v. Gokuldoss Goverdhandoss*(1). Applying these principles I consider that the Court must hold that the appellant is entitled to the sum which the first respondent wishes to withdraw from the Court if it is clear that the mortgaged properties are not sufficient to pay the mortgage debt. It would appear that they are not sufficient, but this must be ascertained with certainty before any order for payment out is made. If the appellant is entitled to the rents and profits, I do not consider that the fact that he has not brought the properties to sale earlier can destroy his right. I mention this because much has been made of the fact that the appellant has so far neglected to exercise his right to bring the mortgaged properties to sale. The first respondent could herself have brought the properties to sale in execution proceedings had she desired, but the sale would, of course, have been subject to the mortgage.

We will allow the appeal and set aside the order for payment out to the first respondent of the sum of Rs. 3,143-2-7, but subject to the observations which follow. The Court has been given to understand that the appellant is prepared to bring the mortgaged properties to sale under his final decree, and if this is done the position with regard to the sufficiency or otherwise of the security will be manifest. If the appellant does not within a reasonable time from the date of this judgment convince the Court that the mortgaged properties and the rents and profits thereof are insufficient to discharge his debt the Court will be justified in directing payment out to the first respondent of the sum in question, provided, of course, that her decree remains unsatisfied. The appellant

(1) (1931) I.L.R. 54 Mad. 585.

cannot be permitted to leave the question of the sufficiency of his security in doubt indefinitely.

The case will be remitted to the Original Side to be dealt with in the light of this judgment. As the appellant has been dilatory we make no order as to costs.

MADHAVAN NAIR J.—I agree and I have nothing special to add to the judgment delivered by my Lord, the Chief Justice; but I would like to say a few words about my decision in *Maharajah of Pittapuram v. Gokuldoss Goverdhandoss*(1) referred to in my Lord's judgment. That decision is ample authority for the position that an equitable mortgagee of properties at whose instance a receiver has been appointed by Court will have, in the event of his security proving insufficient, a preferential right as against the ordinary creditors of the mortgagor to any monies realised by the receiver from the properties. In that case however, the contest was between the equitable mortgagee who had obtained a decree on his equitable mortgage and the Official Assignee who represented the mortgagor who had become an insolvent. I held that the claim of the equitable mortgagee prevailed over that of the Official Assignee representing the general body of creditors. In *Ponnu Chettiar v. Sambasiva Ayyar*(2) it was held that the effect of the order appointing a receiver in a suit to enforce a simple mortgage is to deprive the mortgagor of his right to deal with the income of the property over which the receiver is appointed and that the mortgagor cannot defeat the order by assigning the profits to a third party and that a purchaser of the mortgagor's right, title and interest in the property

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(2) (1932) I.L.R. 56 Mad. 546.

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over which the receiver is appointed, in execution of a money decree obtained by him against the mortgagor, is no more entitled than the mortgagor to the income of the property realised by the receiver. The learned Counsel for the appellant argued in support of the position that the simple mortgagee who got the receiver appointed in that case could not put forward any claim as against the appellant to the income realised by the receiver. In the course of the arguments he relied upon *In re Dickinson. Ex parte Charrington & Co.*(1), *In re Potts. Ex parte Taylor*(2) and *In re Pearce. Ex parte The Official Receiver, The Trustee*(3), and contended that the effect of the order appointing a receiver is not to create a lien in favour of the mortgagees. These cases were held inapplicable by VENKATASUBBA RAO J., one of the learned Judges who decided that case on the ground that they dealt with the special provisions of the Bankruptcy Act. Incidentally, the learned Judge expressed a doubt whether my decision in *Maharajah of Pittapuram v. Gokuldoss Goverdhandoss*(4) is correct or not as the claimant in that case whose right was negatived by me was the Official Assignee. What I propose respectfully to say has reference to this doubt; but as the point does not directly arise in the present case, I shall be very brief. In those English cases referred to, the persons who obtained the appointment of receivers were simple money creditors and had no charge over the property, and their general rights if they were mortgagee decree-holders did not arise for consideration. That this aspect of the question is of importance will appear from the observations of two of the learned Judges, Lord ESHER M.R. and FRY L.J.,

(1) (1888) 22 Q.B.D. 187.

(3) [1919] 1 K.B. 354.

(2) [1893] 1 Q.B. 648.

(4) (1931) I.L.R. 54 Mad. 565.

who heard the appeal in *In re Dickinson. Ex parte Charrington & Co.*(1). Lord ESHER M.R. observed:

"I think that the case does not come within sub-section 2 (section 9 of the English Bankruptcy Act) for the appellants have neither a mortgage, charge nor lien upon any part of the property of the debtor."

FRY L.J. observed as follows:

"It is admitted that they do not hold any 'mortgage' on the property of the debtor."

Then they went on to consider the question whether the orders appointing the receiver created a charge making the judgment-creditor a secured creditor within the meaning of section 9 of the Bankruptcy Act. In the other two cases also the question considered was the same. For the purposes of this case it is not necessary to quote the orders under which the receivers were appointed in those cases. It will be sufficient to observe that the learned Judges interpreted the orders to mean that the property of the judgment-debtors was to be placed in the custody of the receiver to be held by him as the agent for the Court and at its disposal to be used subject to its orders. From this standpoint the question for consideration was: has the order appointing the receiver created a charge or lien in favour of the creditor over the property in his custody? In *In re Potts. Ex parte Taylor*(2) Lord ESHER M.R. pointed out that

"an order appointing a receiver can only amount to a charge, if it charges the person in whose hands the money is not to deal with it except in one way",

and that must mean, said the Master of the Rolls in *In re Pearce. Ex parte The Official Receiver, The Trustee*(3),

"except to pay it or to hold it for the execution creditor".

(1) (1888) 22 Q.B.D. 187.

(2) [1893] 1 Q.B. 648.

(3) [1919] 1 K.B. 354, 363.

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The question therefore reduces itself to one of interpretation of the order passed by the Court. In *Maharajah of Pittapuram v. Gokuldoss Goverdhandoss*(1), besides referring to the arguments advanced on the general principles arising from the position of the decree-holder as equitable mortgagee, I drew attention also to the order of the learned Judge appointing the receiver—the only point that received and could receive attention at the hands of the learned Judges in the English cases already referred to. In that case the order stated that the receiver “shall pay the net receipts into Court to the credit of this suit”, Civil suit No. 229 of 1924, the suit instituted by the equitable mortgagee in which he eventually obtained a decree. It seemed to me that, according to this order, the money in the hands of the receiver was not to be dealt with “except in one way” that is, except to put it to the “credit of this suit”, which means to the credit of the mortgagee-decree-holder in the event of his success in the case, and to no one else. According to this interpretation it follows that the mortgagee-decree-holder in *Maharajah of Pittapuram v. Gokuldoss Goverdhandoss*(1) was in the position of a secured creditor as against the Official Assignee and that the latter could not therefore claim any preferential right to the money in the hands of the receiver. It will be clear from pages 570 and 571 that my decision in that case was based both on general principles as well as upon the order appointing the receiver, but the former point happened to be more elaborated in view of the arguments advanced. For the reasons which I have briefly indicated above, I would say respectfully

(1) (1931) I.L.R. 54 Mad. 565.

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that it does not appear to me that the correctness of my decision in *Maharajah of Pittapuram v. Gokuldoss Goverdhandoss*(1) is open to doubt on the strength of the English decisions referred to, unless my interpretation of the order appointing the receiver in *Maharajah of Pittapuram v. Gokuldoss Goverdhandoss*(1) is held to be wrong. I may also add that the general question did not fall to be decided in the three English cases referred to.

G.B.

## APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Madhavan Nair.*

C. S. NATARAJA PILLAI AND ANOTHER (DEFENDANTS  
1 AND 2), APPELLANTS,

v.

C. S. SUBBAROYA CHETTIAR (PLAINTIFF),  
RESPONDENT.\*

*Foreign judgment—Declaration of status as adopted son of  
a Hindu widow by—Suit relating to immovable property in  
British India—Binding nature of judgment in.*

A foreign judgment declaring a person to be the adopted son of a Hindu widow is binding on British Indian Courts in a suit relating to immovable property in British India.

APPEAL against the judgment and decree of WADSWORTH J. dated 1st December 1938 and passed

(1) (1931) I.L.R. 54 Mad. 565.  
\* Original Side Appeal No. 79 of 1938.

NATARAJA  
v.  
SUBBAROYA. in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 596 of 1928.

*K. Krishnaswami Ayyangar and P. R. Ramakrishna Ayyar* for appellants.

*K. Rajah Ayyar and V. Ramaswami Ayyar* for respondent.

*Cur. adv. vult.*

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—In this appeal the Court is called upon to decide the question whether a foreign judgment declaring the respondent to be the adopted son of a Hindu widow is binding on the Court in a suit relating to immovable property. On 26th April 1891 one Calve Sadasiva Chetti, a French citizen, died in Pondicherry leaving a widow, but no issue. The deceased was a man of considerable wealth and had immovable properties in Pondicherry and in the Madras Presidency. By a will and a codicil dated 25th July 1889 and 20th May 1891 respectively, the deceased directed that the bulk of his estate should be devoted to charitable purposes and he appointed five executors and trustees. The will and the codicil were proved both in Pondicherry and in this Court by four of the trustees, but one of them, Calve Krishnaswami Chetti, refused to join in, and in 1892 instituted proceedings in Pondicherry for the removal of the trustees who had proved the will. As the result of this action the trustees were removed in 1906 and fresh trustees were appointed. The final decision was given by the Court of Cession in Paris. There was also litigation in Pondicherry with regard to the validity of the will and this led in 1917 to a declaration by the French Courts that the will was invalid and that Vasavambal Ammal, the widow, took the Pondicherry assets as on

an intestacy. On 12th December 1906 Vasavambal Ammal executed in Madras a deed by which she purported to adopt the second respondent. It is said by the appellants that this adoption was invalid as the widow had no authority to adopt. In fact they say that the will should be construed as embodying a prohibition against adoption. They also say that the widow was induced to sign the adoption deed under pressure from the trustees who were removed by the decree passed in Pondicherry. The deed of adoption was registered in Pondicherry and the French Courts have held the respondent to be the adopted son of Calve Sadasiva Chetti and also of Vasavambal Ammal. I will return to the decisions of the French Courts later, but as there has been considerable litigation with regard to the estate in this Court it will be convenient first to refer to the suits in Madras.

On 19th February 1908 the respondent who was then about four years of age instituted, through Vasavambal Ammal as his next friend, Civil Suit No. 49 of 1908 of this Court, for a declaration that he was the lawfully adopted son of Calve Sadasiva Chetti and that the will was in consequence invalid. On this basis he asked that he be given possession of the Madras properties. On 24th November 1908 this suit was withdrawn with liberty to bring a fresh suit on the same cause of action. In 1910 the persons who were appointed trustees, as the result of the suit filed in Pondicherry by Calve Krishnaswami Chetti in 1892, filed Civil Suit No. 312 of 1910 of this Court for a declaration that the respondent's adoption by Vasavambal Ammal was invalid and for possession of the properties situated in Madras. The defendants in this suit were three of the four trustees who had

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been removed, Krishnaveni Ammal (the respondent's natural mother), Vasavambal Ammal, and the respondent. The fourth trustee had died in the meantime. This suit was tried by WALLIS J. who was then a puisne Judge of this Court. WALLIS J. held that the adoption of the respondent by Vasavambal Ammal was invalid as it was contrary to the provisions of the will and also because the nearest *sapinda* had not been consulted. Accordingly he directed that the properties in the Madras Presidency should be handed over to the plaintiffs. An appeal (Original Side Appeal No. 72 of 1913) was filed against this judgment and was heard by ABDUR RAHIM and PHILLIPS JJ. ABDUR RAHIM J. held that the Pondicherry Court had no power to remove the trustees appointed by the Madras Court in respect of immovable properties situated in Madras and in order to remove the old trustees a suit under section 92 of the Code of Civil Procedure would be necessary. PHILLIPS J. held that this was not a suit for the removal of trustees. The old trustees had been removed and the plaintiffs had been appointed in their places. This was a suit based upon a foreign judgment which recognised the title of the plaintiffs to administer the trust and to recover the trust properties. He agreed that the adoption was invalid for the reasons stated by WALLIS J. and also on the ground that the factum of adoption had not been proved. In view of this disagreement a Letters Patent Appeal, No. 229 of 1916, followed and was heard by AYLING, SESHAGIRI AYYAR and BAKEWELL JJ., who dismissed the suit on the ground that there was a defect in the appointment of the plaintiffs as trustees and that they therefore had no *locus standi*. No opinion was expressed on the question of the validity of the adoption.

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In 1920 Calve Subraya Chetti, son of Calve Krishnaswami Chetti, and two others, with the sanction of the Advocate-General, instituted in this Court Civil Suit No. 226 of that year for the removal of the three surviving trustees who had proved the will in Madras, for the appointment of new trustees and for the settlement of a scheme. The respondent, Krishnaveni Ammal and Vasavambal Ammal were also made defendants. This suit also resulted in a compromise. The compromise was sanctioned by KUMARASWAMI SASTRI J. who passed a decree in the terms agreed upon. The respondent gave up his claim to be the adopted son of Calve Sadasiva Chetti. To Krishnaveni Ammal was allotted one item of immovable property in Madras, subject to her paying a sum of Rs. 50,000 to the respondent, and to the widow was allotted the property which is the subject-matter of the suit out of which this appeal arises. The other properties of Calve Sadasiva Chetti in Madras were to be regarded as constituting valid bequests to charities and a scheme for their management was settled. The respondent was still a minor, but the Court considered that it was in his interest that there should be a decree in the terms agreed upon.

Vasavambal Ammal died on 25th January 1922. Calve Subraya Chetti then claimed to be entitled to the property which was allotted to Vasavambal Ammal under the compromise decree passed in Civil Suit No. 226 of 1920, on the ground that he was the reversioner to the estate of Calve Sadasiva Chetti, and purported to transfer it to the Madras trustees for the benefit of the charities mentioned in the will of Calve Sadasiva Chetti, who was his great uncle. Sankara Chetti, one of the trustees who had been removed by the order of the French Court, set up a claim to the



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property as the nearest reversioner of the widow and purported to transfer it to the appellants, who claim to be illegitimate sons of Calve Sadasiva Chetti. In 1924 the Madras trustees filed Civil Suit No. 53 of 1924 to recover possession of the property and also of a rest-house which had been managed by Vasavambal Ammal. In addition to the appellants, Sankara Chetti, Chockanathan Chetti (who was also one of the original trustees), the then tenant of the property, the respondent and the person in possession of the rest-house were made defendants. In spite of the compromise decree passed in Civil Suit No. 226 of 1920 the respondent advanced the claim to be the adopted son of Calve Sadasiva Chetti as well as the adopted son of the widow. This suit was dismissed on 24th August 1928 by KUMARASWAMI SASTRI J. on the ground that Sankara Chetti and not Calve Subraya Chetti was the nearest reversioner of Calve Sadasiva Chetti. Civil Suit No. 696 of 1924 was tried with this suit. Civil Suit No. 696 of 1924 had been filed by the respondent to recover the rest-house from the caretaker. The respondent claimed the right to possession of the rest-house as the adopted son of the widow, but without prejudice to his claim that he was also the adopted son of Calve Sadasiva Chetti. This suit was decreed by KUMARASWAMI SASTRI J. on 5th September 1928 on the ground that the respondent had been validly adopted to Vasavambal Ammal according to French law by which she was governed. The learned Judge left open the question of the respondent's adoption to the testator.

In Civil Suit No. 591 of 1928 of this Court Sankara Chetti sought to recover from Krishnaveni Ammal possession of the property which had been allotted to her under the decree in Civil Suit No. 226 of 1920.

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Sankara Chetti claimed to be entitled to the property as the nearest reversioner of Calve Sadasiva Chetti. He also claimed the right to manage the rest-house. The suit came before KRISHNAN PANDALAI J. who dismissed it on the ground that the respondent was the validly adopted son of Vasavambal Ammal. The Court also held that Sankara Chetti could not challenge the adoption to Calve Sadasiva Chetti as Sankara Chetti had been instrumental in bringing it about.

In 1930 the respondent instituted in this Court Civil Suit No. 257 of 1930 to set aside the compromise decree passed in Civil Suit No. 226 of 1930. The defendants were the Madras trustees. The respondent again claimed that he had been validly adopted both to the husband and the wife and that he was entitled to their estates. This suit was also compromised. The decree passed in Civil Suit No. 226 of 1920 was confirmed subject to the payment to the respondent of Rs. 1,000 plus a like sum for costs and the payment by the trustees of Rs. 35 per mensem for his maintenance.

I will now return to the litigation in Pondicherry. I have already mentioned that in 1906 the trustees who had proved the will were removed and this led to the appointment of new trustees under the provisions of the will. In 1917 it was held by the Court of Appeal at Pondicherry that the bequests to charities were invalid because the sanction of the administration had not been obtained before the will was executed, and it was further held that in the absence of any other heir the widow took the French estate subject to certain non-charitable legacies. In 1920 Calve Subraya Chetti filed a suit in Pondicherry for a declaration that he was the reversioner to the estate of Calve Sadasiva Chetti. The defendants in this suit were the widow

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and the respondent. The adoption was challenged but the Court of first instance held that the respondent had been validly adopted both to the testator and to Vasavambal Ammal and ordered that all those who were in possession of the properties left by the testator should deliver them up to the respondent. The judgment, of course, did not apply to properties which were made the subject of non-charitable legacies. The judgment was upheld on appeal by the Court of Appeal in Pondicherry and also by the Court of Cession on second appeal. Therefore, so far as the French law is concerned, the respondent is the heir both of Calve Sadasiva Chetti and of his widow and the French Courts have given him a declaration of his status.

The suit out of which this appeal arises was filed on 5th November 1928 to recover the property which was allotted to Vasavambal Ammal under the compromise decree in Civil Suit No. 226 of 1920. The respondent claimed title to the property as the adopted son both of Calve Sadasiva Chetti and of Vasavambal Ammal. The suit was tried by WADSWORTH J. who held that it was no longer open to the respondent to set up his adoption to Calve Sadasiva Chetti, this claim having been abandoned in Civil Suit No. 226 of 1920 and Civil Suit No. 257 of 1930, but it was open to him to claim to be the adopted son of Vasavambal Ammal. The learned Judge held that the adoption by the widow had been proved and as she was governed by French law the adoption was valid. Accordingly he granted the respondent a decree for possession. In holding that the adoption of the respondent was valid the learned Judge relied on the documentary evidence (the deed of adoption and a deed of gift executed by Vasavambal Ammal in which reference is made to the adoption) and on the judicial recognition of the

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respondent's status. The appellants have conceded in this Court that under French law a Hindu widow can adopt a son to herself and that, if she does, her adopted son succeeds to her estate, but they say that the documentary evidence does not prove that there was a giving and a taking and that the requisite ceremony was performed and therefore it is not sufficient to prove that there was a valid adoption. They contend that this Court cannot have regard to the declaration of status given to the respondent by the French Courts or to the decisions of KUMARASWAMI SASTRI J. and KRISHNAN PANDALAI J. For reasons which I shall state, I consider that this Court must accept the declaration of the French Courts that the respondent is the adopted son of Vasavambal Ammal and therefore it is not necessary to inquire further into the matter.

Before stating the reasons for holding that the Court must accept the declaration of status by the French Courts, I will deal with an argument advanced by the learned Advocate for the appellant that succession to the estate of Vasavambal Ammal is governed by the Indian Succession Act which does not recognize adoption. It is said that, in declaring in section 4 that Part II of the Act shall not apply if the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina and in section 29 that Part V shall not apply to an intestacy or to the property of any such person, the Legislature could have only in its contemplation Hindus, Muhammadans, Buddhists, Sikhs and Jainas who are domiciled in British India because a country can only legislate for its own citizens, and therefore when a Hindu domiciled abroad dies leaving property in British India the Act applies because the estate is not within the exception. The Courts of this country

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have always applied the personal law of a Hindu who has migrated from one part of India to another and in the case of *Khatubai v. Mahomed Haji Abu*(1) the Privy Council applied the personal law of a Halai Memon domiciled outside British India in the matter of succession to immovable property within British India. The deceased was domiciled in Porebunder in Kathiawar which is a Native State. He had carried on business for many years in Bombay and died leaving immovable property there. In matters of inheritance and succession the Halai Memons of Porebunder follow the Hindu and not the Muhammadan law and in that respect differ from the Halai Memons of Bombay who have adopted the Muhammadan law. The question was whether the deceased's son took the whole of his estate to the exclusion of his daughter as under Hindu law. The Judicial Committee held that the succession was governed by the personal law of the deceased which was the law of the Halai Memons of Porebunder and not by the personal law of the Halai Memons of Bombay. In *Balwant Rao v. Baji Rao*(2) the Privy Council stated that it was established that the law of succession was in any given case to be determined according to the personal law of the individual whose succession was in question. This case, however, related to a Maharashtra Brahmin domiciled in the Bombay Presidency leaving immovable property in the Central Provinces and is therefore not so much in point as *Khatubai v. Mahomed Haji Abu*(1). The latter case is directly in point and decides the question.

The argument of the learned Advocate for the appellant would appear to be based on observations by

(1) (1922) I.L.R. 47 Bom. 146 (P.C.). (2) (1920) I.L.R. 48 Cal. 30 (P.C.).

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WALLIS C.J. in *Venkatappayya v. Venkata Ranga Row*(1) where he said that the limits of legislative authority are territorial, and the Indian Legislature in particular has authority to legislate only for British India and British subjects in Native States. *Prima facie*, therefore, its enactments are not to be construed to apply to acts done outside British India even by British subjects. In that case the Court held that the Indian Registration Act did not apply to authorities to adopt executed in Native States by domiciled subjects of those States and, such documents being valid and admissible in British India, a person adopted in pursuance of an authority executed in the Nizam's Dominions was entitled to inherit the separate properties of his adoptive mother's father situated in British India. The case was carried to the Privy Council; *Venkatappayya v. Venkata Ranga Row*(2). Their Lordships held that the document in question had been duly registered, and did not consider it necessary to discuss

"the important but somewhat abstruse question, whether the respondent being at that time resident in and a subject of the State of the Nizam, could rely upon the unquestioned fact that his status as an adopted child was accepted by the Courts in the Nizam's Dominions, as a binding decision on the question of his status, precluding all dispute as to the fact and lawfulness of his adoption".

Consequently the Privy Council left open the specific question whether the declaration of a foreign Court on the question of adoption is binding on Courts in British India, but its decision in *Khatubai v. Mahomed Haji Abu*(3) negatives the argument that the Indian Succession Act must be deemed to apply to the estates of Hindus who are domiciled abroad.

(1) (1919) I.L.R. 43 Mad. 288. (2) (1922) I.L.R. 48 Mad. 175 (P.C.).  
(3) (1922) I.L.R. 47 Bom. 146 (P.C.).

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Coming now to the main question it must be accepted that the judgments of the French Courts declaring that the respondent is the validly adopted son of Vasavambal Ammal cannot be regarded as judgments *in rem* within the meaning of section 41 of the Indian Evidence Act, but a declaration by a Court affecting the status of a person domiciled within its territory is treated by the comity of nations as being analogous to a judgment *in rem*, as was pointed out by the Bombay High Court in the recent case of *Messa v. Messa*(1) and governs succession to movable property. Immovable property stands on a different basis and international law does not recognize any power in a Court to adjudicate upon the title or the right to the possession of immovable property situate outside the country of the Court. Chattels can be taken away but land cannot. But in recognizing only the personal law of Hindus, Muhammadans, Buddhists, Sikhs and Jainas in matters of succession British India has added an exception to the general principle that the *lex situs* must be applied in questions relating to immovable property and this is pointed out in Mayne's Hindu Law and Usage, tenth edition, page 96. The *lex situs* is the Succession Act and the Indian Succession Act does not apply to a Hindu, Muhammadan, Buddhist, Sikh or Jaina even when he is domiciled outside British India. So far as such persons are concerned the governing factor is the personal law.

Inasmuch as the Courts of British India recognize the validity of a declaration of status by a foreign Court in a matter of succession to movable property in British India because the personal law applies, it

(1) I.L.R [1938] Bom. 529.

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seems to me that they must do the same in a matter of succession to immovable property where the law requires the personal law to be followed. No reason exists for making any distinction. Treating the personal law as part of the *lex situs* the Courts of the country of domicile are best able to decide questions of status.

In *Ramakrishnayya v. Mahalakshamma Garu*(1) PHILLIPS and REILLY JJ. held that British Indian Courts had no jurisdiction to entertain a suit for a declaration that an adoption which was made in French territory was not valid according to French law, and the fact that there was in British India immovable property belonging to the estate would not invest the Court with jurisdiction to entertain the suit. It appeared from the evidence in the case that the French law as to adoption and as to a Hindu widow's rights in property was not on all fours with the law as administered in British India. The Court considered that the contesting defendants being French subjects were entitled to have the question of status determined according to the law prevailing in the country in which they were domiciled and for a foreign Court to usurp jurisdiction in such a matter was highly undesirable. The Court added that it might be necessary (it did not say that it would be necessary) in litigation with regard to property situated in British India to decide such questions, but it refused to entertain a mere declaratory suit. The decision is not in conflict with the opinion I have expressed but rather lends support.

For the reasons indicated I hold that this Court must accept the declaration of the French Courts that

(1) (1929) 30 L.W. 691.

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the respondent was lawfully adopted by Vasavambal Ammal and that as the property in suit belongs to her estate the respondent is entitled to possession of it. My learned brother shares this view and the appeal will therefore be dismissed with costs. We certify for two Counsel.

G.R.

## APPELLATE CIVIL.

*Before Mr. Justice Madhavan Nair and Mr. Justice Stodart.*

1939,  
January 12.RENTALA GANGA RAJU (FIRST APPELLANT—  
PETITIONER), PETITIONER,

v.

BIKKINA BULLI RAMAYYA AND TWO OTHERS (RESPON-  
DENTS—RESPONDENTS), RESPONDENTS.\*

*Madras Agriculturists Relief Act (IV of 1938), sec. 19—Mortgage decree passed by lower Court and confirmed by High Court on appeal—Scaling down of decree debt and amendment of decree in case of—Application for—Court to which it must be made.*

In a case in which a mortgage decree passed by the lower Court was confirmed by the High Court on appeal, an application under section 19 of the Madras Agriculturists Relief Act (IV of 1938) to scale down the decree debt and amend the decree was made to the lower Court.

*Held* that the application was properly made to the lower Court (the Court of first instance) and that that Court had jurisdiction to deal with the application.

Sections 19 and 20 of the Madras Agriculturists Relief Act should be read together and the explanation of the expression

\* Civil Miscellaneous Petition No. 5016 of 1938 and Civil Revision Petition No. 26 of 1939.

“ Court which passed the decree ” in section 20 equally applies to section 19.

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RAMAYYA.

PETITION under section 19 of Madras Act IV of 1938, praying that, in the circumstances stated therein, the High Court will be pleased to scale down the debt due under the decree in Appeal No. 173 of 1926 on the file of the High Court (Original Suit No. 60 of 1923 on the file of the Court of the Subordinate Judge of Rajahmundry) according to section 8 (1) of the said Act and petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Rajahmundry, dated 5th October 1938 and made in Interlocutory Application No. 224 of 1938 in Original Suit No. 60 of 1923.

*P. V. Vallabhacharyulu* for petitioner.

*A. Satyanarayana* for respondents.

*Cur. adv. vult.*

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The 39th defendant in Original Suit No. 60 of 1923 on the file of the Subordinate Judge of Rajahmundry is the petitioner before us. In that case a mortgage decree was passed against the petitioner and others, and that decree was appealed against to this Court. The appeal was dismissed on 13th February 1936.

MADHAVAN  
NAIR J.

When the decree-holder sought to execute the decree, the proceedings were got stayed by the petitioner on 29th September 1938 by an application under section 20 of Madras Act IV of 1938 (The Madras Agriculturists Relief Act); and on 14th April 1938 he filed an application under section 19 of the said Act praying for the scaling down of the decree debt and amendment of the decree accordingly. This

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—  
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NAIR J.

application was filed in the lower Court within the period mentioned in section 20 of the Act. But that Court held that it had no jurisdiction to deal with the application and returned the petition for presentation to the proper Court.

The petition has therefore been presented to this Court, and a civil revision petition has also been filed by the petitioner to revise the order of the lower Court. Section 20 says that the application for relief under section 19 should be made "to the Court which passed the decree" within sixty days after the application for stay has been granted. That period has now elapsed and the respondent, the decree-holder, takes the objection that the petition under section 19 presented to this Court is barred by time. If the lower Court has jurisdiction to entertain the application under section 19, then the question of limitation does not arise because the application before it was presented in time. The question therefore for our consideration is whether the lower Court had jurisdiction to entertain this application under section 19 of the Madras Agriculturists Relief Act.

The lower Court arrived at the conclusion that it had no jurisdiction on the following reasoning. It stated :

"If really the Legislature thought that the application under section 19 should be made to the Court of first instance only, it would have expressly said so under section 19 by way of explanation as it did under section 20 of the Act. That suggests that the Legislature did not contemplate any change in the general principle so far as section 19 is concerned"—

the general principle being, as is stated in the earlier part of the judgment, that

"after the lower Court's decree had been confirmed or modified by the appellate Court the jurisdiction of the lower Court to amend the decree ceases".

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—  
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NAIR J.

We cannot accept this reasoning. It is true that section 19 of the Act does not explain the expression "Court which passed the decree". Section 20 of the Act says in its explanation that "the Court which passed the decree" shall have the same meaning as in the Code of Civil Procedure, 1908. Section 37, Civil Procedure Code, says :

"The expression 'Court which passed a decree,' or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include, (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction the Court of first instance".

In the present case the reference to the "Court which passed the decree" in section 20 of the Madras Agriculturists Relief Act is, by its explanation, to the Court of first instance, that is, the Court to which the petitioner made his application. A perusal of the two sections, 19 and 20, shows clearly that they have to be read together. Section 19 says :

"Where, before the commencement of this Act, a Court has passed a decree for the repayment of a debt, it shall . . . amend the decree."

Under this section, application has to be made to the Court which has passed the decree and it has jurisdiction to amend the decree in a proper case. No doubt it does not use the exact expression "Court which passed the decree", but it says that where a Court has passed a decree it will have jurisdiction to amend it. Section 20 makes it clear that the Court contemplated in section 19 is the Court which passed the decree, for it says that the executing Court shall, on application, stay the proceedings

"until the Court which passed the decree has passed orders on an application made under section 19";

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NAIR J.

and which that Court is, is explained in that section to mean the Court of first instance. We have no doubt that sections 19 and 20 of the Madras Agriculturists Relief Act should be read together and the explanation of the expression "Court which passed the decree" in section 20 equally applies to section 19. The petitioner's application to scale down the decree debt and amend the decree was in our opinion properly made to the Court of first instance and that Court had jurisdiction to deal with that application. We therefore set aside the order of the lower Court and remand the application to it for disposal according to law after considering the merits. Though the respondent did not seriously contest the application, we think the petitioner is entitled to the costs of the civil revision petition in this Court. The other costs will be provided for in the order of the lower Court.

A.S.V.

## APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice  
Abdur Rahman.

MOTTAI MEERA *alias* SHEIK ABDUL KADIR  
ROWTHER (APPELLANT), PETITIONER,

1938,  
November 25.

v.

CHINNA SHEIK ABDUL KADIR ROWTHER  
AND TWO OTHERS (RESPONDENTS), RESPONDENTS.\*

*Madras Agriculturists Relief Act (IV of 1938), ss. 4 (f) and 9—"Debt" within meaning of Act—Co-owner's liability to the other co-owners for interest on amounts collected by him on their account if—Applicability of sec. 4 (f) of Act to obligations declared in Ch. X of Indian Trusts Act (II of 1882)—Sec. 9 of Madras Act (IV of 1938)—Scope of—Liability arising under decree of Court—Applicability of section to.*

On the death of a Muhammadan leaving three sons and a daughter, the first defendant, his eldest child and a major at the time, entered into possession and management of the deceased's property and held and managed it for some years on behalf of all the co-owners. During the period of his management, the first defendant collected outstandings due to the father's estate and the income due from the common property of the family. In a suit for partition subsequently instituted by the plaintiff, another son of the deceased, the trial Court held the first defendant liable to pay to the plaintiff and to defendants 2 and 3, the third son and the daughter of the deceased, a sum representing (i) amounts collected by the first defendant on their account and (ii) interest thereon, his liability for interest being based on the ground that he had realised interest by investment of the common funds. The decree of the trial Court also directed payment of interest on the aggregate amount at six per cent per annum from the date of the institution of the suit to the date of payment. The High Court on appeal confirmed the decree of the trial

\* Civil Miscellaneous Petition No. 2932 of 1938.

MOTTAI MEERA Court. On an application made by the first defendant for relief under the Madras Agriculturists Relief Act (IV of 1938) with reference to his liability for payment of interest,

*held*: (i) The liability for interest on the amounts collected by the first defendant on account of the plaintiff and defendants 2 and 3 was not covered by Madras Act IV of 1938 as it was not a "debt" within the meaning of that Act and the first defendant was not entitled to relief in respect of it.

Section 4, clause (f), of Madras Act IV of 1938 is applicable to obligations declared in Chapter IX of the Indian Trusts Act.

(ii) The liability to pay interest subsequent to the date of the trial Court's decree was governed by section 9 of Madras Act IV of 1938 and that decree must be varied by limiting the award of six per cent interest up to the date of that decree and providing for payment of interest at five per cent per annum from that date up to date of payment.

Section 9 of Madras Act IV of 1938 refers not only to contractual liability but even to liabilities arising under law, custom or decree of Court. The first defendant's liability for interest subsequent to the date of the trial Court's decree is a liability imposed upon him by the decree and does not rest on the same basis as the original liability to pay over the interest realised by him.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to amend the decree of the High Court, dated 26th August 1938, in Appeal No. 246 of 1934 (Original Suit No. 16 of 1930, Sub-Court, Madura) as regards interest, in accordance with the provisions of the Madras Agriculturists Relief Act IV of 1938.

*B. Sitarama Rao* for *R. Ramasubba Ayyar* for petitioner.

*V. Ramaswami Ayyar* for *K. Rajah Ayyar* and *N. G. Krishna Ayyangar* for respondents.

The ORDER of the Court was delivered by VARADA-CHARIAR J.—This is an application for relief under

Madras Act IV of 1938, filed by the first defendant in a suit for partition in a Mahomedan family.

It was found in the main case that the first defendant who was the eldest child of his father and a major at the time of the father's death entered into possession and management of the father's property at his death and that, as he had a minor brother and a minor step-brother and step-sister, he was found to have held and managed the property on behalf of all the co-owners. In 1925 there were disputes in the family and the first defendant left the family house and lived elsewhere. It was also found that, during his period of management, the first defendant had collected outstandings due to the father's estate and the income due from the common property of the family. In 1929 the plaintiff who is the first defendant's step-brother instituted a suit for division and recovery of his two-sevenths share. A decree was given in the plaintiff's favour and also in favour of defendants 2 and 3 for their respective shares. With respect to the outstandings and the income realized by the first defendant during the period of his management, the lower Court found that the other co-sharers were entitled to claim payment of interest thereon, as it had been shown that the first defendant had been investing all the moneys in his hands and that many of the promissory notes taken by him bore interest at twelve per cent per annum. The lower Court accordingly held that the first defendant was liable to pay to the plaintiff and to defendants 2 and 3 a sum of Rs. 14,480 (representing amounts collected by him on their account) and Rs. 8,700 for interest thereon. It also directed payment of interest on the aggregate amount at six per cent per annum from the date of the institution of the suit to the date of payment.

MOTTAI MEERA  
v.  
ABDUL KADIR.

VARADA-  
CHARIAR J.

VARADA-  
CHARIAR J.



MOTTAI MEERA

v.

ABDUL KADIR.

VARADA-  
CHARIAR J.

On appeal to this Court, we allowed certain deductions claimed by the first defendant in his favour. In other respects we confirmed the decree of the lower Court. The first defendant's liability to pay interest was challenged before us but we affirmed the lower Court's decision on this point. It is with reference to this liability for payment of interest that the present application for relief under Madras Act IV of 1938 has been filed.

We are of opinion that the main liability is not covered by Act IV of 1938 as it is not a "debt" within the meaning of the Act. Our judgment itself and the cases dealing with the point proceed on the footing that ordinarily the relation between co-owners, when one of them is in possession of common funds, is not that of creditor and debtor but that the liability to pay interest will arise in cases in which it is shown that the person in possession of the common funds has realised interest by their investment. In this class of cases, the liability to pay interest seems to us to rest on one of two bases: one, that each co-owner is entitled to claim a share in the common property *as it stands at the time of the division* and that in the case supposed the common property liable to be divided consists not only of the original realisations but of the interest earned by their investment as well. If this be the true basis, we see no justification for denying the co-sharer his share in the full extent of the property which on this theory will consist of the original amount plus its accretion. Another possible view is that the co-owner who has realised interest by the investment of the common funds is governed by section 90 of the Trusts Act and that by virtue of section 95 of that Act he incurs a liability to pay interest under section 23 of that Act. This is the view

taken by VENKATASUBBA RAO J. in *Peer Mohideen Rowther v. Aisa Bivi*(1). If this be the true basis, the case will be taken out of the operation of the Madras Act IV of 1938 by clause (f) of section 4 of that Act. We are not prepared to accede to the contention that section 4, clause (f), ought not to be held to apply to obligations declared in Chapter IX of the Trusts Act.

So far however as the liability to pay interest *subsequent* to the date of the lower Court's decree is concerned, we think there is some justification for the petitioner's contention that that is governed by section 9 of Act IV of 1938. This is a liability imposed upon him by the decree and does not rest on the same basis as the original liability to pay over the interest realised by him. The word "incurred" in the opening sentence of section 9 no doubt suggests the idea of a liability voluntarily incurred but the terms of clause 1 of that section seem to indicate that the section refers not only to contractual liability but even to liabilities arising under law, custom or decree of Court. In this view the decree of the lower Court must be varied by limiting the award of six per cent interest up to the date of the lower Court's decree and providing for payment of interest at five per cent per annum from 31st March 1934 up to date of payment.

A.S.V.

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(1) (1934) 67 M.L.J. 563.

## APPELLATE CIVIL.

*Before Mr. Justice Newsam.*1939,  
March 17.GAJA GOPI REDDI, MINOR BY GUARDIAN AND MOTHER  
SESHAMMA (PETITIONER), PETITIONER,

v.

PULLA RAMI REDDI (FIRST RESPONDENT),  
RESPONDENT.\**Madras Agriculturists Relief Act (IV of 1938), ss. 19 and 20—Judgment-debtor a joint Hindu family—Petition under sec. 20 filed by father and manager of the family—Stay of execution obtained—Application under sec. 19 to scale down the debt not filed within sixty days—Applications subsequent by minor son under ss. 19 and 20 of the Act—Sustainability of.*

In a case in which the judgment-debtor was a joint Hindu family, the father and manager of the family filed a petition under section 20 of Madras Act IV of 1938 and obtained stay of execution, but failed to file an application under section 19 of that Act (for scaling down the debt) within sixty days. Later on his minor son, represented by his mother, filed applications under sections 19 and 20 of the Act.

*Held* that the applications were unsustainable.

The concession is not that every member of the family in succession may obtain sixty days' stay. The joint family is bound by any order passed on the application of any member or by any default committed by any member.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Kurnool, dated 14th August 1938 and made in Execution Application No. 685 of 1938 in Execution Petition No. 611 of 1937 in Original Suit No. 46 of 1937.

\* Civil Revision Petition No. 1074 of 1933.

*K. Srinivasa Rao* for petitioner.  
*P. Chandra Reddi* for respondent.

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## JUDGMENT.

NEWSAM J.—The facts are these. The judgment-debtor was a joint Hindu family. The father and manager of the joint family filed a petition under section 20 of the Act and obtained stay of execution, but failed to file an application under section 19 (for scaling down the debt) within sixty days. Later on his minor son, represented by his mother, filed applications under sections 19 and 20 of the Act, which have been dismissed.

The question arises whether every member of a joint family can file a petition under sections 19 and 20 or *any* member. The word used in section 19 is *any* member, and that must obviously be so, for it is a concession to joint families that any member entitled to relief may apply for stay and scaling down. The concession is not that every member of the family in succession may obtain sixty days' stay. Obviously the joint family is bound by any order passed on the application of any member, or by any default committed by any member. I dismiss this petition with costs.

V.V.C.

NEWSAM J.

## PRIVY COUNCIL.

J.C.\*  
1939,  
February 23.

SRI RAJA VYRICHERLA NARAYANA GAJAPATIRAJU  
BAHADUR GARU, APPELLANT,

v.

THE REVENUE DIVISIONAL OFFICER,  
VIZAGAPATAM, RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

*Land acquisition—Compulsory acquisition—Potentialities—  
Acquiring authority sole possible purchaser of potentiality—  
Valuation—Land Acquisition Act (I of 1894), ss. 23  
and 24.*

Land compulsorily acquired must be valued not merely by reference to the use to which it is being put at the time at which its value has to be determined, but also by reference to the uses to which it is reasonably capable of being put in the future.

Where the land has unusual features or potentialities, the valuing officer must ascertain as best he can from the materials before him the price a willing purchaser would pay for the land with those features or potentialities. The owner is entitled to, and the valuing officer must ascertain, the value of the potentialities even where the only possible purchaser of the potentialities is the authority purchasing under powers enabling compulsory acquisition.

*Glass v. Inland Revenue*(1), *Inland Revenue Commissioners v. Clay*(2), *Gough and Aspatia, Silloth and District Joint Water Board, In re*(3), *Cedars Rapids Manufacturing and Power Company v. Lacoste*(4), *Fraser v. Fraserville (City of)*(5) and *Sidney v. North Eastern Railway*(6) referred to.

Dictum of FLETCHER MOULTON L.J., in *In re Lucas and Chesterfield Gas and Water Board*(7), page 31, disapproved.

\* Present: LORD MACMILLAN, LORD ROMER and SIR GEORGE RANKIN.

(1) [1915] S.C. 449.

(2) [1914] 1 K.B. 339, 348.

(3) [1904] 1 K.B. 417.

(4) [1914] A.C. 569, 576.

(5) [1917] A.C. 187, 194.

(6) [1914] 3 K.B. 629.

(7) [1909] 1 K.B. 16.

Judgment of High Court on principle of valuation of potentialities reversed.

APPEAL (No. 36 of 1938) from a decree of the High Court (May 4, 1937) which reversed an award of the Subordinate Judge of Vizagapatam on a reference under the Land Acquisition Act (September 11, 1933).

The judgment of the High Court is reported as *Revenue Divisional Officer, Vizagapatam v. Zamindar of Chemudu*(1).

A harbour was being constructed at Vizagapatam. Land acquired by the Harbour Authorities on the south of the harbour was allocated by them to oil companies and other industrial concerns. This land was malarious.

The appellant's land, which was to the south of this land, contained a spring which yielded a constant and abundant supply of good drinking water which could easily be made available for the oil companies and people engaged in the harbour works.

The appellant's land was acquired for the purpose of the execution of anti-malarial works.

The appellant claimed compensation on the footing of the potentialities of the land as a building site. The Land Acquisition Officer disallowed this claim and awarded compensation on a valuation of the land as partly waste and partly cultivated with an allowance for some buildings and trees.

On the appellant's application, the matter was, under the Act, referred to the Subordinate Judge. Before him the appellant made a further claim on the footing of potentialities as a source of water-supply.

(1) I.L.R. [1938] Mad. 479.

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NARAYANA  
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REVENUE  
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OFFICER,  
VIZAGAPATAM.

RAJA  
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The Subordinate Judge held that the water could be sold to the oil companies and others at a profit, that the only possible buyers were the oil companies and the Harbour Authorities and that compensation for potentialities could be awarded even where the only possible buyer was the acquiring authority and he assessed the value of the potentialities and made his award accordingly. He found against the potentialities as a building site.

On appeal, the High Court set aside the award of the Subordinate Judge and restored that of the Land Acquisition Officer, holding that the supply of drinking water had no value apart from the scheme for which the acquisition was made and the Harbour Authorities were the only possible purchasers and that the land had no potentialities as a building site.

The facts are more fully stated in the judgment of their Lordships.

*Lionel Cohen K.C., Subba Rao and K. Umamaheswaram* for appellant.—[Sections 3, 4, 5 (a), 7, 9, 11, 15 to 19, 23 to 25, 31 (2) and 53 of the Land Acquisition Act and the facts which led to the acquisition of the land in question were referred to.] In assessing the value of land, its potentialities must be taken into consideration. We are now concerned with the potentialities of the land in question only as a source of water-supply, there being concurrent findings against its potentialities in other respects. This land was not included in the original harbour scheme in 1920. That is a fact which should be taken into consideration. A supply of water was wanted in connection with an anti-malarial scheme on the south of the harbour. This land held the only available source of supply on the south. It could give a constant supply of good drinking water at a comparatively small cost. A scheme of bringing water from the north had been considered and abandoned on account of its prohibitive cost. The water-supply from this land would be available for the oil companies and other concerns that might be established on the south of the harbour

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as well as for the anti-malarial scheme. The special adaptability or potentialities of the land in these circumstances should be taken into account in assessing the "market-value" which is the value to the owner; *Swarna Manjuri Dassi v. Secretary of State for India*(1). Not merely the present value, but potentialities must be considered; *Mohini Mohan Banerjee v. The Secretary of State for India in Council*(2), *Gough and Aspatia Silloth and District Joint Water Board, In re*(3) and the same case on appeal(4). You may look at the ultimate purchaser in estimating the potential value; *Lucas and Chesterfield Gas and Water Board, In re*(5) and the same case on appeal(6).

In my submission, the rights of the owner are understated in *Sidney v. North Eastern Railway*(7).

The potentiality and not the realized possibility is the matter for consideration. In *Cedars Rapids Manufacturing and Power Company v. Lacoste*(8) and in *Sisters of Charity of Rockingham v. The King*(9) the arbitrator acted on the realized possibility and it was held he had applied a wrong principle. Where the principle applied is right, the Board will not examine the amount; *Narsingh Das v. Secretary of State*(10).

In my submission, the Subordinate Judge here has acted on right principles and has correctly applied them. The High Court has fallen into error in holding that the requirement of water for the harbour is not a matter to be taken into consideration. I submit that the possibility of requirement and not the actual requirement should be taken into consideration. The High Court has misdirected itself in stating the question as one of law. It is wrong to consider the Harbour Authorities as the only possible purchasers. The oil companies might have purchased.

It is immaterial that the land was, at the time, undeveloped. There was a possibility of developing it and that possibility must be taken into consideration. The owner himself might have developed and exploited it.

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| (1) (1927) I.L.R. 55 Cal. 994. | (2) (1921) 25 C.W.N. 1002.                           |
| (3) [1903] 1 K.B. 574.         | (4) [1904] 1 K.B. 417.                               |
| (5) [1908] 1 K.B. 571.         | (6) [1909] 1 K.B. 16.                                |
| (7) [1914] 3 K.B. 629.         | (8) [1914] A.C. 569.                                 |
|                                | (9) [1922] 2 A.C. 315.                               |
|                                | (10) (1924) L.R. 52 I.A. 133, 135; I.L.R. 6 Lah. 69. |

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*Willink K.C., Wallach and W. W. K. Page* for respondent.—  
The water is of no value to the appellant as a potential source of supply outside his land. The possible buyer would not pay more for the land on account of the water-supply if the harbour was not made. No allowance can be made for it; *Sidney v. North Eastern Railway*(1) and *Countess Mary Ossalinsky v. Manchester Corporation*(2). [Reference was made to *Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co.*(3), *Gough and Aspatria Silloth and District Joint Water Board, In re*(4), the same case on appeal(5), *Lucas and Chesterfield Gas and Water Board, In re*(6), the same case on appeal(7), *Odlum, &c. v. City of Vancouver & Canadian Northern Pacific Rail. Co.*(8), *Fraser v. Fraserville (City of)*(9), *Vallabhdas Naranji v. The Collector under Act I of 1894*(10), *Inland Revenue Commissioners v. Clay*(11), *Cedars Rapids Manufacturing and Power Company v. Lacoste*(12) and *Corrie v. MacDermott*(13).] *Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co.*(3) differs from this case. In that case all the land in the proximity of the railway went up in value.

The purpose for which the land is to be acquired ought not to be taken into account.

The valuation ought to be on the following principles :—

- (i) The exigencies of the purchaser must be excluded.
- (ii) Public need cannot appreciate private competition.
- (iii) Any value due to carrying out the purpose of the acquisition (here the harbour or malarial schemes) must be excluded.
- (iv) Only the general value is to be given and not the particular value to the acquiring authority.
- (v) The general value must be based on possibility of competition.

(1) [1914] 3 K.B. 629.

(2) *Browne and Allan on Compensation*, 2nd Edn., Appx. 659.

(3) [1901] A.C. 373.

(4) [1903] 1 K.B. 574.

(5) [1904] 1 K.B. 417.

(6) [1908] 1 K.B. 571.

(7) 1909] 1 K.B. 16.

(8) (1915) 85 L.J.P.C. 95; 113 L.T. Rep. 795.

(9) [1917] A.C. 187.

(10) (1929) 33 C.W.N. 549.

(11) [1914] 1 K.B. 339, 348.

(12) [1914] A.C. 569.

(13) [1914] A.C. 1056, 1062.

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On the facts of the present case, there is no evidence that anybody other than the Harbour Authorities would have been in the market. The possibilities or potentialities must, therefore, be included on the principles laid down by FLETCHER MOULTON L.J. in *In re Lucas and Chesterfield Gas and Water Board*(1).

In India no one could purchase with a view to providing a water-supply except a public body or some one licensed or authorized by Government; so there could be no competition. The value to the owner is to be ascertained under section 4 of the Act on the footing of a voluntary transaction between a willing buyer and a willing seller, that is, as between a purchaser not under compulsion to buy and a seller not under compulsion to sell. The value is not the value in use, but the value at a specified date. That value may be greater or less than the value calculated on the revenue obtained by the owner in the past or that might be obtained by him in the future if he retained the property. Potentialities at the date of the sale may legitimately be taken into account, but only so far as the owner can use them to influence a willing buyer. The price that might be offered by speculators on the date of the acquisition may be considered, but not the use to which the property will be put by the acquiring body after acquisition.

*Lionel Cohen K.C.* in reply.—The evidence shows that a profit could be made by selling water to the community or settlement which would follow the making of the harbour. There is no prohibition against selling water in India. Profit that can be made is an element that can be taken into consideration; *Trent-Stoughton v. Barbados Water Supply Company*(2).

This land was left out in the original scheme. The value of it rose on that scheme. The carrying out of anti-malarial work was a certainty. It began in 1926. Any purchaser might and would assume that this work would be carried out and a water-supply would be a necessity. The supply from this land would be the cheapest and most convenient. It is said there was no possibility of another buyer. The value is the value to the owner. If deprived of the land, he is deprived of what he might earn. If the water were brought to the boundary of the harbour, would the Harbour Authorities

(1) [1909] 1 K.B. 16.

(2) [1893] A.C. 502, 504.

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forbid their workmen and tenants buying and using the water? "Urgency" has been referred to. "Urgency" in section 24 means, I submit, urgency in point of time. It has that meaning in section 17 clearly and *prima facie* the word would bear the same meaning throughout the Act. In section 24 only enhancement is considered, not initial potentiality. Proof of competition is not necessary. Competition affords one way of ascertaining the value, but that is not the only way. If there is no competition, the value must be ascertained in some other way, e.g., the profit the owner could get if he retained the land.

In every case in which *Lucas's* case(1) was approved, except in *Sidney's* case(2), it was approved not on the point raised here of absence of competition, but on the point not disputed that potential value may be considered. In *Sidney's* case(2) the reason given by ROWLATT J. is against me, but the decision is in my favour. [The other cases cited by the respondent were referred to.]

*Willink K.C.* replied on the point raised in *Trent-Stoughton v. Barbados Water Supply Company*(3) and asked that section 26 of the Act which had not been referred to might be considered.

The JUDGMENT of the Judicial Committee was delivered by Lord ROMER.—This appeal is concerned with the question of what is the proper sum to be awarded to the appellant by way of compensation in respect of the compulsory acquisition by the Vizagapatam Harbour Authority of certain land of his adjoining the Harbour, the respondent being the representative of such authority for the purposes of this appeal. The circumstances in which the land was acquired are as follows.

The Vizagapatam Harbour, the construction of which appears to have been begun in the year 1920, was formed by making excavations in swampy land situate to the south-west of the town of Vizagapatam and by dredging a deep water channel in the creek to

(1) [1909] 1 K.B. 16.

(2) [1914] 3 K.B. 629.

(3) [1893] A.C. 502, 504.

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the south of that town that led from the swampy land into the Bay of Bengal. On the south of the land acquired by the Harbour Authority for the purpose of these works is situated the property of the appellant known as the Lova Gardens. These gardens are formed by a valley which runs down from high ground on the south-west to low ground on the north-east adjoining the land of the Harbour Authority on the south of the above-mentioned creek. The upper portion of this valley consists of a shallow basin in the hills which forms the catchment area of a spring of water that emerges from the ground at the north-east end of the basin. This spring, which appears to yield even in the dry season an average flow of 50,000 gallons a day of excellent drinking water, is situated at a height of 150 feet above sea level. Until a part of it was diverted by the Harbour Authority, as narrated hereafter, the whole of the water from this spring ran down the valley to the lower end of Lova Gardens and from thence discharged itself into the creek. By the early part of the year 1926 the construction of the harbour had made considerable progress and it was hoped that it would be ready for opening by the end of 1929. With that end in view a portion of the harbour site had been allocated by the Harbour Authority for the purpose of being used by oil companies and other industrial concerns. The entire south side of the harbour had indeed been allocated for industrial purposes. But the harbour land was very malarious, and so, too, was much of the land to the south of the harbour, including the lower part of the Lova Gardens, a circumstance that gave rise to some anxiety in the minds of the Harbour Authority. They accordingly consulted Mr. Senior White, who is an expert upon the subject, and upon 1st May 1926 that gentleman,

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after making an "anti-malarial survey" of the area, embodied the results of his survey in a report. This report disclosed a serious state of affairs in the villages situated in the area of which there appear to have been at that time no less than 32 of which nine were on the south side of the creek. These villages, or many of them, seem to have been dependent upon wells for their water-supply, and these wells formed breeding grounds for the malaria-bearing mosquitoes. It is plain from the report that persons carrying on business at the harbour would run a serious risk of contracting malaria as matters then stood, and this would greatly hamper the development of the harbour site for industrial purposes. Further, as Mr. White pointed out, there was the possibility of shipping at the quays becoming infected, and the mere possibility, which had already been suggested in the Indian Press, was detrimental to the interest of the port. It appears from a letter written by Mr. Rattenbury, the Deputy Engineer-in-Chief to the Harbour Authority, dated 14th July 1926, that in these circumstances, Mr. White was "very keen on closing the wells along the south side", and this, the letter adds, could be done if a gravity water-supply were provided instead. Such a supply could be furnished by the spring at the upper end of Lova Gardens, and accordingly the Harbour Authority conceived the idea of using the water from the spring for the purpose of freeing the harbour from malaria. But apart altogether from the assistance that this supply of water would give to the prevention of malaria, there was much to justify its acquisition on its own merits, as was pointed out in a letter of 2nd October 1926, written by one of the harbour officials. For the water could be made available as a supply to the oil companies and other

industrial concerns that might be established in the southern part of the harbour area. The method of utilizing the water for these purposes that was ultimately adopted was this. The water was to be diverted from the lower part of the valley to which reference has been made and led from a short distance below the spring directly to the harbour area by means of a tunnel to be made through the hilly land to the north-west of the valley. This scheme, which was in due course carried out and is now in operation, involved the acquisition from the appellant of the shallow basin forming the catchment area of the spring, the site of the spring itself, and a narrow strip of land below the spring. In due course the necessary steps were taken for the compulsory acquisition of this land under the provisions of the Land Acquisition Act, 1894, the notification under section 4 (1) of the Act being given on 13th February 1928. The public purpose for which the land was needed was stated in the notification to be the execution of anti-malarial works, the total area to be acquired from the appellant being 108·9 acres. Of this acreage the catchment area, including the site of the spring referred to as 2-1 D and 2-1 E, accounted for 105·92 acres, and the land below the spring referred to as 2-1 B (0·53 acre), 2-1 C (0·48 acre) and 2-3 B (1·97 acres) accounted for the rest.

After the giving of the notification and the procedure laid down in sections 6, 7 and 8 of the Act having been followed, the Collector took the steps prescribed by sections 9, 10 and 11 to determine the compensation that ought to be allowed to the appellant for his land. It is provided by section 15 of the Act that in so doing, the Collector shall be guided by the provisions

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contained in sections 23 and 24, and it will be convenient before continuing this narrative to turn to these provisions. So far as material to the present purpose they are as follows :

“ 23 (1) In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration—

first, the market-value of the land at the date of the publication of the declaration relating thereto under section 6 ;

secondly, the damage sustained by the person interested by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof ;

thirdly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of severing such land from his other land ;

fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner, or his earnings.

24. But the Court shall not take into consideration—

first, the degree of urgency which has led to the acquisition ;

secondly, any disinclination of the person interested to part with the land acquired ;

\* \* \* \*

fifthly, any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired.”

The general principles for determining compensation that are specified in these sections differ in no material respect from those upon which compensation was awarded in this country under the Lands Clauses Act of 1845 before the coming into operation of the Acquisition of Land (Assessment of Compensation) Act of

1919. As was said by WADSWORTH J. when giving judgment in the High Court in the present case :

“ It is well settled that English decisions under the Lands Clauses Act, 1845, lay down principles which are equally applicable to proceedings under the Indian Act.”

The compensation must be determined, therefore, by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. But this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded. The wish of a particular purchaser, though not his compulsion, may always be taken into consideration for what it is worth. But the question of what it may be worth, that is to say, to what extent it should affect the compensation to be awarded is one that will be dealt with later in this judgment. It may also be observed in passing that it is often said that it is the value of the land to the vendor that has to be estimated. This, however, is not in strictness accurate. The land, for instance, may have for the vendor a sentimental value far in excess of its “ market-value ”. But the compensation must not be increased by reason of any such consideration. The vendor is to be treated as a vendor willing to sell at “ the market-value ”, to use the words of section 23 of the Indian Act. It is perhaps desirable in this connection to say something about this expression “ the market-value ”. There is not in general any market for land in the sense in which one speaks of a market for shares or a market

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for sugar or any like commodity. The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by "the market-value" in section 23. But sometimes it happens that the land to be valued possesses some unusual, and it may be, unique features, as regards its position or its potentialities. In such a case the arbitrator in determining its value will have no market-value to guide him, and he will have to ascertain, as best he may from the materials before him, what a willing vendor might reasonably expect to obtain from a willing purchaser for the land in that particular position and with those particular potentialities. For it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined [that time under the Indian Act being the date of the notification under section 4 (1)], but also by reference to the uses to which it is reasonably capable of being put in the future. No authority indeed is required for this proposition. It is a self-evident one. No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain that in ascertaining its value, the possibility of its being used for building purposes would have to be

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taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that is embodied in section 24 (5) of the Act and is sometimes expressed by saying that it is the possibilities of the land and not its realized possibilities that must be taken into consideration.

But how is the increase accruing to the value of the land by reason of its potentialities or possibilities to be measured? In the case instanced above of land possessing the possibility of being used for building purposes, the arbitrator (which expression in this judgment includes any person who has to determine the value) would probably have before him evidence of the prices paid, in the neighbourhood, for land immediately required for such purposes. He would then have to deduct from the value so ascertained such a sum as he would think proper by reason of the degree of possibility that the land might never be so required or might not be so required for a considerable time. In the case, however, of land possessing potentialities of such an unusual nature that the arbitrator has not similar cases to guide him, the value of the land must be ascertained in some other way. In such a case, moreover, there will, in all probability, be only a very limited number of persons capable of turning the potentialities of the land to account.

If the owner of the land is the only person who can do so, the value to him must be ascertained by reference to what profit he might thereby have been able to derive from the land in the future. Take as an example the case of an owner of vacant land that adjoins his factory. The land possesses the potentiality of being profitably used for an extension of the factory. But

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the owner is the only person who can turn that potentiality to account. In valuing the land, however, as between him and a willing purchaser, the value to him of the potentiality would necessarily have to be included.

The same consideration will apply to cases where the owner is not the only person but merely one of the persons able to turn the potentiality to account. The value to him of the potentiality will not be less than the profit that would accrue to him by making use of it had he retained it in his own possession. But now take the case where the owner is himself unable to turn the potentiality to account whether by promotion of a company or otherwise. In such a case there may be several other persons who would be able to do so, or there may be only one. If there are more than one it is recognized by all the authorities that have been cited to their Lordships, and seems to be consistent with common sense, that the owner is entitled to be paid the value to him of the potentiality, though the ascertainment of its value may in many cases be a matter of considerable difficulty.

It has been suggested that in order to ascertain it, the arbitrator is to hold an imaginary auction. But with all respect to those who have made the suggestion, their Lordships are unable to see how this is going to help the arbitrator. At such imaginary auction, all possible purchasers must, no doubt, be imagined as attending. They will include, therefore, persons who are in no way interested in the land's potentialities, and such persons will bid no higher price than the value of similar land without its potentialities. This value in this judgment is referred to as the "poramboke" value. But they will also include what may be called the purchasers of the potentialities. There

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may also be present some speculative buyers who will be willing to bid more than the "poramboke" value upon the chance of being able to resell to a purchaser of the potentiality at a profit. It would seem, however, logically, that such purchasers should be disregarded. For the object of the imaginary auction is to discover what a purchaser of the potentiality will be willing to pay for it, and this cannot depend upon the presence at the auction of persons willing to pay less, unless it be that such ultimate purchaser is to be considered willing to pay whatever fantastic price he may be forced up to by competition. And no one suggests this.

Proceeding, therefore, with the imaginary auction at which are present two classes of buyers, viz.: the "poramboke buyers" and the "potentiality buyers", the former will disappear from the bidding as soon as the "poramboke" value has been reached, and the bidding will thereafter be confined to the "potentiality buyers". But at what figure will this bidding stop? As already pointed out it cannot be imagined as going on until the ultimate purchaser has been driven by the competition up to a fantastic price. For he is *ex hypothesi* a willing purchaser and not one who is by circumstances forced to buy. Nor can the bidding be imagined to stop at the first advance on the poramboke value. For the vendor is a willing vendor and not one compelled by circumstances to sell his potentiality for anything that he can get. The arbitrator will, therefore, continue the imaginary bidding until a bid is reached which, in the arbitrator's estimate, represents the true value to the vendor of the potentiality. The auction will, therefore, have been an entire waste of the arbitrator's imagination. If the value of the potentiality be Rs. X, the imaginary

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auction will have taken place to ascertain the value of X from the imaginary bidding, and all that can be said is that the bidding will stop at Rs. X.

The truth of the matter is that the value of the potentiality must be ascertained by the arbitrator on such materials as are available to him and without indulging in feats of the imagination.

Their Lordships would not have thought it necessary to deal with this question of the imaginary auction at such length, were it not for the fact that in the argument before them, the respondent's Counsel endeavoured to show, by reference to such an auction, that when there was only one possible purchaser of the potentiality, the value of it to the vendor was nil—that is to say that the value of the land with the potentiality was substantially nothing in excess of its value without it. This argument, it may be observed, commended itself to Lord CULLEN in the Scottish case of *Glass v. Inland Revenue*(1) referred to below, but was rejected by the majority of the Court.

Upon the question of the value of the potentiality where there is only one possible purchaser, there are some authorities to which their Lordships will have to refer. But dealing with the matter apart from authority, it would seem that the value should be the sum which the arbitrator estimates a willing purchaser will pay and not what a purchaser will pay under compulsion. It was contended on behalf of the respondent that at an auction where there is only one possible purchaser of the potentiality, the bidding will only rise above the "poramboke" value sufficiently to enable the land to be knocked down to that purchaser. But if the potentiality is of value to the vendor if there happen to be two or more possible

(1) (1915) S.C. 449.

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purchasers of it, it is difficult to see why he should be willing to part with it for nothing merely because there is only one purchaser. To compel him to do so is to treat him as a vendor parting with his land under compulsion and not as a willing vendor. The fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it. An instance of this is to be found in the case of *Inland Revenue Commissioners v. Clay*(1). That was a case under section 25 (1) of the Finance (1909-1910) Act, 1910, and is not perhaps strictly relevant to the present case. The facts of it, however, are worth recalling. There was a house of which the value to any one except certain trustees was no more than £750. These trustees were the owners of a nurses' home which adjoined the house, and they were desirous of extending their premises. They accordingly purchased the house for £1,000, the owner thus receiving £250 for the potentiality his house possessed by reason of its position adjoining the nurses' home. It was held by the Court of Appeal that £1,000 was the value of the house to a willing seller. "To say", said Lord COZENS HARDY M.R., "that a small farm in the middle of a wealthy landowner's estate is to be valued without reference to the fact that he will probably be willing to pay a large price, but solely with reference to its ordinary agricultural value, seems to me absurd." Had the house in that case been acquired compulsorily by a railway company, or local authority under the provisions of the Lands Clauses Consolidation Act, 1845, before its purchase by the trustees, the house ought, in their Lordships' opinion, and for the reasons already given, to have been valued at £1,000 and not merely at £750.

(1) [1914] 1 K.B. 339, 348.

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A case in many respects similar to *Clay's case*(1) is that of *Glass v. Inland Revenue*(2). That also was a case arising under the Finance (1909-1910) Act, 1910, and was one where land of an agricultural value of £3,379 had been sold in 1911 to certain Water Commissioners for £5,000, they being the only possible purchasers of the land for other than agricultural purposes. It was held that in valuing the land as on 30th April 1909 the possibility that the Commissioners might give more than the agricultural value for the land must be taken into consideration. In Lord JOHNSTON'S words, it was necessary in order to fix the value of the land on 30th April 1909, to ascertain

" what is to be attributed to the probability of the Water Commissioners, in the circumstances, desiring to acquire the property, and what figure in a friendly negotiation they would be prepared to pay for it."

But however this may be, it is said that the matter assumes a totally different complexion when the only possible purchaser is the one who has obtained the compulsory powers of purchase, and that this has been established by authorities that should be followed by this Board. Of these authorities, the first one to which reference need be made is that of *In re Gough and Aspatria, Silloth and District Joint Water Board*(3). In that case it was not proved that the acquiring authority was the only possible purchaser and it may be that all that the Court of Appeal decided was that it was not incumbent upon the claimant for compensation to specify that any particular body of persons were possible purchasers, though the judgment of Lord ALVERSTONE L.C.J. seems quite consistent with the view that the potentiality must be

(1) [1914] 1 K.B. 339, 348.

(2) (1915) S.C. 449

(3) [1904] 1 K.B. 417.

valued even if the acquiring authority be its only possible purchaser. But it is contended that Sir RICHARD HENN COLLINS M.R. expressed the contrary view. After referring to the particular adaptability of the land that was in question and that it ought to find a place in the estimate of the amount of compensation, he said (page 423) :

" That view is supported by authority and long practice ; but underlying it is the question, which is one of fact for the Arbitrator, whether there is a possible market for the site, and in determining that the statutory purchase is not to be considered."

But the Master of the Rolls said that the purchase, not the purchaser, was to be left out of consideration. Any enhanced value attaching to the land by reason of the fact that it has been compulsorily acquired for the purpose of the acquiring authority must always be disregarded, and the Master of the Rolls meant no more than that. The case of *In re Lucas and Chesterfield Gas and Water Board*(1) must, however, be considered in greater detail, for it is on certain dicta of FLETCHER MOULTON L.J. in that case that the respondent chiefly relies. The land that had been compulsorily acquired in that case had potentialities for which the acquiring authority was not the only possible purchaser. The point now being considered, did not, therefore, arise for decision. But in the Court below, in the same case(2), BRAY J. had said this :

" I come back to the question whether the fact that no buyer for reservoir purposes can be found, except a buyer who has obtained parliamentary powers, prevents the special value of the land being marketable. In my opinion the answer I ought to give to that question is ' No '."

(1) [1909] 1 K.B. 16.

(2) [1908] 1 K.B. 571, 572

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In the Court of Appeal, VAUGHAN WILLIAMS L.J. said (page 25) :

"I agree with BRAY J. that the fact that no buyer for reservoir purposes can be found except a buyer who has obtained parliamentary powers does not prevent the special value being marketable."

and stated that one of his reasons for so agreeing was that the fact that the board (who were the acquiring authority) might themselves become possible purchasers who would give a special price for the land, ought to be considered. FLETCHER MOULTON L.J., however, said that the decided cases to his mind laid down the principle that when 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 the scheme to enhance the value of the land to be purchased under it. He added that where there were other possible purchasers there would be competition among them and this fact would enhance the market price. The learned Lord Justice did not specify the authorities which laid down the principle in question and their Lordships are not aware of any that would justify it. It must, of course, be conceded that the existence of the scheme must not be allowed to enhance the price, if by "scheme" is meant the fact that compulsory powers of acquisition have been obtained for the purpose of carrying into effect a particular scheme for the profitable use of the potentiality. The valuation must always be made as though no such powers had been acquired, and the only use that can be made of the scheme is as evidence that the acquiring authority can properly be regarded as possible purchasers. But their Lordships have some difficulty in seeing why the taking into consideration of the fact that the

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special value exists for those purchasers only should be said to be allowing the existence of the scheme to enhance the value of the lands. The only difference that the scheme has made is that the acquiring authority, who before the scheme were possible purchasers only, have become purchasers who are under a pressing need to acquire the land; and that is a circumstance that is never allowed to enhance the value. If, on the other hand, the Lord Justice meant by "the scheme" the intention formed by the acquiring authority of exploiting the potentiality of the land, his statement can only mean that the value of the land is not to be enhanced by the fact that they are possible purchasers. The result of this would be that even in a case where there are two or more possible purchasers, their existence must not be allowed to enhance the value. For each purchaser must be deemed to have a scheme in the sense supposed, and the enhancement of value due to their competition which the Lord Justice envisages will in fact be due to the "schemes". In these circumstances their Lordships are not prepared to follow the dictum of FLETCHER MOULTON L.J. in the *Lucas's* case(1) and prefer the opinion there expressed by VAUGHAN WILLIAMS L.J. It is said, however, that the dictum of FLETCHER MOULTON L. J. has already received the approval of this Board on more than one occasion. But in no case to which their Lordships' attention has been called was the question of the effect of there being only one possible purchaser of the land considered by the Board, and any approval of the statement of the law by the Lord Justice must be regarded merely as an approval of such statement so far as it affected the particular question then before

(1) [1909] 1 K.B. 16.

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the Board. It is sufficient in this connection to refer to two of such cases. In *Cedars Rapids Manufacturing and Power Company v. Lacoste*(1) Lord DUNEDIN, in delivering the judgment of the Board, said this :

“ The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England and it has been explained in numerous cases, nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board*(2) where VAUGHAN WILLIAMS and FLETCHER MOULTON L. JJ. deal with the whole subject, exhaustively and accurately.”

As has already been pointed out, the opinions of the two Lords Justices upon the question now being considered were diametrically opposed to one another. The other case is that of *Fraser v. Fraserville (City of)* (3), where Lord BUCKMASTER, in delivering the judgment of the Board, said (page 194) :

“ The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *In re Lucas and Chesterfield Gas and Water Board*(2), *Cedars Rapids Manufacturing and Power Company v. Lacoste*(1), and *Sidney v. North Eastern Railway*(4). The principles of those cases are carefully and correctly considered in the judgments the subject of appeal, and the substance of them is this : 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 advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case.”

It will be observed that Lord BUCKMASTER makes no reference whatsoever to the present question. But in one of the cases to which the noble and learned Lord referred, viz., *Sidney v. North Eastern Railway* (4), ROWLATT J. is thought to have said much the

(1) [19'4] A.C. 589, 576.

(3) [1917] A.C. 187.

(2) [1909] 1 K.B. 16.

(4) [1914] 3 K.B. 629.

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same as had been said by FLETCHER MOULTON L.J. In that case certain land possessed the potentiality of being used for the purposes of a railway. That potentiality was capable of being turned to account by a railway company who had obtained compulsory powers of acquiring it and by the proprietor of an adjoining colliery. In assessing the compensation to be paid by the railway company for the land, the arbitrator took into account the possibility that, but for its acquisition by the railway company, the colliery proprietor might have purchased it, but he did not take into consideration the possibility that the company might in friendly negotiation have been willing to pay more for it than the colliery proprietor. In their Lordships' opinion he was wrong in this. The Divisional Court, however, on a case stated, upheld the decision of the arbitrator. In the course of his judgment ROWLATT J. said this :

“ Now 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 the 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 ? The point has been reached when the owner is offered more than the land is worth to him for his own purposes and all that any one else would offer him except one person, the promoter, who is now, though he was not before, freed from competition. Apart from compulsory powers, the owner need not sell to that one and that one would need to make higher and yet higher offers. In respect of what would he make them ? There can only be one answer—in respect of the value to him for his scheme. And he is only driven to make such offers because of the unwillingness of the owner to sell

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without obtaining for himself a share in that value. Nothing representing this can be allowed."

If and so far as this means that the value to be ascertained is the price that would be paid by a willing purchaser to a willing vendor, and not the price that would be paid by a "driven" purchaser to an unwilling vendor, their Lordships agree. But so far as it means that the possibility of the promoter as a willing purchaser being willing to pay more than other competitors, or, in cases where he is the only purchaser of the potentiality, more than the value of the land without the potentiality is to be disregarded, their Lordships venture respectfully to differ from the learned Judge.

For these reasons, their Lordships have come to the conclusion that even where the only possible purchaser of the land's potentiality is the authority that has obtained the compulsory powers, the arbitrator in awarding compensation must ascertain to the best of his ability the price that would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in a case where there are several possible purchasers and that he is no more confined to awarding the land's "poramboke" value in the former case than he is in the latter.

It is now necessary to take up once more the narrative of the events that have led up to this appeal.

On 5th January 1929 the appellant filed his claim for compensation. It was certainly not lacking in courage but it was lacking strangely enough in any suggestion that the land had a potential value as a source from which water might be supplied to persons or corporations outside Lova Gardens. He did, however, allege that Lova Gardens had a valuable

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potentiality as a building site and that such potentiality would be destroyed if he were deprived of the spring. He accordingly claimed Rs. 2,50,000 in this respect, calling it "Damages sustained by severance", though in strictness it should have been called damages sustained by reason of the acquisition injuriously affecting his other property. He also claimed Rs. 1,200 per acre in respect of the land and Rs. 16,050 as the value of the masonry structures, roads and trees on the land, the total claim amounting to Rs. 3,96,730.

On 18th January 1929 the Land Acquisition Officer made his award. He allowed in all a sum of Rs. 17,745-1-3 including the fifteen per cent addition prescribed by section 23 (2) of the Act. It appears from the grounds of award bearing the same date that he thought nothing of the potentiality of Lova Gardens as a building site, and the existence of any such potentiality has now disappeared from the case and need not be referred to again. He valued the land at Rs. 50 an acre with the exception of the land numbered 2-3B which he valued at Rs. 300 an acre. As to the claim in respect of "Damages sustained by severance", he thought that the rest of the appellant's land was probably better off without the water from the spring than with it. The lower part of the gardens, which was marshy and malarious had too much water as it was. In any case he considered that the appellant would be amply compensated for the loss of the spring water by the Rs. 5,000 that he awarded under this head. The appellant's claim of Rs. 2,50,000 was, he said, preposterous. He also awarded a sum of Rs. 4,493 in respect of trees and buildings. The appellant thereupon required that the matter should be referred to the Court for determination under section 18 of the



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Act and in due course it came on for hearing before the Subordinate Judge of Vizagapatam. It was then claimed on the appellant's behalf that the spring could, but for its acquisition, have been used by him as a source of water-supply either to the Harbour Authority or to the oil companies and others residing or carrying on business in the harbour area; and the appellant claimed to be compensated upon this footing. After a lengthy hearing before him in the course of which many questions of law and fact not now in issue were discussed, the learned Judge made his award. He found as a fact, and the fact cannot be disputed, that the water of the spring was on 13th February 1928 capable of being used as a source of water-supply to persons outside the appellant's land. He also found that the only possible buyers of the water at that date were the Harbour Authority itself and the oil companies and labour camps that might be established as a result of the development of the harbour and stated that this fact would be taken into consideration in fixing the amount of compensation. But, after considering the authorities on the subject, he came to the conclusion as a matter of law that the value to a vendor of a potentiality of his land can be assessed even though there are no other possible purchasers beyond the acquiring authority. Other principles of law stated by him for his guidance in making his award were that it was the contingent possibility of the user that had to be taken as the basis of valuation and not the realized possibility and that the use to which the acquiring authority had actually put the property could be taken as a strong piece of evidence to show that the property acquired could be put to such use by the owner at the date of acquisition. Applying these principles, he found that the value of the land

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acquired, including the spring, was Rs. 1,05,000, which, with the addition of the fifteen per cent under section 23 (2) of the Act, amounted to Rs. 1,20,750. The Rs. 17,745-1-3 awarded by the Land Acquisition Officer had been paid to the appellant and received by him under protest, and deducting this sum from the Rs. 1,20,750, there remained Rs. 1,03,004-14-9 due to the appellant. This sum he decreed in favour of the appellant with certain interest. The valuation of Rs. 1,05,000 was arrived at in this way. Evidence had been given before the learned Judge by two witnesses on behalf of the appellant as to what would be a proper charge for water supplied to the harbour area from the spring, and they estimated the charge at Rs. 1-8-0 per 1,000 gallons. The learned Judge, however, said that taking into consideration the conclusions arrived at by him, which were presumably the conclusions of law and findings of fact referred to above, he thought it would be reasonable and proper to fix the value of the acquired property, i.e., the water-source, on date of the acquisition on the basis of Re. 1 per 1,000 gallons. Taking the normal supply of water at 50,000 gallons a day, this gave as the gross annual value of the water the sum of Rs. 18,250. He estimated that maintenance charges, depreciation of machinery, and interest on the capital outlay, would come to Rs. 12,273; but taking these items at the round figure of Rs. 13,000 the net annual income from this spring would be Rs. 5,250. This he capitalised at twenty years purchase and so arrived at the Rs. 1,05,000. Having regard, amongst other things, to the extravagant claims put forward by the appellant in the first instance he awarded him no costs.

From this decision an appeal was taken by the present respondent to the High Court at Madras, the



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appellant lodging a memorandum of cross-objections to the valuation of the Subordinate Judge which need not be specified. The appeal was heard by WADSWORTH and STODART JJ. and judgment allowing the appeal was delivered on 4th May 1937. The reasons for this decision given by WADSWORTH J., in whose judgment STODART J. concurred, may be summarised as follows :

The scheme for utilisation of the water and the carrying out of anti-malarial operations in the valley (i.e., the Lova Gardens) 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 that area fit for development. At the time when this scheme was promulgated the whole of that area was undeveloped. It was full of malaria and was incapable of any profitable use apart from the success of the anti-malarial campaign of which this acquisition was part. It was not conceivable that the present appellant himself would ever have been able to develop a water-supply scheme, carrying out all the necessary anti-malarial works and thereby encouraging business concerns to occupy the harbour land and buy water from him. The conclusion, therefore, must be that the special adaptability of the land for the supply of drinking water had no value apart from the scheme for which the acquisition was made.

The Harbour Authority, therefore, was at the date of the notification the only reasonably possible purchaser for the drinking water-supply on the appellant's land and this being so the Subordinate Judge had erred in awarding compensation for the special adaptability of the land to supply drinking water to persons outside the appellant's land. After referring to the authorities

and in particular the dictum of FLETCHER MOULTON L.J. in the *Lucas's* case (1), he said :

"There can be little doubt that this exposition of the 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."

By the harbour the learned Judge meant, of course, the Harbour Authority. STODART J., who, as already stated, concurred in the judgment of WADSWORTH J., added :

"It is not contended that any other public authority or private undertaker except the Harbour Authority would ever have come forward to develop this area and make it habitable. Thus the value of the . . . spring as a source of drinking water. . . 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."

The appeal was accordingly allowed with costs there and below and the award of the Land Acquisition Officer was restored *in toto*. The memorandum of cross-objections was dismissed with costs. From that judgment, the necessary leave having been obtained, the appellant now appeals to His Majesty in Council.

Their Lordships agree with the High Court that on 13th February 1928 the only really possible purchaser of the special adaptability of the appellant's land as a water-supply was the Harbour Authority. The position at that time was that the harbour was so far advanced that its opening in a few years was in contemplation. It was expected that when that had taken place oil companies and other industrial concerns

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with their attendant labour camps, would be attracted to the harbour area, and they would all require to be supplied with water. It is plain that neither the appellant nor any purchaser from him would encounter any engineering difficulties in conducting the water from the spring to the southern boundary of the harbour area. Nor would they encounter any engineering difficulty in conducting the water from that boundary to the premises of the oil companies and other concerns. They would, however, have had to obtain the consent of the Harbour Authority to lay the necessary pipes in the harbour area itself and the possibility of such consent being refused would have to be taken into consideration in estimating the value to the appellant of the special adaptability of his land, though the risk of such consent being refused was not a serious one, assuming that there was no other source from which the water could be profitably supplied by the Harbour Authority itself. There was, however, on 13th February 1928 a much more serious matter to be taken into consideration. As already pointed out, the harbour area was at the date a highly malarious place, little calculated to prove attractive as a site for any industrial concern. Unless, therefore, this state of affairs was remedied, there would be no customers for the appellant's water and the value to him of the special adaptability was nil. Now it is true that there was a practical certainty of the Harbour Authority taking steps to render the site as free as possible from malaria; for, if they did not, the harbour would not be used to any great extent even as a port of call. But in order to carry out the necessary anti-malarial works, it was essential for the Harbour Authority to obtain a supply of drinking water from some source other than the wells in the area which were largely responsible

for the malarious condition of the area and were going to be closed. The appellant on 13th February 1928 would therefore have been in this dilemma. If the only other source of water were the appellant's spring, the Harbour Authority would be the only possible purchaser. If, on the other hand, the Authority could obtain water from other sources sufficient both for the anti-malarial work and the supply of the traders in the harbour area, the appellant would almost certainly be refused permission to carry his competing supply over the Authority's land. In point of fact there was at one time an alternative scheme on foot for obtaining water known as the Meghadrigedda scheme. The scheme was to be for the benefit of the Municipality of Vizagapatam, the Bengal-Nagpur Railway and the Harbour. The scheme aimed at a supply of one million gallons a day of which the harbour was to have 150,000 gallons a day. The scheme has not been proceeded with, but it is impossible to say what would have been done about it had the spring in the Lova Gardens not been acquired. In these circumstances the possibility of the appellant's water being made available for the harbour by anyone other than the Harbour Authority was altogether negligible, and the only enhancement in the value to the appellant of his land by reason of its special adaptability as a water-supply was the sum that the Harbour Authority, as a willing purchaser, would have been willing to give in excess of the land's "poramboke" value.

Their Lordships have given their reasons for thinking, contrary to the view taken by the High Court, that such sum must be taken into consideration in fixing the compensation payable to the appellant, and that such sum is not to be treated as being a negligible

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one merely because the Harbour Authority was the only possible purchaser.

It remains to deal with section 24 (5) of the Land Acquisition Act. That sub-section as applied to the present case means no more than this : that in valuing the appellant's land on 13th February 1928 it must be valued as it then stood, and not as it would stand when the land had been acquired and the water on it used for ridding the harbour area of malaria. The Harbour Authority would otherwise be made to pay for the water twice over. But the sub-section does not mean that the possibility that a particular purchaser of land will give a higher price for it by reason of its possessing a special adaptability must be disregarded merely because the land will be more valuable in his hands when he exploits that adaptability than it would be if left in the hands of the vendor who was unable to exploit it. In *Clay's case*(1), for instance, the house after being added to the nurses' home was no doubt more valuable than it was before. That, indeed, was the reason why the trustees of the home paid £250 more than any other purchaser would have paid. The house in that case was held to be of the value of £1,000 not because that was its value after being put to the use for which it was acquired, but because that was the price which the willing purchaser was prepared to pay for its acquisition. In the present case the land must be valued not at the sum it would be worth after it had been acquired by the Harbour Authority and used for anti-malarial purposes, but at the sum that the Authority "in a friendly negotiation" (to use Lord JOHNSTON's words) would be willing to pay on 13th February 1928 in order to acquire it for those purposes.

(1) [1914] 1 K.B. 339.

Returning to the award made in the present case by the learned Subordinate Judge, it is to be observed that in valuing the land with its special adaptability as being worth Rs. 1,05,000 to the appellant, he did so on the footing that the appellant would himself have been in a position to supply the water to the harbour but for its compulsory acquisition by the Harbour Authority. He would also seem to have so valued it upon the footing that the spring could have been made an income-earning concern on 13th February 1928. He would otherwise have made a substantial discount from the Rs. 1,05,000. It is plain, therefore, that, in view of the fact that the water could not be exploited by the appellant himself and that it would necessarily be some years before the water would become a profit-earning asset in their hands, the Harbour Authority, however willing purchasers they might be, would not have agreed to pay anything like that sum. In these circumstances the matter should in strictness be referred back to the Subordinate Judge to revise his award. Both the parties to this appeal, however, have asked their Lordships, with a view to saving expense, to state what should be the proper amount of the award, and this their Lordships have consented to do. Giving the matter the best consideration they can, their Lordships are of opinion that the total price which the Harbour Authority would have been willing to pay on 13th February 1928 for the land acquired, is the sum of Rs. 40,000 and this sum with the additional fifteen per cent amounts to Rs. 46,000. In their Lordships' judgment the order of the High Court of 4th May 1937 should be discharged except in so far as it dismissed the present appellant's memorandum of objections with costs. The amount decreed by the Subordinate Judge in favour of the appellant

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should be reduced from Rs. 1,03,004-14-9 to Rs. 28,254-14-9 with interest as stated in his award. His order as to costs must stand. But the respondent must pay the appellant's costs before the High Court and his costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitor for respondent: *The Solicitor, India Office.*  
C.S.S.

### APPELLATE CIVIL--FULL BENCH.

*Before Sir Lionel Leuch, Chief Justice, Mr. Justice Wadsworth and Mr. Justice Krishnaswami Ayyangar.*

1938,  
December 15.  
1939,  
January 10.

THE PANCHAYAT BOARD, THIRUVOTHIYUR  
BY ITS PRESIDENT, BALASUBRAMANIA MUDALIAR,  
(DEFENDANT), APPELLANT,

v.

THE WESTERN INDIA MATCHES COMPANY BY AGENT  
HENRIK HYBBINETTEE (PLAINTIFF), RESPONDENT.\*

*Madras Local Boards Act (XIV of 1920) as amended by Act XI of 1930—Sec. 225—Limited to suits for compensation or damages—Inapplicable to suits for refund of tax illegally collected—Sec. 102-A (1) of the Act—Remitting section.*

*Held by the Full Bench:* Section 225 of the Madras Local Boards Act (XIV of 1920) as amended by Act XI of 1930 is limited to suits for compensation or damages and is inapplicable to suits against a Local Board for refund of house-tax alleged to have been illegally collected.

*Swamy Babu v. The Union Board, Narasannapeta*(1) overruled.

\* Second Appeal No. 301 of 1936.

(1) (1933) 65 M.L.J. 725.

Where the Courts have consistently interpreted the law in a particular way for many years it is for the Legislature and not for the Court to effect a change, if a change is desirable.

Where certain words in a statute have received a clear judicial interpretation, and the Legislature has repeated them without alteration in a subsequent statute, the Legislature must be taken to have used them according to the meaning that has previously been given to them.

*Ex parte Campbell In re Cathcart*(1) and *Barras v. Aberdeen Steam Trawling and Fishing Co.*(2) relied upon.

*Held by the Division Bench in the Order of Reference:* Section 102-A (1) of the Madras Local Boards Act (XI of 1930) is not a taxing section but a remitting section and must be read as meaning that; if the tax is otherwise leviable, the owner of a house included within a village is entitled to a remission under that section. The section cannot be read as implying that tax is leviable.

APPEAL against the decree of the Court of the Subordinate Judge of Chingleput in Appeal Suit No. 97 of 1934 preferred against the decree of the Court of the District Munsif of Poonamallee in Original Suit No. 144 of 1933.

The appeal originally came on for hearing before BURN and LAKSHMANA RAO JJ. who made the following

#### ORDER OF REFERENCE TO A FULL BENCH:

[The order of the Bench was delivered by BURN J.]—This is an appeal from the decree of the learned Subordinate Judge of Chingleput in Appeal Suit No. 97 of 1934 on appeal from the District Munsif of Poonamallee. The facts are simple and are not in dispute. The plaintiff in Original Suit No. 144 of 1933 in the District Munsif's Court was the Western India Matches Company. The company has a factory in the village of Ernavur. This factory until 27th July 1931 was outside the limits of the jurisdiction of the Thiruvotthiyur Panchayat Board. On 27th July 1931 it was included within the Panchayat Board's limits by a notification of Government under

(1) (1870) L.R. 5 Ch. 703, 705.

(2) [1933] A.C. 402.

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section 5 (2) of the Local Boards Act. Thereupon the Panchayat Board levied house-tax and education-tax on the company for the year 1931-32 allowing a remission of half the full tax for the first half-year under section 102-A (1) (b). The company paid Rs. 858-3-9 for the first half-year on 4th November 1931, Rs. 1,716-7-6 for the second half-year on 21st November 1931 and Rs. 13-13-0 for a tiffin shed on 18th December 1931. These payments were made under protest, and on 14th March 1933 the Match Company filed the suit against the Panchayat Board for refund of these amounts with costs. The suit was decreed by the District Munsif and his decision was confirmed on appeal by the learned Subordinate Judge. This second appeal has been preferred by the Panchayat Board.

The case for the plaintiff company was that the levy and collection of these taxes was illegal and *ultra vires*. Their case was based on two main grounds, firstly, that the site upon which the match factory stands is not within the limits of any area within which the District Board prior to 1st April 1930 had resolved to levy house-tax under section 75 (1) of the Local Boards Act and, secondly, that the Panchayat Board had made no recommendation to the Local Government under section 75 (2) of the Act and the Local Government had not by notification sanctioned the levy of any tax. The defendant's case, on the other hand, was that the District Board long prior to 1st April 1930 had by resolution levied the tax within the limits of the Union Board of Thiruvotthiyur; by the notification of the Local Government dated 27th July 1931 the company's factory became included within those limits, and therefore became taxable. Secondly, the Panchayat Board contended that the suit was barred by limitation because it had not been brought within six months of the date of collection as required by section 225 (2) of the Local Boards Act.

Both the lower Courts have overruled the defendant's contentions and, in so far as the legality of the levy is concerned, we think there is no doubt but that both the lower Courts have decided rightly. It is not disputed that the site upon which the factory stands is not within the limits of any area covered by any resolution of the District Board prior to 1st April 1930. Now under section 77 (1) (a) of the Local Boards Act any resolution of a District Board determining to

levy any tax or toll under sub-section (1) of section 75 or under section 76 shall specify the local limits of the area in which, the rate at which, the date from which and the period of levy, if any, for which, such tax or toll shall be levied. It is common ground that the resolution of the District Board levying this tax applied to the area controlled by the Union Board of Thiruvotthiyur. The resolution of the District Board has not been filed in the case but it is clear that under section 77 (1) (a) it must have specified the local limits of that area and the match factory was undoubtedly outside those local limits. The Panchayat Board relies on section 102-A (1) of the Local Boards Act and contends that as soon as the area of the village controlled by the Thiruvotthiyur Panchayat Board was extended by the Government Notification of 27th July 1931 so as to include the site of the match factory, the match factory thereby became taxable. Section 102-A (1) is as follows: "If any area is included within a village the owner of every house in such area shall—

(a) if the date of such inclusion falls within the last two months of a half-year, not be liable to pay any house-tax in respect thereof for that half-year; and

(b) if such date falls within the first four months of a half-year, be entitled to a remission of so much not exceeding a half of the house-tax payable in respect thereof for that half-year as is proportionate to the number of days in that half-year preceding such date." As to this the respondent's contention is that this is not a taxing section, but a remitting section, and we think that this contention is clearly correct. The learned Counsel for the appellant Board can only argue that since section 102-A (1) provides for remission it is necessarily implied that but for this section the tax would be leviable for the whole half-year in which any area is included within the village. But, as the learned District Munsif has pointed out, taxing statutes must be construed strictly and we can only read section 102-A (1) as meaning that, if the tax is otherwise leviable, the owner of a house included within a village is entitled to a remission under that section. We cannot read it as implying that tax is leviable. We think it is clear that tax is not leviable in the absence of a valid notification either by the District Board or by the Government and, as no such notification has ever been issued covering the area

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of the plaintiff's factory, we agree with the lower Courts that the levy of the tax was illegal.

The other question whether the suit was barred by limitation is much more difficult. As already mentioned, the suit was filed on 14th March 1933, whereas all the amounts for the recovery of which the suit was filed had been collected by 18th December 1931. Section 225 (1) of the Local Boards Act provides that no suit or other legal proceeding shall be brought against any Local Board, or the president or any member, officer or servant thereof, or against any person acting under the direction of such board, president, member, officer or servant in respect of any act done or purporting to be done in execution or intended execution of this Act . . . . . until the expiration of two months next after notice in writing stating the cause of action, the nature of the relief sought, the amount of compensation claimed . . . . . has been left at the office of the Local Board; and sub-section (2) of the same section says that every such proceeding shall, unless it is a proceeding for the recovery of immovable property or, for a declaration of title thereto, be commenced within six months after the date on which the cause of action arose or in case of a continuing injury or damage, during such continuance or within six months after the ceasing thereof. The Panchayat Board's contention therefore is that this suit, having been filed more than a year after the collection of the amounts claimed, is barred by limitation under section 225 (2). The lower Courts have found against this contention relying upon the decision of MADHAVAN NAIR J. in *Lakshmanan Chetti v. The Union Board of Devakottai*(1). In that case our learned brother MADHAVAN NAIR held expressly that section 225 of the Local Boards Act is applicable only to suits for compensation and for damages, and that a suit for a declaration that the Union Board is not entitled to levy profession tax and for the recovery of the tax so collected is not a suit for compensation and for damages and therefore does not require notice under the section. Section 225 (2) refers explicitly to suits covered by section 225 (1) and it will therefore follow that the special period of limitation provided by section 225 (2) does not apply to such a suit as this. This decision was followed by SUNDARAM CHETTI J. in the *Taluk Board*

(1) (1931) 60 M.L.J. 600.

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of *Devakottah v. Chockalingam Chettiar*(1). The appellant Board on the other hand relies upon the decision of KRISHNAN PANDALAI J. in *Swamy Babu v. The Union Board, Narasannapeta*(2) in which the learned Judge held that a suit for refund of house-tax collected from the plaintiff by the Union Board, on the ground that the requisite notice prescribed by the Act was not published and therefore the levy was illegal, falls within the scope of section 225 of the Local Boards Act and is barred by limitation, if brought more than six months after the date of the cause of action. KRISHNAN PANDALAI J. dissented from the view taken by our learned brethren MADHAVAN NAIR and SUNDARAM CHETTI JJ.

These are the only decisions that have been quoted to us which deal expressly with the point before us, but there are other decisions of Benches of this Court which, in our opinion, render it necessary to have this question referred for decision by a Full Bench. In *Syed Ameer Sahib v. Venkatarama*(3) MUTTUSWAMI AYYAR and WILKINSON JJ. expressed the view that section 156 of the Local Boards Act of 1884 was not applicable to a suit in ejectment against the Local Board. Strictly speaking this opinion was *obiter*, since the learned Judges decided the appeal on the ground that the Taluk Board ought to have been sued and not the President of it. But the learned Judges quoted with approval an observation by GARTH C.J. in *Chunder Sikhur Bundopadhyaya v. Obhoy Churn Bagchi*(4) that the section is only applicable to suits for compensation claimed for wrongful acts committed under colour of the Act. This observation was followed by COLLINS C.J. and PARKER J. in *President of the Taluk Board, Sivaganga v. Narayanan*(5) where the learned Judges said: "We do not think section 156, Madras Act V of 1884, applies. The cases contemplated in that section are suits for compensation and for damages, and the principle is to allow public bodies time for tender of amends to the parties so as to avoid litigation", and the learned Judges then referred to *Chunder Sikhur Bundopadhyaya v. Obhoy Churn Bagchi*(4) and other cases. They decided therefore that previous notice under section 156 was not necessary in a case where a suit was

(1) 1932 M.W.N. 1089.

(2) (1933) 65 M.L.J. 725.

(3) (1892) I.L.R. 16 Mad. 296.

(4) (1880) I.L.R. 6 Cal. 8 (F.B.).

(5) (1892) I.L.R. 16 Mad. 317.

filed for an injunction against the President of a Local Board. The same principle was applied by MUTTUSWAMI AYYAR and PARKER JJ. in *Srinivasa v. Rathnasabapathi*(1). That was a case under section 261 of the District Municipalities Act the wording of which was for the present purpose the same as that of section 156 of the Local Boards Act. These cases were considered by a Full Bench of this Court in *Govinda Pillai v. The Taluk Board, Kumbakonam*(2). That case was decided in 1908 and by that time section 156 of the Local Boards Act had been amended and expanded. The Full Bench held that notice of action was not necessary under section 156 (1) of the Local Boards Act when the suit was for an injunction and that the six months limitation prescribed by section 156 (3) did not apply to such a suit. WHITE C.J. who pronounced the opinion of the Full Bench referred to the case of *President of the Taluk Board, Sivaganga v. Narayanan*(3). He pointed out that in section 156, by an amendment introduced in 1890, it was provided that a person giving notice under section 156 (1) of the Local Boards Act must state "the nature of the relief sought, the amount of compensation claimed". The learned CHIEF JUSTICE considered that these words had been introduced in order to make it clear that the Legislature recognized and accepted the rule of law laid down in the authorities to which he had previously referred, the rule of law being that the cases contemplated by section 156 (1) were suits for compensation and for damages, and the principle to allow public bodies time for tender of amends to the parties so as to avoid litigation. MADHAVAN NAIR J. in *Lakshmanan Chetti v. The Union Board of Devakottai*(4) relies strongly upon this Full Bench decision, but the learned Advocate for the appellant points out that MADHAVAN NAIR J. does not refer in his judgment to section 225 (3) of the Local Boards Act as it stood in 1920. Section 225 (3) of the Act of 1920 had apparently been introduced by the amending Act of 1890. It states: "No action such as is described in sub-section (1) shall, unless it is an action for the recovery of immovable property or for a declaration of title thereto, be commenced otherwise than within six months next after the accrual of the

(1) (1892) I.L.R. 16 Mad. 474.

(3) (1892) I.L.R. 16 Mad. 317.

(2) (1908) I.L.R. 32 Mad. 371 (F.B.).

(4) (1931) 60 M.L.J. 600.

cause of action". Learned Counsel's contention is that the wording of this section shows that section 225 (1) was meant by the Legislature to apply to all actions that might be brought against the Local Board on account of any act done or purporting to be done in pursuance or execution or intended execution of the Act. Otherwise it is difficult to assign any meaning or purpose to the words "unless it is an action for the recovery of immovable property or for a declaration of title thereto". There is considerable force in this contention and indeed this argument seems to have commended itself to the learned CHIEF JUSTICE in *Govinda Pillai v. The Taluk Board, Kumbakonam*(1). On page 376 the learned CHIEF JUSTICE observes as follows: "The explanation of the words 'unless it is an action for the recovery of immovable property or for a declaration of title thereto' in sub-section (3) would seem to be that when the section was amended the Legislature was prepared to accept the view taken by the Bombay High Court in *Nagusha v. Municipality of Sholapur*(2) decided in 1892, viz., that a suit in ejectment fell within the provisions of the corresponding enactment of the Bombay Act." PINHEY J. also said that, in his view, these words had been introduced into sub-section (3) in order to exclude such actions, viz., actions for the recovery of immovable property or for declarations of title thereto, from the scope of sub-section (3) in case the Madras High Court should follow the decision in *Nagusha v. Municipality of Sholapur*(2). These observations would indicate that the intention of the Legislature, in the opinion of those learned Judges, was that all kinds of actions were meant to be included in section 225 (1).

*Prima facie* it seems to us clear that an action for the recovery of house-tax alleged to have been illegally levied by a Local Board is a suit in respect of an act done or purporting to be done in execution of the Local Boards Act. We think there is force in the contention raised on behalf of the appellant that these words in section 225 (1) must be read literally. Learned Counsel has pointed out that their Lordships of the Privy Council have on several occasions laid it down that statutes passed by the Legislatures of this country must be read according to the plain meaning of their words. With

(1) (1908) I.L.R. 32 Mad. 371 (F.B.).

(2) (1892) I.L.R. 18 Bom. 19.



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all respect to our learned brother MADHAVAN NAIR we think that the observations of their Lordships of the Privy Council in *Bhagchand Dagadusa v. Secretary of State for India*(1) have a considerable bearing on this case. The same argument receives added force from the observations of their Lordships of the Privy Council in the case of *Calcutta Port Commissioners v. Corporation of Calcutta*(2). At page 601, their Lordships point out the "pivotal importance" of the words "purporting or professing to act in pursuance of the statute." Their Lordships observe that "even work which is not done in pursuance of the statute may nevertheless be accorded its protection if the work professes or purports to be done in pursuance of the statute". It is difficult, we think, to hold that the Panchayat Board in levying these taxes on the respondent was not purporting to act in execution of the Local Boards Act.

We think it is therefore desirable that the view expressed by the several Benches of this Court to the effect that section 225 (formerly 156) of the Local Boards Act covers only suits for compensation and for damages should be reconsidered. We therefore decide to refer to a Full Bench the question whether suits against a Local Board for refund of house-tax alleged to have been illegally collected come within section 225 (1) and (2) of the Local Boards Act.

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

*K. S. Sankara Ayyar* for appellant.—The suit of the company to recover house-tax illegally collected comes within the purview of section 225 (1) of the Madras Local Boards Act. The words of that section "in respect of any act done or purporting to be done in execution or intended execution of this Act" show clearly that it applies to all actions that might be brought against Local Boards. It is only "a proceeding for the recovery of immovable property or for a declaration of title thereto" as mentioned in section 225 (2) that is excluded. All actions against a Local Board except those mentioned in sub-section 2 are included in section 225 (1). An action for the recovery of house-tax illegally collected is a suit in

respect of an act done in execution of the Local Boards Act. The words of the section must be read literally. The Privy Council has laid down that statutes in India must be read according to the plain meaning of their words; *Calcutta Port Commissioners v. Corporation of Calcutta*(1). The suit was not brought within six months from the date of the collection of the tax as required by section 225 (2) of the Local Boards Act. Hence the suit is barred by limitation. The decisions which confine the application of the section to suits for damages or compensation are wrong. Only the plain meaning of the section should be considered. Where the Legislature intended to confine the section to suits for damages or compensation it has said so in plain words. Section 350 of the District Municipalities Act, 1920, which corresponds to section 225 of Local Boards Act, expressly confines its application to suits for damages or compensation.

The case of *Swamy Babu v. The Union Board, Narasannapeta*(2) supports this view. [Section 156 of the earlier Local Boards Acts of 1884 and 1900 and section 225 of the Local Boards Acts of 1920 and 1930 were referred to. The corresponding sections of the old District Municipalities Acts, sections 261 of the Acts of 1884 and 1897, and section 350 of the District Municipalities Act of 1920 were compared and contrasted.] [The following cases decided under the two Acts were then cited: *Syed Ameer Sahib v. Venkatarama*(3), *President of the Taluk Board, Sivaganga v. Narayanan*(4), *Srinivasa v. Rathnasabapathi*(5), *Govinda Pillai v. The Taluk Board, Kumbakonam*(6), *Mahamahopadyaya Rangachariar v. The Municipal Council of Kumbakonam*(7), *Municipal Council of Kumbakonam v. Veeraperumal Padayachi*(8), *Municipal Council, Dindigul v. Bombay Co., Ltd.*(9), *Krishna Jute and Cotton Mills Co., Ltd. v. Municipal Council, Vizianagaram*(10), *Salem Municipality v. Bhakthavatsalu Naidu*(11), *Lakshmanan Chetti v. The Union Board of Devakottai*(12),

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| (1) I.L.R. [1938] 1 Cal. 440 (P.C.). | (2) (1933) 65 M.L.J. 725.             |
| (3) (1892) I.L.R. 16 Mad. 296.       | (4) (1892) I.L.R. 16 Mad. 317.        |
| (5) (1892) I.L.R. 16 Mad. 474.       | (6) (1908) I.L.R. 32 Mad. 371 (F.B.). |
| (7) (1906) I.L.R. 29 Mad. 539.       | (8) (1914) 28 M.L.J. 147.             |
| (9) (1928) I.L.R. 52 Mad. 207.       | (10) (1925) 49 M.L.J. 542.            |
| (11) I.L.R. [1937] Mad. 491.         | (12) (1931) 60 M.L.J. 600.            |

(1) (1927) I.L.R. 51 Bom. 725 (P.C.). (2) I.L.R. [1938] 1 Cal. 440 (P.C.).



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*Taluk Board of Devakottah v. Chockalingam Chettiar*(1) and  
*Athimannil Muhammad v. Malabar District Board*(2).]

[THE CHIEF JUSTICE.—In *Swamy Babu v. The Union Board, Narasannapeta*(3) KRISHNAN PANDALAI J. disregarded all other decisions on the point and contrasted section 350 of the District Municipalities Act, 1920, with section 225 of the Local Boards Act, 1930. The Local Boards Act has been amended twice since 1900. In spite of the long line of decisions, the Legislature has thought fit not to change the language of section 225.]

[Craies on Statute Law and *Barras v. Aberdeen Steam Trawling and Fishing Co.*(4) were referred to.]

*C. Krishnaswami Ayyar* for respondent was not called upon.

*Cur. adv. vult.*

#### OPINION.

LEACH C.J.

LEACH C.J.—In 1931 the village of Ernavur was added to the jurisdiction of the Panchayat Board of Thiruvethiyur. The respondent company has a match factory in Ernavur and when the village came within the jurisdiction of the Panchayat Board the factory buildings were assessed to house-tax, the amount of the tax collected being Rs. 2,588-8-3. The respondent company challenged the validity of the action of the Panchayat Board and filed a suit in the Court of the District Munsif of Poonamallee to recover what it had been compelled to pay. The District Munsif held that the tax had been illegally levied and rejected the contention of the Panchayat Board that the suit did not lie because it had not been filed within the period allowed by section 225 of the Madras Local Boards Act, 1920, as amended by Act XI of 1930. The District Munsif considered that the period of limitation imposed by that section only applied to suits for

(1) 1932 M.W.N. 1089.

(3) (1933) 65 M.L.J. 725.

(2) (1934) I.L.R. 58 Mad. 746.

(4) [1933] A.C. 402.

compensation or damages. The Subordinate Judge of Chingleput upheld the decision of the District Munsif on both points on appeal. The Panchayat Board then filed a second appeal to this Court. The appeal was heard by BURN and LAKSHMANA RAO JJ. who agreed that the levy was illegal, but referred to a Full Bench the question whether section 225 of the Madras Local Boards Act, 1920, is confined to suits for compensation or damages. This Bench has been constituted to decide the question.

A long series of decisions, with one exception, support the decisions of the lower Courts on the question of the applicability of section 225. I shall refer to certain of these decisions presently, but before doing so it is necessary to set out the history of the section and that of the corresponding section in the Madras District Municipalities Act, 1920. Most of the decisions have been under earlier Acts. The first Act relating to local boards was the Madras Local Boards Act, 1884, in which section 156 was the section corresponding to section 225 of the present Act. Section 156 of the Act of 1884 read as follows :

“No action shall be brought against any Local Board, or any of their officers, or any person acting under their direction, for anything done or purporting to be done under this Act until the expiration of one month next after notice in writing shall have been delivered or left at the office of the Local Board, or at any place of abode of such person, explicitly stating the cause of action, and the name and place of abode of the intended plaintiff ; and unless such notice be proved the Court shall find for the defendant ; and every such action shall be commenced within six months next after the accrual of the cause of action, and not afterwards : and if any person to whom any such notice of action is given shall, before action brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover more than the amount so tendered, and shall pay all costs incurred by the defendant after such tender.”

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The Act of 1884 was amended by Act VI of 1900 and section 156 was amended to read as follows :

(1) "No action shall be brought against any Local Board or Panchayat or against any member or servant of such board or panchayat or against any person acting under the directions of such Local Board or Panchayat or of a member or servant of such board or panchayat, on account of any act done, or purporting to be done, in pursuance or execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act until the expiration of one month next after notice in writing shall have been delivered or left either at the office of the Local Board or Panchayat or at the place of abode of such member or servant or of such person, explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed and the name and place of abode of the intended plaintiff; and unless such notice be proved to have been so delivered or left, the Court shall find for the defendant.

(2) If the Local Board or Panchayat, member or servant or other person to whom notice is given as provided in sub-section (1) shall, before action is commenced, tender sufficient amends to the plaintiff, such plaintiff shall not recover more than the amount so tendered. The plaintiff shall also pay all costs incurred by the defendant after such tender.

(3) No action such as is described in sub-section (1) shall, unless it is an action for the recovery of immovable property or for a declaration of title thereto, be commenced otherwise than within six months next after the accrual of the cause of action.

(4) No action shall be brought against the President of a Local Board or Chairman of a Panchayat on account of any act done in pursuance or execution or intended execution of this Act, or in respect of any alleged default on his part in the execution of this Act, if such act was done or if such default was made in good faith; but any such action shall, so far as it is maintainable in a Court, be brought against the Local Board except when brought by the Local Board or the Secretary of State for India in Council under section 157 on account of anything done by the President or Chairman himself."

The next Act was the Madras Local Boards Act, 1920, in which section 156 of the former Act became

section 225. The new section followed the lines of section 156 of the Act of 1900, except that the period of notice was extended from one to two months. There was another amending Act in 1930, but so far as the present question is concerned it made no substantial alteration to the section as it stood in the Act of 1920. In all the Acts since the Act of 1884 the section required the statutory notice to state the amount of compensation claimed.

In the Madras District Municipalities Act, 1884, the section corresponding to section 156 of the Madras Local Boards Act of that year was section 261 and the wording was identical. The Madras District Municipalities Act of 1884 was amended by the Madras District Municipalities Amendment Act, 1897, and section 261 was one of the sections amended. The amendment was to the same effect as the amendment made in the Madras Local Boards Act, 1884, by the amending Act of 1900. In 1920, District Municipalities became governed by the Madras District Municipalities Act of that year and section 350 which replaced section 261 expressly limited the necessity of notice and the period of limitation to suits for damages or compensation and this is how the Madras District Municipalities Act now stands.

The earliest decisions of this Court relating to the question under discussion were given in 1893. There were three decisions in that year, two with reference to the Madras Local Boards Act, 1884, and one with regard to the Madras District Municipalities Act of that year. In *Syed Ameer Sahib v. Venkatarama* (1) MUTTUSWAMI AYYAR and WILKINSON JJ. gave it as their opinion that section 156 of the Act only related to

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(1) (1892) I.L.R. 16 Mad. 296.

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suits for compensation for wrongful acts committed under colour of the Act, and in *President of the Taluk Board, Sivaganga v. Narayanan*(1) COLLINS C.J. and PARKER J. expressly held that the cases contemplated by the section were suits for compensation or damages, the principle being to allow public bodies time for tender of amends to the parties so as to avoid litigation. In *Srinivasa v. Rathnasabapathi*(2) MUTTUSWAMI AYYAR and PARKER JJ. held that a suit to recover a forfeited deposit of a contractor was outside the scope of the section, and concurred in the opinion that the section applied only to suits for compensation or damages.

Under the Madras Local Boards Act of 1900 there was one decision, *Govinda Pillai v. The Taluk Board, Kumbakonam*(3), and under the District Municipalities Act as amended in 1897 two decisions, *Mahamahopadyaya Rangachariar v. The Municipal Council of Kumbakonam*(4) and the *Municipal Council of Kumbakonam v. Veeraperumal Padayachi*(5). The judgments in these cases followed the earlier decisions. It is necessary to refer only to the first of these cases which was decided by a Full Bench consisting of WHITE C.J., SANKARAN NAIR and PINHEY JJ. WHITE C.J. observed that the explanation of the words "unless it is an action for the recovery of immovable property or for a declaration of title thereto" in sub-section 3 of the Act of 1897 would seem to be that when the section was amended the Legislature was prepared to accept the view taken by the Bombay High Court in *Nagusha v. Municipality of Sholapur*(6) to the effect that a suit in ejectment fell within the provisions of the

(1) (1892) I.L.R. 16 Mad. 317.

(3) (1908) I.L.R. 32 Mad. 371 (F.B.).

(5) (1914) 28 M.L.J. 147.

(2) (1892) I.L.R. 16 Mad. 474.

(4) (1906) I.L.R. 29 Mad. 539.

(6) (1892) I.L.R. 18 Bom. 19.

corresponding enactment of the Bombay Act. The judgment went on to point out that the decision in the last-mentioned case was overruled by a Full Bench of the Bombay High Court in *Manohar Ganesh Tambekar v. Dakor Municipality*(1) and this Court in *Syed Alli Saheb v. Chairman of the Salem Municipality*(2) took the same view. In my opinion the explanation for the insertion of the words "unless it is an action for the recovery of immovable property or for a declaration of title thereto" is that the Legislature had in mind the decision in *President of the Taluk Board, Sivaganga v. Narayanan*(3) where it was said that the principle embodied in the section could not apply when the object of the suit was to obtain a declaration of title to immovable property and for an injunction to restrain interference with immovable property. It was not realised that the wording might be made the basis of an argument that the statutory notice was necessary for all suits other than those relating to immovable property.

In *Municipal Council, Dindigul v. Bombay Co., Ltd.*(4) COUTTS TROTTER C.J. and MADHAVAN NAIR J. gave a decision which is directly in point here. This was a suit filed against the Municipal Council of Dindigul for the recovery of a sum wrongfully collected by the Municipality as tax. It was held that such an action was essentially an action for "money had and received" and the bar of limitation prescribed by section 350, clause (2), of the Madras District Municipalities Act of 1920 would not apply. There are three decisions relating to suits for recovery of profession tax said to have been

(1) (1896) I.L.R. 22 Bom. 289 (F.B.).

(3) (1892) I.L.R. 16 Mad 317.

(2) (1893) 3 M.L.J. 223.

(4) (1928) I.L.R. 52 Mad. 207.

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wrongfully levied; *Krishna Jute and Cotton Mills Co., Ltd. v. Municipal Council, Vizianagram*(1), *Lakshmanan Chetti v. The Union Board of Devakottai*(2) and *Taluk Board of Devakottai v. Chockalingam Chettiar*(3). In all these cases it was held that the suit was outside the section. In *Lakshmanan Chetti v. The Union Board of Devakottai*(2) MADHAVAN NAIR J. after a careful review of the authorities accepted the opinion already prevailing and held that section 225 of the Madras Local Boards Act, 1920, was applicable only to suits for compensation or damages.

The only judgment which runs counter to these decisions is that of KRISHNAN PANDALAI J. in *Swamy Babu v. The Union Board, Narasannapeta*(4) where it was held that a suit for refund of house tax collected on the ground that the levy was illegal fell within the scope of section 225 of the Local Boards Act as it now stands. The learned Judge considered that observations in the judgment in *Govinda Pillai v. The Taluk Board, Kumbakonam*(5) left him free to decide the question untrammelled by authority and he formed the opinion that to exclude a suit of this nature from the section would be to defeat the object for which it was framed. I do not consider that the judgment in *Govinda Pillai v. The Taluk Board, Kumbakonam*(5) left it open to the learned Judge to disregard the other decisions of the Court and I am unable to accept his decision as embodying a correct statement of the law.

It is not necessary to examine the decisions given by other Courts. Reference to the principal decisions

(1) (1925) 49 M.L.J. 542.

(3) 1932 M.W.N. 1089.

(2) (1931) 60 M.L.J. 600.

(4) (1933) 65 M.L.J. 725.

(5) (1908) I.L.R. 32 Mad. 371 (F.B.).

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elsewhere is to be found in the judgment of MADHAVAN NAIR J. in *Lakshmanan Chetti v. The Union Board of Devakottai*(1), and all that need be said here is that they do not throw doubt on the decisions of this Court.

Where the Courts have consistently interpreted the law in a particular way for many years it is for the Legislature and not for the Court to effect a change, if a change is desirable. As I have indicated, section 225 of the Madras Local Boards Act stands substantially as it was in 1900. Since 1900 there have been two amending Acts and numerous decisions of this Court interpreting the section in the same way; in fact an unbroken line but for the decision of KRISHNAN PANDALAI J. In *Barras v. Aberdeen Steam Trawling and Fishing Co.*(2) VISCOUNT BUCKMASTER said:

"It has long been a well-established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it."

VISCOUNT BUCKMASTER went on to quote the words of JAMES L.J. in *Ex parte Campbell. In re Cathcart*(3) where he observed:

"Where once certain words in an Act of Parliament have received a judicial construction in one of the superior Courts, and the Legislature has repeated them without alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them."

The last amendment having been made before the decision of KRISHNAN PANDALAI J. and this Court having repeatedly interpreted the section as applying

(1) (1931) 60 M.L.J. 600.

(2) [1933] A.C. 402.

(3) (1870) L.R. 5 Ch. 703.

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only to suits for compensation or damages it must be taken that the Legislature intended it to be interpreted in this way. Moreover in the last amendment of the Madras District Municipalities Act the corresponding section was expressly limited to suits for compensation or damages. The Legislature could not have intended Local Boards to be in a different position to District Municipalities in this respect. If section 225 of the Local Boards Act had been placed on the statute book for the first time in 1930 it might be open to the Court to come to another conclusion, but in the circumstances it can only be held that section 225 of the Madras Local Boards Act is limited to suits for compensation or damages, and the question referred is answered in this sense.

The costs of the reference will be made costs in the appeal.

WADSWORTH J.—I agree.

KRISHNASWAMI AYYANGAR J.—I agree.

The second appeal then came on for final hearing after the expression of the opinion of the Full Bench, and the Court (BURN and LAKSHMANA RAO JJ.) delivered the following

#### JUDGMENT.

The Full Bench having decided that the suit was not barred by limitation, this appeal must be and is hereby dismissed with costs.

Attorney-at-law for appellant: *S. G. Satagopa Mudaliyar.*

Solicitors for respondent: *King and Partridge*  
V.V.C

#### APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Somayya.*

RM. AR. AR. RM. ARUNACHALAM CHETTIAR (DEAD)  
AND FOUR OTHERS (FIRST RESPONDENT AND HIS LEGAL  
REPRESENTATIVES AND SUPPLEMENTAL APPELLANTS),  
APPELLANTS,

1939,  
February 9.

*v.*

SABARATNAM CHETTIAR AND TWO OTHERS  
(RESPONDENTS 3, 2 AND 1), RESPONDENTS.\*

*Provincial Insolvency Act (V of 1920), sec. 28 (2)—Hindu joint family—Father—Insolvency of—Proceedings against his undivided son's share in family property after—Condition precedent to taking of—Leave of Insolvency Court if—Attachment of son's share in execution—Power of Official Receiver after, to sell that share to meet just and proper debts of insolvent.*

Section 28 (2) of the Provincial Insolvency Act of 1920 refers only to the property of the insolvent and the prohibition against the institution of legal proceedings without the leave of the Insolvency Court contained therein refers to proceedings with regard to the insolvent's property. In the case of the insolvency of a Hindu who is subject to the Mithakshara law his undivided son's share in the family property does not vest in the Official Receiver, what vests in him being only the power of the insolvent himself to sell his son's share in the family property for paying his just and proper debts. Section 28 (2) is therefore no bar to proceedings being taken in respect of the son's share in the family property without the leave of the Insolvency Court.

The right of the Official Receiver to exercise the power of the insolvent himself and sell his undivided son's share to meet his (the insolvent's) just and proper debts exists only so long as the son's interest in the family property exists. If

\*Appeal Against Appellate Order No. 166 of 1936.

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the interest has been sold or if there has been a lawful attachment thereof, which has the same effect, the power of the Official Receiver to sell the son's share is lost.

*Baluswami Naidu v. Official Receiver, Madura*(1) overruled.

*Gopalakrishnayya v. Gopalan*(2) and *Manickam Pillai v. Vellayya Naickar*, Appeal Against Order No. 253 of 1936, followed.

*Chinna Veeriah v. Gurivi Reddi*(3) approved.

*Seetharama Chettiar v. Official Receiver, Tanjore*(4) relied upon.

APPEAL against the order of the District Court of Ramnad at Madura, dated 2nd July 1936 and passed in Civil Miscellaneous Appeal No. 105 of 1932 preferred against the order of the Court of the Subordinate Judge of Devakottah in Interlocutory Application No. 423 of 1932 in Insolvency Petitions Nos. 12 and 13 of 1927.

*M. Patanjali Sastri* and *T. K. Sundararaman* for appellants 2 to 5.

*C. S. Venkatachari* for *M. Murugappa Chettiar* for first respondent.

*K. Sankara Sastri* for second respondent.

*T. M. Ramaswami Ayyar* for third respondent.

## JUDGMENT.

LEACH C.J.

LEACH C.J.—On 24th September 1931 the appellant obtained a decree for Rs. 19,383-10-1 with interest against one Ramaswami Chettiar and his five sons. The father and the sons constituted a joint Hindu family. In 1926 the father was adjudicated an insolvent by the Subordinate Judge of Tinnevely. The Court of the Subordinate Judge of Devakotta

(1) (1938) 1 M.L.J. 824.  
(3) (1933) 66 M.L.J. 277.

(2) (1926) I.L.R. 51 Mad. 342.  
(4) (1926) I.L.R. 49 Mad. 849 (F.B.).

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subsequently obtained seisin of the insolvency proceedings and the estate of the insolvent vested in the Official Receiver of Ramnad. The Official Receiver sought to bring the whole of the family properties to sale for the benefit of the creditors on the ground that the sons' shares in those properties were available for the discharge of the father's debts on the principle of Hindu law that sons are liable for their father's debts. The Official Receiver received bids for the various items of property in March 1932, but he did not accept any bid and adjourned the sale until 9th April 1932. Meanwhile the appellant had filed in the Court of the Subordinate Judge of Devakotta proceedings in execution of his decree and asked for the attachment of the shares of the sons in the family properties. An order was issued and the properties were attached. The appellant then filed an application asking the Court to restrain the Official Receiver from proceeding to sell the shares of the sons in the attached properties. By consent, on 9th April 1932, an order was passed by the Subordinate Judge allowing the Official Receiver to proceed with the sale of the properties, but subject to his paying five-sixths of the proceeds (the amount representing the sons' shares) into Court pending the decision of the main application. In pursuance of this order the Official Receiver sold the properties in June 1932 and realised a total sum of Rs. 17,400. Of this amount Rs. 14,500, representing the shares of the sons, was deposited in the Court of the Subordinate Judge. The Subordinate Judge having heard the parties held that the appellant was entitled to an order for payment to him of the Rs. 14,500 on the ground that the Official Receiver's power to sell the interests of the sons in the properties for the discharge of the father's debts was

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defeated by the order of attachment. The Official Receiver appealed to the District Judge who reversed the decision of the Subordinate Judge on the ground that the right to sell the properties had vested in the Official Receiver either at the time of adjudication or some time before the sale of the properties took place. The learned District Judge failed to understand the question which was before him. The fact that the right to sell the sons' shares had devolved on the Official Receiver was not the only factor. The present appeal is from the order of the District Judge.

The appellant contends that the Official Receiver merely stands in the shoes of the father. He says that as the attachment would be valid against the father and would prevent him from exercising his power to sell his sons' interests in the family properties in order to discharge his own debts, the attachment puts an end to the right of the Official Receiver to sell as he has no greater rights than the father. The Official Receiver does not attempt to support the decision of the District Judge on the ground given by the District Judge, but he says that there cannot be a valid attachment without the leave of the Insolvency Court and in this connection relies on the provisions of section 28 of the Provincial Insolvency Act, 1920. Before examining the effect of section 28 it will be convenient to refer to certain authorities which lay down principles which have application here.

In *Sat Narain v. Behari Lal*(1) the Privy Council held that when a Hindu is adjudicated an insolvent under the Presidency-towns Insolvency Act, 1909, his sons' interests in the joint family property do not thereby become vested in the Official Assignee, although

(1) (1924) I.L.R. 6 Lah. 1 (P.C.).

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under section 52 or in some other way their interests in the family property might be available for the payment of the father's debts. There is no provision in the Provincial Insolvency Act which renders the position any different from the position under the Presidency-towns Insolvency Act. In *Seetharama Chettiar v. Official Receiver, Tanjore*(1), a case governed by the Provincial Insolvency Act, a Full Bench of this Court expressly held that on the insolvency of a Hindu who is subject to the Mithakshara law, the insolvent's power to sell his sons' shares in the family property for paying his just and proper debts vests in the Official Receiver but that the sons' shares do not vest in him. This principle was re-affirmed by the Judicial Committee in *Sat Narain v. Sri Kishen Das. Same v. Bank of Upper India*(2). There, their Lordships pointed out that, although section 52 (2) (b) of the Presidency-towns Insolvency Act entitles the Official Assignee to exercise the father's powers to sell the share of his son in the family property to discharge his debts, such powers are subject to limitation.

Section 28 (2) of the Provincial Insolvency Act states :

"On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceedings, except with the leave of the Court and on such terms as the Court may impose."

(1) (1926) I.L.R. 49 Mad. 849 (F.B.).

(2) (1936) I.L.R. 17 Lah. 644 (P.C.).

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This section refers only to the property of the insolvent and the prohibition against the institution of legal proceedings without the leave of the Court refers to proceedings with regard to the insolvent's property. Although the right of an insolvent Hindu father to sell his son's share in the family property to discharge his own lawful debts vests in the Official Assignee or the Official Receiver as the case may be, it does not follow that proceedings cannot be taken in respect of the son's interest in the family property without the leave of the Insolvency Court. The right to sell the son's interest only exists so long as the son's interest in the family property exists. If the interest has been sold or if there has been a lawful attachment, which has the same effect, there exists no property over which the power can be exercised.

The right of a creditor to proceed to attach a son's property notwithstanding the father's insolvency has been recognized by two Benches of this Court. In *Gopalakrishnayya v. Gopalan*(1) RAMESAM and DEVADoss JJ. held that, notwithstanding that on the insolvency of a Hindu father joint with his son the power of the father to sell the son's share in the family property passed to the Official Receiver in the insolvency, the Official Receiver is not entitled to exercise that power after there has been an attachment of the son's share by a creditor. The attaching creditor is entitled to proceed with the execution by selling the share of the son. In *Manickam Pillai v. Vellayya Naicker*, Appeal Against Order No. 253 of 1936, a decision which has not yet been reported, KING and KRISHNASWAMI AYYANGAR JJ. had to consider the direct question whether section 28 (2) of

(1) (1926) I.L.R. 51 Mad. 342.

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the Provincial Insolvency Act prohibits an attachment of a son's share without the leave of the Insolvency Court. They held that it did not. The learned Judges in that case pointed out that all that the Official Receiver can do in respect of the property of the undivided sons of an insolvent is to exercise the power of the insolvent himself and sell that property to meet the insolvent's debt; but that power can be defeated at any time by any action taken by the sons themselves to dispose of their property or by any action taken by the sons' creditors against them. This principle was also recognized by KRISHNAN PANDALAI J. in *Chinna Veeriah v. Gurivi Reddi*(1). In that case, after the adjudication of the managing member of a joint Hindu family a creditor filed a suit on a promissory note executed by the managing member. The suit was dismissed as against the insolvent and the Official Receiver, but was decreed as against the other members of the joint family. It was argued on appeal that the suit could not even be maintained as against the other members of the family on the ground that on the insolvency of the managing member the power to sell the whole of the family property to discharge the debts of the family vested in the Official Receiver as the property of the insolvent. The Court held that the creditor was not resorting to any property of the insolvent or trying to interfere with the power of the Official Receiver. The creditor was only seeking to realize his debt from the share of the son in the family property and therefore the suit was maintainable.

The learned Advocate for the Official Receiver has quoted the decision of PANDRANG ROW J. (sitting alone) in *Baluswami Naidu v. Official Receiver*,

(1) (1933) 66 M.L.J. 277.



ARUNACHALAM *Madura*(1). The learned Judge does appear to  
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 SABARATNAM. have formed the opinion that in the case of the insol-  
 LEACH C.J. vency of a Hindu father, section 28 (2) of the Provincial  
 Insolvency Act does prevent the creditors of a son  
 from attaching the son's share in the family property  
 without the leave of the Insolvency Court. As I  
 have indicated, I do not share this view and, as I have  
 also indicated, it is opposed to the decisions of two  
 Benches of this Court : *Gopalakrishnayya v. Gopalan*(2)  
 and *Manickam Pillai v. Vellayya Naickar*, Appeal  
 Against Order No. 253 of 1936. The position is that  
 while the interest of the son remains unsold or  
 unattached the Official Assignee has the right to  
 sell the properties for the lawful debts of the  
 insolvent father, but unless he exercises his right he  
 may lose it and he loses it if the interest of the son is  
 attached by a creditor of the son.

For these reasons I hold that the decision of the  
 District Judge is wrong and the decision of the Sub-  
 ordinate Judge should be restored. Accordingly  
 I would allow the appeal with costs against the Official  
 Receiver here and below.

SOMAYYA J.—I agree.

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(1) (1938) 1 M.L.J. 824.

(2) (1926) I.L.R. 51 Mad. 342.

## APPELLATE CIVIL

*Before Sir Lionel Leach, Chief Justice, and  
 Mr. Justice Somayya.*

C. R. BALANAGAYYA CHETTI (RESPONDENT),  
 PETITIONER,

v.

CHETTI VARADARAJULU CHETTI AND ANOTHER  
 (APPELLANTS), RESPONDENTS.\*

*Code of Civil Procedure (Act V of 1908), O. XLV, r. 4—  
 Consolidation of suits under—Order for—Condition of—  
 One of questions only being common to two suits—Right to  
 order for consolidation in case of.*

Order XLV, rule 4, of the Code of Civil Procedure, which  
 provides for a consolidation of two suits, requires that the  
 questions for determination in both suits shall substantially  
 be the same. The fact that there is a question common to the  
 two suits does not entitle a petitioner to an order for their  
 consolidation when there are other questions which are not  
 common. The basis of an order for consolidation is that the  
 two suits involve substantially the same questions.

PETITIONS praying that the High Court will be pleased  
 to grant leave to the petitioner therein to appeal to  
 His Majesty in Council against the decrees of the High  
 Court, dated 20th October 1938 and passed in Appeals  
 Nos. 288 and 275 of 1934 preferred against the decrees  
 of the Court of the Subordinate Judge of Salem in  
 Original Suits Nos. 57 and 56 of 1933 respectively  
 (Original Suit No. 21 of 1929 and Original Suit No. 25  
 of 1928 on the file of the District Court of Salem);  
 and petition praying that in the circumstances stated  
 in the affidavit filed therewith the High Court will be  
 pleased to pass an order under Order XLV, rule 4, of

\* Civil Miscellaneous Petitions Nos. 5512 to 5514 of 1938.

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the Code of Civil Procedure for consolidation of the Appeals Nos. 275 and 288 of 1934 on the file of the High Court, Madras, preferred against Original Suits Nos. 56 and 57 of 1933 on the file of the Court of the Subordinate Judge of Salem (Original Suit No. 25 of 1928 and Original Suit No. 21 of 1929 on the file of the District Court, Salem).

*T. R. Venkatarama Sastri* and *B. V. Viswanatha Ayyar* for petitioner.

*A. Srirangachariar* for respondents.

LEACH C.J.

The ORDER of the Court was delivered by LEACH C.J.—We have before us two applications for certificates permitting appeals to His Majesty in Council and for an order consolidating the two appeals. The appeals were heard together and dealt with in one judgment. In the trial Court the suits were tried together, but there were separate judgments. The first suit was Original Suit No. 56 of 1933 of the Court of the Subordinate Judge, Salem, and was filed by the second respondent for the dissolution of a partnership with the petitioner and the taking of the partnership accounts. He valued his relief at Rs. 6,000. The petitioner denied that the partnership ever existed. The second suit was Original Suit No. 57 of 1933 of the Court of the Subordinate Judge, Salem, and was filed by the petitioner against both respondents. The first respondent is the father of the second respondent. In this suit the petitioner alleged that he had paid to the respondents various sums of money with the direction that they should be paid to one Raja Hanumappa Chetti in discharge of his indebtedness to him. The petitioner said that the monies had not been paid over to his creditor according to his direction and that he had been compelled to pay twice over. On this footing the petitioner asked for a decree for

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Rs. 6,436-5-0 against the first respondent and a decree for Rs. 802-8-0 against the second respondent. The suits were entirely different, but there was a common question, namely, whether there had been a settlement of matters in dispute between the petitioner and the respondents. It was said that the disputes had been settled by a third party and that the terms of the settlement had been embodied in a letter marked as Exhibit C. The Subordinate Judge held that there had been no settlement and dismissed the second respondent's suit, but in the petitioner's suit he found for the petitioner and granted him a decree for Rs. 7,924-4-4. The second respondent appealed to this Court in Appeal No. 275 of 1934 against the dismissal of his suit and both the respondents appealed in Appeal No. 288 of 1934 against the decree granted to the petitioner.

The judgment of this Court recognised that all the questions were not common to the two suits but allowed both the appeals on the ground that a settlement had in fact been arrived at. The petitioner contends that in these circumstances he is entitled to certificates permitting appeals to His Majesty in Council and an order consolidating the two appeals. Order XLV, rule 4, of the Code of Civil Procedure states that for the purposes of pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated; but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination. Totalling the values placed on the respective claims, the suits, if consolidated, would comply with the condition with regard to value, but this does not mean that the petitioner is entitled to

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certificates permitting him to appeal to the Privy Council. Order XLV, rule 4, requires that the questions for determination in both suits shall substantially be the same. Now there is one common question, namely, the question with regard to the settlement, but there are other questions which are not common and if the question with regard to the settlement is answered in the way that it was answered by the Subordinate Judge it would involve the decision of the questions which are not common. The fact that there is a common question does not entitle a petitioner to an order for consolidation when there are other questions which are not common. The basis of an order for consolidation must be that the two suits involve substantially the same questions. This is not the position here. Moreover, the rule says that suits "may" be consolidated. It does not say that they shall be consolidated. Therefore the Court is not bound to grant an order for consolidation. But apart from the question of discretion the present cases do not come within the rule, and this decides the matter.

The applications will be dismissed with costs in the first application (No. 5512 of 1938).

A.S.V.

# APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Somayya.*

T. S. GOPALASWAMI ODAYAR AND ANOTHER (FIRST AND  
SECOND RESPONDENTS), PETITIONERS,

1939,  
February 22.

v.

T. S. SWAMINATHA ODAYAR AND FIVE OTHERS,  
RESPONDENTS.\*

*Receiver—Sale of immovable property—Receiver appointed by  
Court for—Notice of sale to be given by—Period of,  
necessary.*

Receivers appointed by Court to sell immovable property should, unless there are special circumstances or they are otherwise directed by the Court, follow the rule laid down by the Code of Civil Procedure and give not less than thirty days' notice. It is, however, open to the parties to agree to a lesser period.

PETITION praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to issue an order setting aside the sale held by the Receiver, the fifth respondent herein, on 28th January 1939 by refusing the confirmation thereof, in Appeal No. 60 of 1930 preferred to the High Court against the order of the Court of the Subordinate Judge of Kumbakonam, dated 26th September 1932 and made in Interlocutory Application No. 695 of 1930 in Original Suit No. 22 of 1924.

*K. Rajah Ayyar and N. A. Krishna Ayyar for  
petitioners.*

*S. Ramanujam, T. R. Srinivasa Ayyangar, M. S.  
Venkatarama Ayyar, A. V. Viswanatha Sastri for  
K. Swaminatha Ayyar, K. R. Rangaswami Ayyangar*

\* Civil Miscellaneous Petition No. 551 of 1939.

GOPALASWAMI and K. Krishnaswami Ayyangar, T. R. Venkatarama  
v.  
SWAMINATHA. Sastri and G. Jagadisa Ayyar for respondents.

LEACH C.J. LEACH C.J.—The question before us is whether a sale which has taken place by the direction of this Court should be confirmed or whether a fresh auction should be ordered. The suit out of which this matter arises was filed for partition of the properties of a joint Hindu family. The final decree was passed on 5th May 1938 and the first defendant, who is objecting to the sale being confirmed, received as his share in the family estate immovable properties in the Tanjore district, but he was directed to pay to the fourth defendant in the suit Rs. 7,662-6-0 and to the sixth defendant Rs. 12,841-7-8, both sums to carry interest. In order to discharge the first defendant's liability to the fourth and sixth defendants a receiver was appointed to sell a portion of the lands allotted to him. The receiver gave notice that a sale would take place on the 28th January of this year. The sale took place on that date and the properties were sold to the sixth respondent for a sum of Rs. 31,250. The sale was expressly stated to be subject to the confirmation of the Court and the first defendant says that it should not be confirmed for a number of reasons, one of them being that adequate notice of the sale was not given. We consider that this contention is well-founded and it is not necessary for us to inquire into the truth of the other allegations.

An advertisement was published in "The Hindu" and "The Swadesamitran" on 19th January 1939, that is, nine days before the sale. The advertisement appeared only in one issue of the respective newspapers. The receiver sent copies of the sale announcement to a considerable number of public officials in the Tanjore

district with a view to the posting of the announcement on notice boards and also circularized about a hundred persons who he thought might be possible bidders. It is quite clear that these notices would not reach the addressees until the 20th or possibly later. It may safely be taken that generally notice was not received more than a week before the date fixed for the sale. We consider that in cases where immovable property is to be sold by order of the Court far more than a week's notice should be given. For a sale in execution of a Court decree the Code of Civil Procedure requires that not less than thirty days' notice shall be given. I may mention that the receiver fixed the upset price at Rs. 53,000, but he did not insist on any upset price at the sale and he knocked down the property to the sixth respondent for Rs. 31,250. Property values may have fallen, but where property which was valued at Rs. 1,26,000 in 1932, as in this case, is sold some six years later for Rs. 31,250, it would appear to be an inadequate price. But be this as it may, what the Court is really concerned with is the fact that the sale was not properly advertised and sufficient notice was not given. In these circumstances we refuse to confirm the sale.

We are of the opinion that receivers should, unless there are special circumstances or they are otherwise directed by the Court, follow the rule laid down by the Code of Civil Procedure and give not less than thirty days' notice. Of course the parties may agree to a lesser period.

The purchase price paid by the purchaser will be refunded to him by the receiver. The costs of the sale will be paid by the first defendant within a fortnight's time after the receiver has given intimation of the exact amount.

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The Court has been informed that a resale may not be necessary as the first defendant has come to an arrangement with the fourth defendant and the tenth defendant, who now represents the sixth defendant. If a resale is not necessary as the result of an arrangement between the parties, the receiver will nevertheless be entitled to his commission. By consent it is agreed that, in the event of there being no resale, the first defendant shall pay into Court as the receiver's commission a sum of Rs. 900. Liberty will be given to the receiver to apply to the Court in the event of this order not being complied with.

A.S.V.

### APPELLATE CIVIL.

*Before Mr. Justice Varadachariar and Mr. Justice  
Abdur Rahman.*

YERLAGADDA MAHALAKSHMI (PLAINTIFF),  
APPELLANT,

v.

MIDDE SOMARAJU AND SIX OTHERS (DEFENDANTS),  
RESPONDENTS.\*

*Transfer of Property Act (IV of 1882), sec. 101—Principle  
underlying section.*

Though section 101 of the Transfer of Property Act is generally invoked in cases where the rights of mesne encumbrancers come up for decision, the principle of the section is not limited to those cases. It only lays down a general rule of presumed intention and, where the later conveyance will be inoperative as against any intermediate right, whether

\* Appeal No. 245 of 1934.

founded on an encumbrance or on an attachment, the principle must be held equally to apply.

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APPEAL against the decree of the District Court of East Godavari at Rajahmundry in Original Suit No. 1 of 1932.

*B. Somayya* for *K. Bhimasankaram* for appellant.

*P. Somasundaram* for seventh respondent.

Respondents 1 to 6 were not represented.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—The plaintiff-appellant sued to recover money due under a mortgage deed for Rs. 3,000 executed in her favour by defendants 1 to 3 and their father on 13th March 1917. The seventh defendant was the principal contesting defendant. His defence was in the main founded upon certain events that happened in 1918 and 1920.

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In August 1918, a third party who had a money claim against the mortgagors attached some of the mortgaged items before judgment pending his money suit against them. On 2nd October 1918 the mortgagors purported to sell the mortgaged items to the plaintiff under the original of Exhibit I partly for the mortgage amount and partly for a further consideration of Rs. 441. When the money decree-holder attempted to bring the properties to sale on the basis of the attachment already made, the plaintiff filed a claim petition, Exhibit G, on 29th September 1920. In this petition she claimed one of two reliefs: she set up her sale and asked that the property should be released from attachment; in the alternative, she asked that, even if the sale should be held to be invalid as against the attaching decree-holder, the execution sale should be directed to be held subject to the mortgage in her favour. It appears from the endorsement

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on Exhibit G that the decree-holder himself had referred in his sale proclamation to the mortgage in the plaintiff's favour but suggested that it was supported by consideration only to the extent of Rs. 2,500. When the matter came on for final disposal the executing Court held that the sale, having been effected subsequent to the attachment, was invalid as against the decree-holder and the Court directed that the sale should be held subject to the mortgage "referred to by the decree-holder". The property was accordingly sold subject to the mortgage and purchased by the decree-holder himself, who in turn conveyed it to the seventh defendant as the result of a decree for specific performance of an agreement entered into between them. The result of the execution sale was that the plaintiff was deprived of possession of items 1, 2 and 4 to 6 of the plaint schedule and retained possession only of items 3 and 7. The plaintiff accordingly filed this suit for the recovery of the amount due under the mortgage, contending that, as the sale had failed, she was entitled to fall back upon the mortgage. The seventh defendant contended that the sale must be deemed to have extinguished the mortgage and that the subsequent events could not revive the plaintiff's claim under the mortgage. The learned Subordinate Judge gave effect to this contention and dismissed the suit. The seventh defendant raised other contentions which formed the subject-matter of the other issues raised in the case. One of them was a plea of partial discharge which forms the subject-matter of the fourth issue. Another was a claim that the plaintiff should give credit as against the mortgage amount and the interest due thereon for the profits realised by her during the time that she had been in possession of the properties sold to her. Finally, there was a question

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of the amount which the plaintiff was entitled to recover in view of the fact that she still retains as vendee two items of the hypotheca.

In so far as the lower Court dismissed the plaintiff's suit, we are unable to concur in its decision. The decision is mainly based on the judgment of this Court in *Daso Polai v. Narayana Patro*(1). We shall presently show that that case is distinguishable on its facts; but we think it right to add that we are, with all respect, unable to concur in some of the observations in that case. In the present case, the Order, Exhibit G-1, was clearly one under order XXI, rule 62, Civil Procedure Code. As we have already stated, the plaintiff put forward alternative claims in her claim petition, one on foot of the sale in her favour and the other on foot of the mortgage. The Court rejected the claim based on the sale but upheld the claim based on the mortgage. Neither party took steps to impeach that order and it became conclusive between the claimant and the decree-holder in the money suit. The Court accordingly purported to sell only the equity of redemption and the decree-holder (who became the auction purchaser) having purchased only the equity of redemption could convey only that interest to the present seventh defendant. In respect of these facts the position in *Daso Polai v. Narayana Patro*(1) was very different. The claim petition there was dismissed as preferred too late and, as no suit was brought by the claimant under Order XXI, rule 63, Civil Procedure Code, that order became final. It was in those circumstances impossible to imply any adjudication that the claim founded on the mortgage was well-founded. The learned Judges had therefore to hold that the reference to the mortgage

(1) (1933) I.L.R. 57 Mad. 195.

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in the sale proceedings amounted to nothing more than a notice to intending purchasers under Order XXI, rule 66, Civil Procedure Code. It was on that footing that they held that the Court-auction-purchaser was not precluded from contesting the existence or validity of the mortgage. On the facts of the present case, as we have set out above, neither the decree-holder in the money suit nor the Court-auction-purchaser nor the seventh defendant as the purchaser from him could go behind the order in the claim proceedings which upheld the mortgage claim. We may also point out that in *Daso Polai v. Narayana Patro*(1) the learned Judges laid stress on the fact that even in the claim petition the claim based on the mortgage was never put forward and that the claimant insisted that the mortgage had been discharged by the sale deed in his favour. The conclusion reached in that case that the mortgage had been extinguished has largely been based upon this ground. That ground also will not avail the seventh defendant in this case because, as already stated, the claim was put forward both on the mortgage and on the sale. The portion of the judgment with which we are unable to agree is the interpretation which the learned Judges have placed on section 101 of the Transfer of Property Act. With all respect, we think that in a case like the present it must be presumed that it is to the advantage of the mortgagee to keep his interest as mortgagee and his interest as purchaser of the equity of redemption distinct because of the intervening attachment against which his sale cannot be effective.

The question in this class of cases is not whether the sale is not effective as between the vendor and the

(1) (1933) I.L.R. 57 Mad. 195.

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vendee, but whether, there being the possibility of the sale proving ineffective as against a third party, it is not to the interest of the mortgagee not to treat his mortgage as extinguished by the sale. In the application of this principle of *presumed* intention, it makes no difference whether the third party is allowed to claim in preference to the sale on the ground of his being a subsequent encumbrancer or on the ground of his being an attaching decree-holder. If the decree in pursuance of which the attachment was made is paid off, the sale will of course stand as between the vendor and the vendee and the mortgage will be satisfied. But, if in pursuance of the attachment the properties are brought to sale in execution, the vendee is deprived of his rights under the sale to the extent to which the properties are sold in execution and we think that there is no meaning in saying that even to this extent the sale is operative as between the vendor and the vendee. This seems to us to be the principle of the decision in *Gopal Sahoo v. Gunga Pershad Sahoo* (1) which we are prepared to follow. The learned Subordinate Judge distinguished that case as a decision under the Civil Procedure Code of 1882, according to which he thought that a transfer pending an attachment was wholly void whereas under the present Code it is void only as against the rights enforceable under the attachment. This distinction drawn by the learned Judge is obviously erroneous. The law has always been that a transfer pending an attachment is void only as against the rights enforceable under the attachment.

The learned Counsel for the respondent drew our attention to a decision of the Allahabad High Court,

(1) (1882) I.L.R. 8 Cal. 530.

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*Lachman Prasad v. Lachmeswar Prasad*(1). With all respect, we are unable to follow that decision. The sale there was made to the father of the mortgagee and the father was a member of a joint Hindu family with the mortgagee. The sale deed directed that a portion of the consideration should be applied by the vendee to discharge the mortgage bond in favour of his son. The learned Judges observed that the father and the son must be treated as virtually one and the same person and that the direction to the father to pay off the mortgage must be treated as an extinction of the mortgage debt. We do not find any reference in the judgment to the principle of section 101 of the Transfer of Property Act. In the leading case of *Gokaldas Gopaldas v. Puranmal Prem-sukhdas*(2) their Lordships of the Privy Council referred to the practice prevailing in England of circumventing the doctrine of *Toulmin v. Steere*(3) by taking a conveyance of the equity of redemption in favour of trustees for the benefit of the prior mortgagee and added that in India it was unnecessary to resort to this conveyancing device and as a rule of equity the principle of presumed intention to keep the mortgage alive might be applied. It seems to us that what was done in the Allahabad case was practically the conveyancing device referred to by their Lordships of the Privy Council in *Gokaldas Gopaldas v. Puranmal Prem-sukhdas*(2) and, if even under the decision in *Toulmin v. Steere*(3) such a device would have prevented the extinction of the mortgage, we venture to think, with all respect, that it would be *a fortiori* so in this country.

(1) (1922) 20 A.L.J. 51; 66 I.C. 203. (2) (1884) I.L.R. 10 Cal. 1035 (P.C.).  
(3) (1817) 3 Mer. 210; 36 E.R. 81.

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Though section 101 of the Transfer of Property Act has generally been invoked in cases where the rights of mesne encumbrancers come up for decision, the principle of the section is not limited to those cases. It only lays down a general rule of presumed intention and where the later conveyance will be inoperative as against any intermediate right, whether founded on an encumbrance or on an attachment, the principle must be held equally to apply. In *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi*(1) this question had to be considered in respect of the effect of an intermediate attachment, as in the present case, and their Lordships observed (at page 164):

"It is idle to contend that there was any intention to extinguish the old mortgages for the benefit of the execution creditor or any purchaser at the sheriff's sale."

We must accordingly hold that the plaintiff's claim under the suit mortgage has not been extinguished by the subsequent sale and that it is enforceable in the events that have happened.

Mr. Somasundaram next contended that, according to the proper construction of the order (Exhibit G-1), the mortgage must be held to be valid only to the extent of Rs. 2,500. We do not think that is the effect of the order. The only point then decided was that as between the sale and the mortgage the Court upheld the mortgage and negatived the claim under the sale. This is made clear by the use of the words "mortgage referred to by the decree-holder" instead of words like "mortgage admitted by the decree-holder". The Court has now found that the mortgage was fully supported by consideration and nothing has been shown against the correctness of that finding.

(1) (1901) I.L.R. 29 Cal. 154 (P.C.).



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It remains to deal with two other questions raised by Mr. Somasundaram on behalf of the seventh defendant. He first contended that the lower Court's finding on the fourth issue was not in accordance with the evidence and that the issue should have been found in his client's favour. This relates to a plea of discharge, it being the seventh defendant's case that, in or about April 1925, he paid to the plaintiff a sum of Rs. 1,950 in full quit of so much of the mortgage debt as would be recoverable from the properties agreed to be purchased by the seventh defendant. Though the seventh defendant is not able to fix the exact date of payment, he states that the agreement between himself and the Court-auction-purchaser was in February 1925 and that the payment to the plaintiff was about two months later. Though the learned Subordinate Judge has not discussed in detail the evidence bearing upon this question, he has clearly indicated that he was not impressed by the evidence adduced in support of the plea of discharge. We have been taken by Mr. Somasundaram through the relevant portions of the oral evidence and we see no reason to come to a different conclusion. The seventh defendant has not thought fit to take any voucher for the payment of such a large sum of money nor has he even cared to insist upon the payment being endorsed on the mortgage bond. Even according to his version, the plaintiff promised to make the endorsement in due course and yet, after the plaintiff had failed to do so for more than a year, the seventh defendant never even thought fit to send any notice to the plaintiff complaining of her conduct. Further, the seventh defendant's evidence as to the circumstances under which the alleged payment was made and the manner in which he found the money to make the payment, is not at all convincing. It is

very doubtful if at or about this time he had the money to pay at all. D.W. 1, whose help has been availed of to support this story apparently because he had to receive some money from the plaintiff, is the son-in-law of the seventh defendant's brother and, assuming it to be true that he had to receive a sum of Rs. 200 from the plaintiff and did receive it about this time, we are not by any means satisfied that there is any connection between that transaction and the alleged payment by the seventh defendant to the plaintiff. The remaining witnesses who support this story of payment do not really seem to have had anything to do with the transactions between the plaintiff and the seventh defendant and, as one of them admits, it is probably the seventh defendant's local influence that has enabled him to get these witnesses to support his story. We must accordingly find against the seventh defendant on his plea of alleged discharge.

The second issue raised the question of the accountability of the plaintiff for the profits received by her from the lands which had been purchased by the seventh defendant. The law on this point is not by any means settled. We may observe in passing that the observations in *Muthammal v. Razu Pillai*(1) are not wholly reconcilable with the view taken in *Natesan Chettiar v. Ramalinga Chettiar*(2). As we do not propose to decide the question as an abstract question of law in this case, we do not think it necessary to refer to the cases in detail. We only wish to guard ourselves against being understood as concurring in all the observations in *Natesan Chettiar v. Ramalinga Chettiar*(2); for instance, the statement, that a purchase by a prior mortgagee in execution

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(1) (1917) I.L.R. 41 Mad. 513, 518.

(2) (1937) 46 L.W. 332.

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of a decree obtained in his suit without impleading the puisne mortgagee therein is a *nullity* and will not be effective even to pass the title of the mortgagor as against the puisne mortgagee, seems to us to have been too broadly made. In the circumstances of the present case, and in view of the fact that a petition has been filed before us on behalf of the seventh defendant for relief under the Madras Agriculturists Relief Act (IV of 1938), we think it best to hold that no accounting is necessary and that it would be more equitable to say that, after 23rd October 1920, the plaintiff is not entitled to claim interest as against the seventh defendant to the extent of the proportion of the mortgage debt recoverable from the properties in the seventh defendant's possession. In this view, there is no occasion, in our opinion, to deal with the petition under the Madras Agriculturists Relief Act (IV of 1938) either. As the plaintiff has become the owner of the equity of redemption in some of the items of the mortgaged property, the mortgage must be held to have been split up and the plaintiff will be entitled to a decree only for a proportionate share of the mortgage debt as against the properties purchased by the seventh defendant.

The parties are not able to agree before us as to the proportion. The lower Court will ascertain the amount due for principal and interest as per terms of the mortgage bond on 23rd October 1920, the date on which the seventh defendant's vendor became the Court-auction-purchaser; out of that amount, there will be a decree for sale of the properties purchased in that Court sale by the seventh defendant's vendor for an amount bearing the same proportion to the mortgage debt due on that date as the said properties

bear to the entirety of the mortgaged properties valued as on the date of the mortgage.

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The appeal is allowed and the case will be sent back to the lower Court to give effect to the above directions and pass a preliminary decree for sale for the amount ascertained as above. The plaintiff and the seventh defendant will pay and receive proportionate costs both here and in the Court below.

G.R.

### APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice  
Krishnaswami Ayyangar.

KALYANASUNDARAM PILLAI (JUDGMENT-DEBTOR—  
DEFENDANT), APPELLANT,

1938,  
October 6.

v.

VAITHILINGA VANNIAR (DECREE-HOLDER—SECOND  
PLAINTIFF), RESPONDENT.\*

*Provincial Insolvency Act (V of 1920), sec. 78 (2)—Period of pendency of insolvency—Exclusion of, in computing period of twelve years fixed by sec. 48 of Code of Civil Procedure (Act V of 1908)—Sec. 48, Civil Procedure Code, sec. 78 (2), Provincial Insolvency Act, and art. 182 of Limitation Act (IX of 1908)—Scope and effect of.*

The judgment-debtor in a suit in which a decree was passed on 29th August 1917 was adjudicated an insolvent on 21st December 1923. The adjudication was annulled on 19th August 1929. On 18th April 1935 the decree-holder filed a petition for the execution of the decree. It was the last of four execution applications filed after the period of twelve years from the date of the decree, each of them being within time

\* Appeal Against Order No. 482 of 1937.

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so far as article 182 of the Limitation Act was concerned. The petition of 18th April 1935 having been filed more than seventeen years and seven months after the date of the decree would be barred under section 48 of the Code of Civil Procedure unless the period during which the insolvency was pending could be excluded in computing the period of twelve years limited by that section. The question was whether by reason of section 78 (2) of the Provincial Insolvency Act the period during which the insolvency was pending had to be excluded in computing the period of twelve years fixed by section 48 of the Civil Procedure Code.

*Held* that the language of section 78 (2) of the Provincial Insolvency Act was comprehensive enough to affect and control the computation of the period of time limited by section 48 of the Code of Civil Procedure, that the period during which the insolvency was pending must therefore be excluded in computing the period of twelve years fixed by section 48 of the Code of Civil Procedure and that the execution petition of 18th April 1935 was in time.

If the law fixes a period of time after which a suit or other proceeding is not to be entertained by the Court, the period so limited is etymologically a period of limitation. It is in this sense that this expression has been used in section 78 (2) of the Provincial Insolvency Act. The period of twelve years limited by section 48 of the Civil Procedure Code is a "period of limitation" within section 78 (2) of the Provincial Insolvency Act. The applicability of that section is not confined to the period of limitation fixed by the Limitation Act only, but extends to other statutes which similarly enact periods of limitation in the sense explained.

Where it was also contended that the benefit of section 78 (2) of the Provincial Insolvency Act was exhausted as soon as it was once made use of and that if in respect of the first of the execution applications after the twelve years' period that section was applied and an exclusion of time was obtained for that application, no more exclusion was available for the second or any of the later applications, so much so that the later applications, though within the extended period sanctioned by section 78 (2) and though within the limit of time fixed by article 182 of the Limitation Act, must be held to be barred,

*held further* that the contention was based on a confusion of the respective functions of section 48, Civil Procedure Code, and section 78 (2) of the Provincial Insolvency Act and was unsustainable.

The true scope and effect of the provisions explained.

APPEAL against the order of the District Court of East Tanjore at Negapatam, dated 28th August 1937 and made in Execution Petition No. 9 of 1936 in Original Suit No. 282 of 1917, District Munsif's Court, Tanjore.

V. Ramaswami Ayyar for K. Rajah Ayyar for appellant.

R. Sundaralingam for respondent.

*Cur. adv. vult.*

The JUDGMENT of the Court was delivered by KRISHNASWAMI AYYANGAR J.—This appeal is directed against an order of the District Judge, East Tanjore, on an execution petition filed more than twelve years after the decree. He has entertained the petition and allowed execution to proceed, overruling the judgment-debtor's contention that it was barred by section 48 of the Civil Procedure Code. The judgment-debtor has appealed, and on his behalf the same contention has been repeated before us.

The decree was passed on 29th August 1917. The execution petition which is said to be barred was filed on 18th April 1935 more than seventeen years and seven months after the date of the decree. *Prima facie*, the execution petition would seem to be barred under section 48 of the Civil Procedure Code unless it could successfully be urged that a sufficient period could be excluded in computing the period of twelve years limited by the section. That, in fact, was the contention which has been accepted by the learned Judge. It would appear that the judgment-debtor

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was adjudicated an insolvent on 21st December 1923, and it was not until 19th August 1929 that the adjudication was annulled. During this period when the insolvency was pending, the decree-holder could not prosecute the petition except with the leave of the Court, or obtain any remedy on it. Acting on section 78 (2) of the Provincial Insolvency Act, the learned Judge excluded the period during which the insolvency was pending and held that the execution petition was in time. The learned Judge thus arrived at a conclusion which is in our opinion not only just in itself, but in perfect consonance with the law

Section 78 (2) says :

“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.”

The terms of the section are, we think, clear and definite and direct the exclusion of the time during which the insolvency was pending. This section, it may be remembered, was newly introduced into the Act of 1920 in order to mitigate the rigour of the restriction contained in section 16 (2) of the old Act corresponding to the present section 28 (2). Under the law as it stood before, it was held, in spite of this restrictive clause, that time ran, as once it began to run no subsequent disability or inability could stop it [*Sidhraj Bhojraj v. Alli Haji*(1)] in view of section 9 of the Limitation Act. We must be satisfied, if we are to accede to the appellant's contention, that

(1) (1922) I.L.R. 47 Bom. 244.

the legislative effort made in section 78 (2) to remove a patent hardship has failed of the very purpose for which it seems to have been made. Far from being so satisfied, we are satisfied the other way, that the effort has succeeded.

We have heard a good deal about what is and what is not a period of limitation. The argument is that section 48 of the Civil Procedure Code does not enact a rule of limitation; the period of twelve years fixed by it is not a “period of limitation” within section 78 (2) of the Provincial Insolvency Act; and its computation is therefore not governed by the exclusory provision of the latter section. We are quite unable to understand why the period of twelve years limited by section 48 of the Civil Procedure Code is not to be regarded as a period of limitation. It is undoubtedly so treated by the express language of article 181, column 1, of the Limitation Act which refers to “applications for which no period of limitation is provided elsewhere in this Schedule or by section 48 of the Civil Procedure Code, 1908”, and also by column 1 of article 182 which speaks of the “execution of a decree or order of any Civil Court not provided for by article 183 or by section 48 of the Code of Civil Procedure, 1908”. An attempt, and we think it a futile one, was made to distinguish between what was called the positive provision contained in section 3 of the Limitation Act which, it was conceded, is strictly a rule of limitation, and the negative language adopted in section 48, which, it was boldly asserted, is not a rule of limitation at all but merely a rule of procedure. While we see a difference in the manner of expression, we are quite unconvinced that that difference is calculated to mark or emphasize a distinction of substance or

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principle. It is not so much the form as the effect that matters. Both enactments in essence direct the Court to dismiss a suit or an application presented after the period prescribed, and why such a period is not properly described as a period of limitation passes our comprehension. If the law fixes a period of time after which a suit or other proceeding is not to be entertained by the Court, the period so limited is etymologically a period of limitation. It is in this sense, we think, that this expression has been used in section 78 (2) of the Act, and it follows that the time during which the insolvency was pending must be excluded in computing the period of limitation by whatever statute that period might have been fixed. The language is quite general, and refers to the period of limitation prescribed for any suit or application, and we are unable to find anything in the section which can support the argument that its applicability is confined to the period of limitation fixed by the Limitation Act only, and does not extend to other statutes which similarly enact periods of limitation in the sense explained.

It has been said that section 48 enacts a rule of procedure and not a period of limitation; *Jurawan Pasi v. Mahabir Dhar Dube*(1), per JWALA PRASAD J. in *Mahanth Krishna Dayal Gir v. Musst. Sakina Bibi*(2) and *Subbarayan v. Natarajan*(3). Indeed it may be truly said of all rules of limitation that they belong to the domain of adjectival, rather than that of substantive law. But it appears to us that this is in practice a profitless distinction at any rate for the present purpose; for it cannot be gainsaid that rules of limitation not only regulate the remedy but very often affect the

(1) (1918) I.L.R. 40 All. 198, 203.

(2) (1916) 20 C.W.N. 952, 956.

(3) (1922) I.L.R. 45 Mad 785, 792.

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substance of the right itself. A division of rules of law into substantive and adjectival law is an interesting study for students of jurisprudence, but it is likely to mislead if one's entire attention is centered on the label by itself. Nor are we wholly satisfied about the necessity or the correctness of classifying rules of limitation as falling under the two heads, viz., strict rules, and loose or secondary ones; per RAMESAM J. in *Subbarayan v. Natarajan*(1), the view expressed wherein has coloured the decision in *Ganeshi Lal v. Imtiaz Ali*(2) and is also noticeable in *Mohammad Abdul Karim v. Nawaz Singh*(3). On this point, we prefer to follow with respect the more logical, and to our mind the more convincing, view taken in *Shiam Karan v. The Collector of Benares*(4) where the learned Judges considered the effect of paragraph 11(3) of the Third Schedule of the Civil Procedure Code on the twelve years' rule contained in section 48. They held:

"There are two descriptions of limitation provided for applications for execution. One is that prescribed by the Indian Limitation Act, and the other is that provided in section 48 of the Code of Civil Procedure. Section 48 forbids the granting of an application after the expiry of twelve years from the date of the decree except in the cases specified in the section. This provision lays down a limitation to the right of the decree-holder to execute his decree as much as the Limitation Act prescribes different periods of limitation for repeated applications for execution. It seems to us that in clause (3) of paragraph 11 the words 'periods of limitation' are intended to apply to both kinds of restrictions placed upon the right of the decree-holder to take out execution of his decree, and in this sense that clause would be applicable to a case to which section 48 applies."

At page 124, however, occur observations which, if we may say so with respect, appear to have been made

(1) (1922) I.L.R. 45 Mad. 785, 798.  
(3) (1910) 13 O.C. 303.

(2) (1931) 8 O.W.N. 642.  
(4) (1919) I.L.R. 42 All. 118.

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under the influence of an earlier decision of the same High Court in *Jurawan Pasi v. Mahabir Dhar Dube*(1) and which have been elaborated by RAMESAM J. in the case already cited. It was observed :

"No doubt, in a strict sense, section 48 does not prescribe a period of limitation, but in a general sense it imposes a 'limitation' on the right of the decree-holder to apply for execution after the expiry of twelve years from the date of the decree. In that general sense, although by section 48 'a period of limitation' strictly so called is not prescribed, the twelve years rule in effect lays down the period of limitation applicable to an application for execution."

As we have said it is unnecessary, with all respect, to subscribe to a distinction which strikes us as too artificial in character especially when, as we think, it is not founded on any rational basis, not warranted by the statutory language, and not necessary for advancing the argument.

Whether the periods of limitation enacted in the Second Schedule of the Limitation Act are controlled in their application by the provisions of the sections of that Act only, or by other enactments, and *vice versa*, must always remain a matter of judicial interpretation. The observations of the learned Judges who decided the cases cited above must of course be understood with reference to the context in which they were made. Reference was made in particular to the following observation of SPENCER J. in *Subbarayan v. Natarajan*(2) :

"I am aware that article 181 of the schedule speaks of section 48, Civil Procedure Code, as providing 'a period of limitation'. But section 48 has nothing to do with the periods of limitation prescribed in the schedule to the Limitation Act, and has no connection with the process of computation of time according to the nature of the cause of action in particular suits. For, as may be seen by its position in the

(1) (1918) I.L.R. 40 All. 198.

(2) (1922) I.L.R. 45 Mad. 785, 792.

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Code of Civil Procedure in the part that is headed 'execution', it enacts a rule of procedure for all executing Courts. The effect of that rule is to put an absolute term of twelve years on the right of decree-holders to apply to execute their decrees. See the observations of JWALA PRASAD J. in *Mahanth Krishna Dayal Gir v. Musst. Sakina Bibi*(1). The only exceptions to the absolute term fixed by the section are those mentioned in proviso 2 to the section itself."

It was mainly on the strength of the last sentence above extracted that it was urged that section 78 (2) of the Insolvency Act should not be interpreted so as to control section 48 of the Civil Procedure Code, for to do so would be, it was urged, to introduce a further exception to that already contained in the section itself. We do not think that the learned Judge intended to lay down any such absolute proposition, and indeed he was not called upon to do it by anything in the facts then before him. He was examining a much more circumscribed proposition, viz., whether in computing the period of twelve years, it was permissible to exclude, under section 15 of the Limitation Act, the period of time during which the decree had been stayed by an order of Court. Both the learned Judges held that the section was inapplicable, as on its true construction the word "prescribed" found in it meant "prescribed in the Schedule to the Act", though these latter words do not occur in it. No wider rule could have been in the learned Judge's mind especially in view of the fact that he refers to *Shiam Karan v. The Collector of Benares*(2) without expressing any dissent in spite of its recognising an exception outside section 48, Civil Procedure Code. As regards the question whether this section enacts a mere rule of procedure, we have explained what, in our opinion, should be the correct approach.

(1) (1916) 20 C.W.N. 952.

(2) (1919) I.L.R. 42 All. 118.

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The very point we are now called upon to decide came up before the Chief Court of Oudh in a case reported as *Dhan Dei, Musammat v. Kashmiri Bank, Ltd., Fyzabad*(1) and it was there held that section 48 of the Code is controlled by section 78 (2) of the Provincial Insolvency Act. We are clearly of opinion that the language of the latter section is comprehensive enough to affect and control the computation of the period of time limited, whether by section 48, Civil Procedure Code, the Limitation Act or any other statute. It seems to us that the Legislature deliberately stopped short of referring in section 78 (2) to any statute or statutes in particular in order to prevent the generality of the purpose being in any manner limited to a particular statute or statutes. Otherwise, as we have said, injustice and hardship are bound to result.

There remains a minor point which was also taken by the appellant's Advocate. In this case there were four execution applications after the period of twelve years, the last of which was filed on 18th April 1935 as already mentioned. Each one was within time so far as article 182 is concerned. The argument on behalf of the appellant was, if we followed it aright, that if in respect of the first of the applications after the twelve years' period, section 78 (2) is applied and an exclusion of time is obtained for that application, no more exclusion is available for the second or any of the later applications. In other words, the benefit of the section is exhausted as soon as it is once made use of, so much so that the later applications, though within the extended period sanctioned by section 78 (2) and though within the limit of time fixed by article 182, must be held to be barred. We are of opinion that this

(1) (1931) I.L.R. 7 Luck. 397.

contention is based on a confusion of the respective functions of section 48, Civil Procedure Code, and section 78 (2) of the Provincial Insolvency Act. Though section 78 (2) is applicable to the periods limited by both section 48, Civil Procedure Code, and article 182, each of these two periods runs independently of the other. In the former case, the period of twelve years is extended by the addition of a further period equivalent to that during which the insolvency was pending. The ultimate point of time within which applications are to be made is thus determined. Within the enlarged time so obtained, it is open to the decree-holder to make any number of applications each one of which again has to be tested by reference to article 182. The two statutory provisions function independently of each other though, in deciding whether a given application is in time, regard must be had to both. It is only if it satisfies the conditions of both provisions that an application can be said to be in time. This being their true scope and effect, we must repel this contention as well.

In the result, this appeal fails and is dismissed with costs.

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## APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice  
Krishnaswami Ayyangar.

1939,  
February 10.

MAHARAJA OF VENKATAGIRI (DEAD) AND  
ANOTHER, (DEFENDANTS), APPELLANTS,

v.

RAJA RAJESWARA RAO AND ANOTHER, (PLAINTIFFS),  
RESPONDENTS.\*

*Hindu law—Impartible estate—Joint family owning an—  
Illegitimate son of member of—Maintenance out of estate—  
Right of illegitimate son to—Amount to be allowed to him for  
maintenance—Arrears of maintenance—Right to—Sudra  
caste—Family belonging to—Considerable property left to  
illegitimate son by his father—Effect of—Maintenance  
allowance to junior member and his purusha santhathi—  
Settlement deed by holder of impartible estate providing for—  
Illegitimate sons of member, if included in expression  
purusha santhathi and entitled to allowance.*

The Venkatagiri family belongs to a sub-division of the sudra caste and is an ancient one and of important standing in the Madras Presidency. Succession to the Venkatagiri estate is governed by the law of primogeniture. In 1878 the then Maharaja of Venkatagiri who had four sons (R, M, K and V) handed over the zamindari to his eldest son R. In 1889 M and K claimed that the Venkatagiri Zamindari was partible and that each of the brothers was entitled to a fourth share in the family properties. As a result of advice given to them by their father and friends of the family, M and K withdrew their claim to partition and recognized the zamindari to be impartible. V was then a minor. The terms of settlement were embodied in a deed dated 8th April 1889, V being represented therein by his father. Clause 5 of the deed recited, *inter alia*, that R and his successors to the estate should pay M, K and V a sum of Rs. 1,000 each per mensem for life and on the death of each of them a similar amount to his male descendants (*purusha santhathi*) by way of maintenance, the amount

\* Appeal No. 227 of 1936.

payable to each branch being Rs. 1,000 irrespective of the number of descendants. After V attained majority he recognized the validity of the deed of 8th April 1889. V never married but by a woman, who belonged to another sub-division of the sudra caste and who was in his continuous and exclusive keeping, he had two sons, the respondents. V died leaving a large estate to the respondents. The respondents sued to establish their right to maintenance out of the Venkatagiri Zamindari under the deed of 8th April 1889 and to recover the arrears of maintenance from the date of the death of their father (V) which occurred on 20th June 1920, nearly twelve years prior to the suit, or, in the alternative, to an allowance for maintenance under Hindu law.

*Held* :—(i) The intention of the parties to the deed of 8th April 1889 was to limit the maintenance allowance to legitimate descendants; and the respondents, who were the illegitimate sons of V, were not entitled to the maintenance claimed by reason of that deed.

(ii) Though the words *purusha santhathi* used in their widest sense would cover illegitimate descendants, the circumstances surrounding the execution of the deed of 8th April 1889 showed that it was not likely that the parties to it had any intention of making provision for illegitimate descendants and an examination of the document showed a clear intention to exclude them.

(iii) The respondents being members of the Venkatagiri family and there being no custom depriving junior members of that family of the right of maintenance, the respondents were entitled under Hindu law to maintenance out of the Venkatagiri estate, since provision had not already been made for them. The fact that their father left a large fortune to the respondents did not deprive them of their right to maintenance out of the Venkatagiri estate.

(iv) In fixing the amount of allowance for the respondents' maintenance the rule that an illegitimate son of a sudra is only entitled to a half of what a legitimate son is entitled to in his father's estate might be taken as a guide.

(v) The respondents were not disentitled to arrears of maintenance from the date of their father's death, as (a) the date was within the period of limitation, (b) the delay in filing the suit was due to their ignorance of their rights and (c) the

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appellant had not pleaded that he had been misled by the delay into the belief that the claim for maintenance had been abandoned.

Case-law on all points exhaustively reviewed.

APPEAL against the decree of the Court of the Subordinate Judge of Nellore dated 18th March 1936 and made in Original Suit No. 30 of 1932.

The material portions of the deed of 8th April 1889 are given in the judgment of his Lordship the CHIEF JUSTICE.

*Sir Tej Bahadur Sapru* (of the Allahabad Bar) (with him, *P. V. Rajamannar*, *K. Subba Rao* and *P. S. Raghavarama Sastri*) for appellants.—The plaintiffs (respondents) based their claim under three heads, (i) a deed of family settlement dated 8th April 1889, (ii) Hindu law as the illegitimate sons of Raja Venugopal and (iii) family and territorial custom.

The chief contention of the plaintiffs-respondents under the first head is that they come within the words *purusha santhathi* in the portion of the deed of 1889 providing for an allowance for maintenance to Raja Venugopal and his *purusha santhathi*. In deciding whether that contention is sustainable, the Court must have regard to the circumstances surrounding the execution of that deed. The Venkatagiri family is one of the premier families of the Madras Presidency. The members of the family were sudras. The late Maharaja of Venkatagiri had seven sons, three of whom had been given in adoption. Rajagopala Krishna was his eldest son and Raja Venugopal one of his younger sons. Raja Venugopal did not marry but, by a woman belonging to a sub-division of the sudra community, he had two illegitimate sons, the plaintiffs in the suit. No doubt a different rule of succession may and does exist with respect to illegitimate sons of sudras. In 1889 there was no illegitimate son of any member of the family in existence. Raja Venugopal was himself a minor at the time and unmarried. The Court cannot presume that the Maharaja of Venkatagiri and the Maharaja of Bobbili who brought about the settlement of 1889 would have thought that Raja Venugopal might have illegitimate sons when he grew up and as a result would have provided for them also in the deed of 1889.

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[Counsel read the material portions of the deed and proceeded:]

In *Wilkinson v. Adam*(1) illegitimate children were in existence when the document was executed and they were also recognized as the children of the persons referred to in the document. So Lord ELDON held that those illegitimate children satisfied the character of children contemplated by the document. *Prima facie* the word children means only legitimate children unless excluded by the circumstances of the particular case; see *Norton on Deeds*, page 465. In *Dorin v. Dorin*(2) it was held that the position and status of the testator could be looked into to find out whether the testator, by the use of the general word children, intended to include illegitimate children also. In *Megson v. Hindle*(3) SCRUTTON L.J. held that, if illegitimate children should also be included, there must be clear indication on the face of the document. The English rule is embodied in section 100 of the Indian Succession Act. If this is the state of the law in India also, there is nothing in the fact that the parties belonged to the sudra caste to take the case out of the normal interpretation to be given to the words *purusha santhathi* which mean "male descendants". The fact that among sudras illegitimate sons get a share of the inheritance or maintenance, as the case may be, will not entitle a Court to introduce that consideration in interpreting the words *purusha santhathi* in a will or deed. The learned editor of the latest edition of Mayne's Hindu Law expresses the correct view at page 424. Moreover, there cannot be a coparcenary between legitimate and illegitimate sons. An illegitimate son can be a member of a joint family. He cannot become a coparcener in a joint family; see Mayne's Hindu Law, latest edition, page 690. The *Balrampur* case [*Sher Bahadur v. Ganga Bakhsh Singh*(4)] is directly in point. There, a high class Kshatriya had an illegitimate son by a Mahomedan concubine. The word that was used by the testator was "aulad" which means issue. Nevertheless their Lordships held that the illegitimate son did not come within the meaning of the word "aulad" in the document. The question is not whether an illegitimate son

(1) (1812) 1 V. & B. 422; 35 E.R. 163, 179 and 181.

(2) (1875) 33 L.T. 281. (3) (1880) 15 Ch. D. 198, 205.

(4) (1913) L.R. 41 I.A. 1; I.L.R. 36 All. 101.

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is not entitled to a right of inheritance or to maintenance but whether an illegitimate son would come within the expression *purusha santhathi* in the deed of 1889. The point is not whether illegitimate children could not also come within the meaning of *purusha santhathi* but whether there is anything in the document in question to compel the Court to include illegitimate children also. In *Barlow v. Orde*(1), the antecedents of the testator and the life which he was leading and the number of illegitimate children he had during his lifetime compelled their Lordships to come to the conclusion that the illegitimate children were intended to be benefited.

The deed of 1889 uses the following words, viz., marriage, respectability of the family, adoption, gnati, *bharya* (wife) and *aurasa* son. It uses the same words "*purusha santhathi*" in connection with the succession to the impartible estate itself. If the construction put forward on behalf of the plaintiffs is accepted, this deed must be held to provide for a perpetual line of illegitimate children. The words "*purusha santhathi*" have been construed in the following cases: *Rajah of Ramnad v. Sundara Pandiaswami Thevar*(2), *Guruvajammah v. Ramaswamy Mudaliar*(3) and *Mrs. M. E. D'Cruz v. Nagiah Naidu*(4). See also *Subramania Chetti v. Mahalakshmi Ammal*(5). *Vellaiyappa Chetty's* case [*Vellaiyappa Chetty v. Natarajan*(6)] and *Subramania Ayyar v. Rathnavelu Chetty*(7) are not cases that deal with the construction of words in a deed but they are cases which deal with the rights flowing from Hindu law. Further, if illegitimate sons are included, the estate created in their favour by the deed of 1889 will offend against the rule in the *Tagore* case [*Jatindra Mohan Tagore v. Ganendra Mohan Tagore*(8)] because women are generally excluded and in some contingencies they would get only a half of what they would be entitled to under the Hindu law.

[KRISHNASWAMI AYYANGAR J.—If a deed creates no estate in immovable property but only a charge, would it offend against the rule in the *Tagore* case(8) ?]

- (1) (1870) 13 M.I.A. 277. (2) (1914) 27 M.L.J. 694, 718.  
(3) (1920) 13 L.W. 513, 515. (4) (1928) 55 M.L.J. 683, 689.  
(5) A.I.R. 1933 Mad. 659.  
(6) (1931) L.R. 58 I.A. 402; I.L.R. 55 Mad. 1.  
(7) (1917) I.L.R. 41 Mad. 44 (F.B.).  
(8) (1872) L.R. Sup. I.A. 47; 9 Beng. L.R. 377.

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Even if it is held that no estate was created by the deed of 1889 but that there was only a contract between the parties to the deed from which certain rights flowed in favour of the "*purusha santhathi*" of Venugopal, the deed would offend against the rule laid down in *Chandi Churn Barua v. Sidheswari Debi*(1) as creating a succession of beneficiaries contrary to Hindu law. See also the *Kalahasthi* case [*Rajah Venkatappa Nayanam Varu v. Rajah Thimma Nayanam Varu*(2)]. The case of *Khajeh Solehman Quadir v. Salimullah Bahadur*(3) relied on by the lower Court does not touch the above point. The contention of the respondents in the lower Court, that the words "*purusha santhathi*" in the deed were words of surplusage and as such could be ignored, would, if accepted, leave only a life estate in favour of Venugopal. Their contention that the deed was in effect a grant for Venugopal for life and thereafter to his "male descendants" is contrary to their pleadings. The contention that the deed in effect created successive life estates in favour of Venugopal and his male descendants is contrary to the words used in the deed. Even if the deed is construed as creating two independent gifts, one to Venugopal, and another to his "male descendants", the second gift will be invalid since it excludes females and thereby creates a new line of succession unknown to Hindu law. In *Madhavrao Ganpatrao v. Balabhai Raghunath*(4) this aspect was not discussed. See *Ganesh Chunder Dhur v. Lal Behary Dhur*(5). In *Rajah of Ramnad v. Sundara Pandiyasami Tevar*(6) the deed was upheld because the words used therein did not exclude the collaterals. If the contention is that no estate is created but that only an interest in an estate is created, even then it would be bad since the charge that is created is heritable (and is also claimed in the pleadings as being heritable) and as such it could not come under the exceptions laid down in the *Tagore* case(7).

*S. Srinivasa Ayyangar* (with him, *U. Ramachandran*) for respondents.—The deed of 1889 did not create an estate. No kind of property was conveyed or granted to Venugopal or his male

- (1) (1888) L.R. 15 I.A. 149, 154; I.L.R. 16 Cal. 71.  
(2) (1914) 27 M.L.J. 656, 664.  
(3) (1922) L.R. 49 I.A. 153; I.L.R. 49 Cal. 820.  
(4) (1927) L.R. 55 I.A. 74; I.L.R. 52 Bom. 176.  
(5) (1936) L.R. 63 I.A. 448.  
(6) (1918) L.R. 46 I.A. 64; I.L.R. 42 Mad. 581.  
(7) (1872) L.R. Sup. I.A. 47; 9 Beng. L.R. 377.

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descendants, nor was there any kind of limitation imposed. The male descendants were entitled to maintenance from the estate. The deed of 1889 assumed the same and the grant of maintenance was merely undertaken by the Raja to be paid out of the estate. The mere creation of a charge does not amount to the creation of an estate, as would be seen from section 100 of the Transfer of Property Act; see *Gobinda Chandra Pal v. Dwarka Nath Pal*(1) and *Jawahir Mal v. Indomati*(2). The *Tagore* case(3) contemplated a grantor and a grantee. If parties to a family settlement who are entitled to certain rights under their personal law or custom merely declare such rights in a deed of family settlement, there would be no transfer of interest in favour of anyone; see *Rani Mewa Kumar v. Rani Hulas Kumar*(4) and *Khunni Lal v. Gobind Krishna Narain*(5). To such a case the rules that apply to gifts and bequests do not apply. In *Bhimnath Missir v. Srimati Tara Dai*(6) a grant to lineal descendants was held to include daughters also, though under Hindu law daughters could not take when sons existed. It could not be suggested that their Lordships of the Privy Council were not aware of the interpretation that is sought to be put on the *Tagore* case(3) when they decided the later cases. See also *Aulad Ali v. Ali Athar*(7) and *Rajah of Ramnad v. Sundara Pandiyasami Tevar*(8). Annuity or corrody was not unknown to Hindu jurisprudence and maintenance grants and grants of a similar nature have been held not to offend against the rule in the *Tagore* case(3). See *Jatindra Mohan Mandal v. Ghanashyam Chowdhury*(9). The case of *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*(10) grafted another principle on the *Tagore* case(3) by holding that the creation of a new line of trusteeship contrary to the line of devolution of property was invalid. To the same effect is *Ganesh Chunder Dhur v. Lal Behary Dhur*(11). Since Venugopal died after the

(1) (1908) I.L.R. 35 Cal. 837, 843.

(2) (1914) I.L.R. 36 All. 201.

(3) (1872) L.R. Sup. I.A. 47; 9 Beng. L.R. 377.

(4) (1874) L.R. 1 I.A. 157.

(5) (1911) L.R. 38 I.A. 87, 102; I.L.R. 33 All. 356.

(6) (1929) 33 C.W.N. 837 (P.C.).

(7) (1927) I.L.R. 49 All. 527, 531 (F.B.).

(8) (1918) L.R. 46 I.A. 64; I.L.R. 42 Mad. 581.

(9) (1922) I.L.R. 50 Cal. 266.

(10) (1899) I.L.R. 23 Mad. 271 (P.C.).

(11) (1936) L.R. 63 I.A. 448.

passing of the Hindu Transfers and Bequests Act (I of 1914), Venugopal's son could, in any event, claim under the deed. In *Mullab Hasan v. Mt. Kalawati*(1) it was held that a maintenance charge created in favour of descendants did not amount to a transfer of interest.

*Santhathi* is not a word of art. It means heirs and not descendants, though the literal meaning may be descendants; see *Rajah of Ramnad v. Sundara Pandiaswami Thevar*(2) and *Guruvajammah v. Ramaswamy Mudaliar*(3). The male heirs had to be ascertained according to law on the death of Venugopal. If Venugopal had an illegitimate son as heir, he would be the "purusha santhathi" of Venugopal. No stigma is attached to a *dasiputra*. Decisions have gone to the extent of saying that a "dasi" is almost a wife and her chastity is a modified form of chastity. Her status and the status of a *dasiputra* are well recognised. After Venugopal's death the grant became a heritable allowance and would be distributed according to law. In a sense, the deed created a heritable charge on the estate. There were two gifts in the deed, one to the brothers for their lives, and the other to their male heirs after their death. A separate obligation was assumed by the estate as regards the latter. The several clauses referred only to the manner in which the allowances were to devolve, and had nothing to do with the main gift to the three brothers for their lives.

The clause conferring a maintenance allowance to Venugopal and the clause relating to a maintenance allowance to his male heirs are interposed by gifts in favour of the other two brothers. The restrictions imposed upon the clause conferring the grant to the brothers are repeated in the clause relating to the sons. If it was intended to be a single grant, the deed could have mentioned Venugopal and his "purusha santhathi". In *Madhavrao Ganpatrao v. Balabhai Raghunath*(4) the Privy Council, in construing clauses in a similar document, held that an independent grant was created in favour of male heirs. The words "purusha santhathi" have been used at least in two different senses in different places in the deed. There is no inflexible rule that a term

(1) A.I.R. 1933 All. 934, 937. (2) (1914) 27 M.L.J. 694, 718.

(3) (1920) 13 L.W. 513, 515.

(4) (1927) L.R. 55 I.A. 74; I.L.R. 52 Bom. 176.

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should be interpreted in the same way wherever it occurs in the same document; see *Edyvean v. Archer. In re Brooke*(1). English rules of construction are not applicable to India. Section 100 of the Indian Succession Act has not been made applicable to Hindus. The rule of construction must be according to the personal law of the parties. In this view *Ganesh Chunder Dhur v. Lal Behary Dhur*(2) really supports the respondents' case.

The next point to be considered is whether in an impartible estate a junior member is entitled to a maintenance allowance. Before 1883 the law in this Presidency was that he was entitled to maintenance. He was also held entitled to prohibit an alienation by the holder of the estate of any part thereof except for reasonable purposes. In the *First Pittapur* case [*Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards*(3)] it was held that a zamindar could alienate the zamindari except in cases where by custom it was impartible and inalienable. Then the Legislature intervened and passed the Madras Impartible Estates Act (II of 1904) by which it restored the joint family law in impartible estates. It also recognized the existence of a general custom in zamindari regulating their affairs. The Venkatagiri Zamindari was impartible by custom. The deed of 1889 should be construed in the light of the law as it then stood. By the Amending Act of 1934 rights of maintenance were given to certain members of the family. Through a series of fluctuations the legal position to-day is the same as it was in 1889. The right of maintenance which existed had not been taken away by Act II of 1904.

[Counsel discussed the *Second Pittapur* case [*Rama Rao v. Rajah of Pittapur*(4)], *Bajinath Prasad Singh v. Tej Bali Singh*(5), *Protap Chandra Deo v. Jagadish Chandra Deo*(6), *Ulagalum Perumal Sethurayar v. Subbalakshmi Nachiar*(7) and *Shibaprasad Singh v. Prayagkumari Debee*(8), and proceeded :—]

- (1) [1903] A.C. 379. (2) (1936) L.R. 63 I.A. 448.  
(3) (1899) L.R. 26 I.A. 83; I.L.R. 22 Mad. 383.  
(4) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.  
(5) (1921) L.R. 48 I.A. 195; I.L.R. 43 All. 228.  
(6) (1927) L.R. 54 I.A. 289; I.L.R. 54 Cal. 955.  
(7) (1935) 71 M.L.J. 1, 17.  
(8) (1932) L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399.

The effect of the *Second Pittapur* case(1) has been taken away by the latest pronouncement of the Privy Council in *Collector of Gorakhpur v. Ram Sundar Mal*(2). At least so far as this Presidency is concerned the joint family status in impartible estates has been fully restored in the matter of alienation, maintenance and succession by survivorship. It restored the law laid down in *Sartaj Kuari's* case [*Sartaj Kuari v. Deoraj Kuari*(3)] and the *Challapalli* case [*Raja Yarlagadda Mallikarjuna Prasada Nayadu v. Raja Yarlagadda Durga Prasada Nayadu*(4)]. The right of maintenance is the only substitute for the deprivation of the right of the junior members to have a partition of the estate; see *Commissioner of Income-tax v. Zamindar of Chemudu*(5). So the Court has to find out the law relating to the right to maintenance of illegitimate sons of junior members unaffected by the decision in the *Second Pittapur* case(1) and the cases that followed it. The junior members were entitled to maintenance. So also were their illegitimate sons. See the following cases: *Naraganti Achammagaru v. Venkatachalapati Nayanivaru*(6), *Chuoturya Run Murdun Syn v. Saheb Parkulad Syn*(7), *Naragunty Lutchmeedavamah v. Vengama Naidoo*(8), *Venkatachella Reddiar v. Venkatachella Reddiar*(9), *The Udayarpalayam* case (High Court) [*Kachi Yuva Rangappa Kalakka Thola Udayar v. Kachi Kalyana Rangappa Kalakka Thoda Udayar*(10)], *The Udayarpalayam* case (Privy Council) [*Kachi Kalyana Rangappa Kalakka Thola Udayar v. Kachi Yuva Rangappa Kalakka Thola Udayar*(11)], *Thirumal Rao Saheb v. Rangadani Rao Saheb*(12), *Palani Chetty v. Rathina Chetty*(13), *Subramania Ayyar v. Rathnavelu Chetty*(14) and *Ramalinga Muppan v. Pavadai Goundan*(15). The only difference between the right of an illegitimate son and that

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- (1) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.  
(2) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.  
(3) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.  
(4) (1900) L.R. 27 I.A. 151; I.L.R. 24 Mad. 147.  
(5) (1934) I.L.R. 57 Mad. 1023, 1025.  
(6) (1881) I.L.R. 4 Mad. 250. (7) (1857) 7 M.I.A. 18.  
(8) (1861) 9 M.I.A. 66. (9) (1909) 20 M.L.J. 394.  
(10) (1901) I.L.R. 24 Mad. 562.  
(11) (1905) L.R. 32 I.A. 261; I.L.R. 28 Mad. 508.  
(12) (1912) 23 M.L.J. 79. (13) (1914) 26 M.L.J. 208.  
(14) (1917) I.L.R. 41 Mad. 44 (F.B.).  
(15) (1901) I.L.R. 25 Mad. 519, 521.

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of a legitimate son is that, in the case of the former, it is an inchoate right that becomes perfected on the death of his father while, in the case of the latter, it is a right that exists even during his father's lifetime. Coparcenary between them exists even during the lifetime of the father. Coparcenary cannot spring into existence on the death of the father. The blood relationship enables the putative father to succeed to his illegitimate sons under certain circumstances. The illegitimate son of a junior member may not be a coparcener in the wider joint family but he would certainly be a member of the wider joint family. In view of the fact that his putative father was a coparcener in the wider joint family, maintenance is awarded to the illegitimate son of a junior member. In the *Mitakshara*, the chapter dealing with illegitimate sons comes before the chapter dealing with obstructed heritage. The case of *Vellaiyappa Chetty v. Natarajan*(1) set at rest the controversy as regards the status of an illegitimate son. Learned Hindu Judges of this High Court have held that his status is not inferior to that of an adopted son. Moreover, a document should be construed with reference to the law as it stood when it was executed; see *Abdul Aziz Khan v. Appayasami Naicker*(2).

[Counsel referred to the evidence as regards the family and territorial custom to prove that junior members and their illegitimate sons in a number of zamindaris were granted maintenance and proceeded:]

In determining the amount to be allowed for maintenance the fact that the grantee had separate property of his own should not be considered except in gross cases; see *Lingayya v. Kanakamma*(3) and *Kodandarami Reddi v. Chenchamma*(4).

*Sir Tej Bahadur Sapru* in reply.—The words “*purusha santhathi*” must have the same meaning wherever they occur in the deed. The necessary implication in the deed is that illegitimate sons are excluded. Even if the word “*santhathi*” is construed to be a term of art, as is stated to be suggested in *Rajah of Ramnad v. Sundara Pandiaswami Thevar*(5) and

- (1) (1931) L.R. 58 I.A. 402; I.L.R. 55 Mad. 1.  
(2) (1903) L.R. 31 I.A. 1, 9; I.L.R. 27 Mad. 131.  
(3) (1913) I.L.R. 38 Mad. 153. (4) (1929) 59 M.L.J. 531.  
(5) (1914) 27 M.L.J. 694.

*Guruvajammah v. Ramaswamy Mudaliar*(1), its meaning could be controlled by the terms in the deed; see *Mrs. M. E. D'Cruz v. Nagiah Naidu*(2).

The right to receive maintenance is property which is included in the term estate. It cannot be transferred. It is heritable. It is a right of property. On page 643 of Stroud's Judicial Dictionary an estate is stated to include lien, charge, encumbrance, etc. See also Halsbury's Laws of England, Hailsham Edition, Vol. 27, page 572. Real estate is defined to include a rent charge. In Halsbury's Laws of England, Hailsham Edition, Vol. 28, page 169, a rent charge is defined as a right created by an instrument, deed, will or codicil. See also *Madhavrao Ganpatrao v. Balabhai Raghunath*(3). So it offends against the rule in the *Tagore* case(4). Under no circumstances could an illegitimate son be termed a coparcener, i.e., a person who gets a right by birth and not by death. In *Baijnath Prasad Singh v. Tej Bali Singh*(5) the Privy Council regretted that the word coparcener should have been introduced into the Hindu law conception of a joint family. An illegitimate son gets a right only on the death of his putative father. After the *Second Pittapur* case(6) the theory of a notional coparcenary existing in an impartible estate was introduced and this was recognized in *Baijnath Prasad Singh v. Tej Bali Singh*(5). The case of *Vellaiyappa Chetty v. Natarajan*(7) is inapplicable to the present case, because it was not a case of an impartible estate and also because in that case there was a son in existence who could claim a partition which gave the illegitimate son also a right to a share in the estate. In *Shibaprasad Singh v. Prayagkumari Debee*(8) the coparcenary was held to exist only to the limited extent of determining succession and not for any other purpose. The *Second Pittapur* case(6) is still good law in so far as it deals with the class of persons who alone are entitled to maintenance. [THE CHIEF JUSTICE.—When the view that a joint family existed is restored by *Collector of Gorakhpur v. Ram Sundar*

- (1) (1920) 13 L.W. 513. (2) (1928) 55 M.L.J. 683.  
(3) (1927) L.R. 55 I.A. 74, 76, 79; I.L.R. 52 Bom. 176.  
(4) (1872) L.R. Sup. I.A. 47; 9 Beng. L.R. 377.  
(5) (1921) L.R. 48 I.A. 195, 211; I.L.R. 43 All. 228.  
(6) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.  
(7) (1931) L.R. 58 I.A. 402, 407; I.L.R. 55 Mad. 1.  
(8) (1932) L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399.

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*Mal*(1) is not the right of maintenance also restored along with it ?]

Not necessarily. The *Second Pittapur* case(2) governs that point and it is re-affirmed in *Maharajah of Jeypore v. Vikarama Deo Garu*(3).

[THE CHIEF JUSTICE.—That decision was prior to *Collector of Gorakhpur v. Ram Sundar Mal*(1).]

The point whether an illegitimate son who had considerable property was entitled to maintenance or not was left open in *Vellaiyappa Chetty. v. Natarajan*(4). Such a person is not entitled to maintenance. In any event the fact that the respondents inherited more than fifteen lakhs of rupees from their putative father disentitles them to any substantial maintenance from the appellants.

*Cur. adv. vult.*

#### JUDGMENT.

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LEACH C.J.—This appeal raises the question of the right of illegitimate sons of a member of a joint family of the sudra caste to maintenance out of the family estate when it is impartible. The suit was filed by the respondents in the Court of the Subordinate Judge of Nellore to establish their status as illegitimate sons of Venugopal, the paternal uncle of the appellant, the Maharaja of Venkatagiri, and the right which they claimed to maintenance out of the Venkatagiri Zamindari, the succession to which is governed by the law of primogeniture. They averred that they were entitled under a deed of family settlement, dated 8th April 1889, to an allowance of Rs. 1,000 per mensem from the death of their father, which occurred on 20th June 1920, but their claim did not rest on the deed alone. They said that

(1) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.

(2) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.

(3) (1919) 37 M.L.J. 188, 191; 24 C.W.N. 226 (P.C.).

(4) (1931) L.R. 58 I.A. 402, 407; I.L.R. 55 Mad. 1.

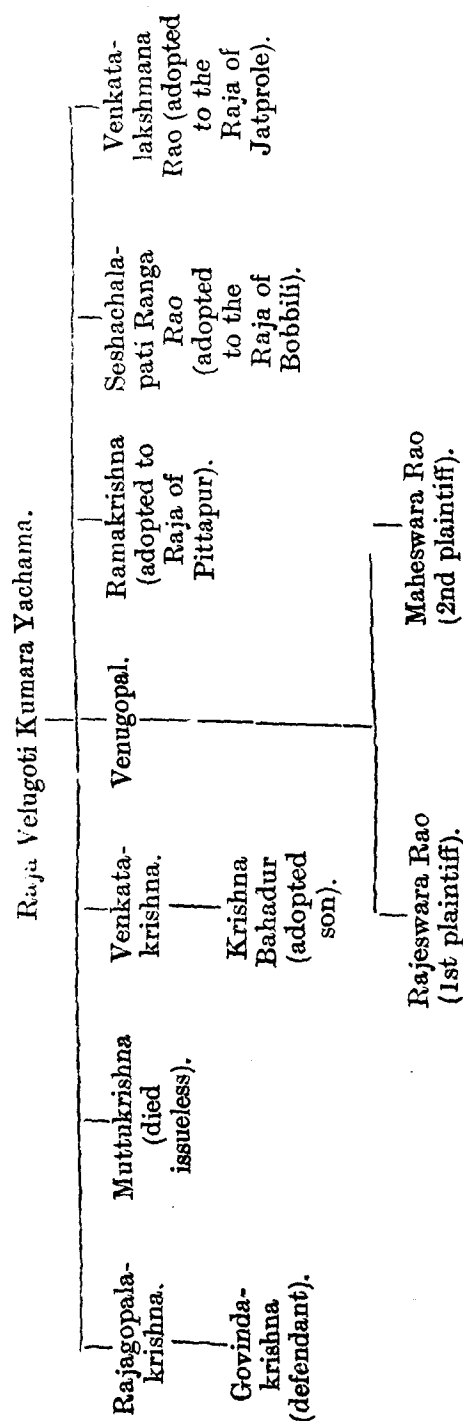
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irrespective of the deed they were entitled to an allowance for maintenance by custom and also under Hindu law. The appellant refused to recognise the respondents as the illegitimate sons of his uncle and said that even if they were his sons they were not entitled to be maintained by the estate. The Subordinate Judge held that the respondents had established their status as illegitimate sons of Venugopal and their claim to maintenance from the estate at the rate of Rs. 1,000 per mensem under the deed of 8th April 1889, but found against them in so far as their case was based on custom and Hindu law. The Subordinate Judge also held that the respondents were entitled to an allowance from the date of the death of their father and included in the decree a direction to the appellant to pay the respondents Rs. 1,44,000 as arrears of the allowance. The allowance was made a charge on the estate. The appellant accepts the finding of the trial Court on the question of status, but challenges the decision that they are entitled to maintenance out of the estate.

The Venkatagiri family belongs to the Velama community, a sub-division of the sudra caste. In the year 1878 the estate was in the possession of Raja Velugoti Kumara Yachama, who had seven sons, three of whom had before that year been given in adoption. The relationship of the parties will be more readily appreciated if I reproduce the pedigree set out in the judgment of the lower Court: [See next page.]

In October 1878 Raja Velugoti Kumara Yachama handed over the estate to his eldest son Rajagopalakrishna. In 1889 Muttukrishna and Venkatakrishna, the two brothers nearest in age to Rajagopalakrishna, claimed that the Venkatagiri Zamindari was partible and that the four brothers who remained in the

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family were each entitled to a fourth share in the family properties. As the result of advice given to them by their father and friends of the family, Muttukrishna and Venkatakrishna withdrew the claim to partition and recognised the zamindari to be impartible, but the settlement involved the payment of large sums of money to the three younger brothers, Muttukrishna, Venkatakrishna and Venugopal. Venugopal was then a minor. The terms were embodied in the deed of 8th April 1889, Venugopal being represented by his father. It will be necessary to refer to certain of the provisions of the deed in detail, but for the purpose of the narrative its terms may be summarised as follows :

(i) The Venkatagiri estate should be treated as impartible and should descend along the eldest line of descent ; (ii) Muttukrishna, Venkatakrishna and Venugopal should each receive a sum of Rs. 5,81,252-11-10 ; (iii) Muttukrishna, Venkatakrishna and Venugopal should also receive a sum of Rs. 40,000 each for the purpose of purchasing or building a residence ; (iv) Venkatakrishna and Venugopal being unmarried should each receive Rs. 15,000 for marriage expenses ; (v) Rajagopalakrishna and his successors to the estate should pay to Muttukrishna, Venkatakrishna and Venugopal a sum of Rs. 1,000 each per mensem for life and on their death a similar amount to their male descendants by way of maintenance, the amount payable to each branch being Rs. 1,000 irrespective of the number of descendants.

In 1890 a suit was filed on behalf of Venugopal impeaching the settlement and reiterating the claim that the estate was partible. This suit was filed shortly before Venugopal came of age. On his attaining majority he withdrew the suit and recognised the validity of

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the deed of 8th April 1889. The settlement therefore became final so far as the brothers were concerned.

Venugopal never married, but by one Saraswathamma he had two sons, the respondents. Saraswathamma was of the balija community, also a subdivision of the sudra caste. Under Hindu law the illegitimate son of a sudra by a *dasi*, that is a Hindu concubine in his continuous and exclusive keeping, is entitled not only to maintenance but to a share in the estate of his father, the share being half that of a legitimate son. It is conceded that Saraswathamma's status was that of a *dasi*. The first respondent was born on 24th September 1907. There is no evidence when the second respondent was born, but he is the younger of the two. On 28th August 1916 Venugopal executed a will under which he left Rs. 5,000 to a nephew, Rs. 5,000 to a niece, Rs. 5,000 to Saraswathamma for the construction of a house, Rs. 5,000 to one servant, five sums of Rs. 200 each to other servants, a garden in Venkatagiri to two nephews, and the remainder of his estate to the respondents. Venugopal died on 20th June 1920 and probate of his will was obtained. The record of the probate proceedings shows that the net estate was sworn at Rs. 10,04,518-14-5. Charges of maladministration against one of the executors were made subsequently and it would appear that a large portion of the property which Venugopal left was lost. The suit out of which this appeal arises was instituted on 4th July 1932, just over twelve years after the death of Venugopal, but it was within time as the period of limitation expired during the Court vacation and the suit was filed on the re-opening day. The reason given for the delay in filing the suit was that the respondents were not aware of their rights until 1930.

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Two grounds have been urged in support of the appeal. In the first place it is said that the Subordinate Judge erred in holding that the respondents are entitled to maintenance under the deed. In the second place it is said that, even if the deed can be read as conferring a right to maintenance on the illegitimate sons of Venugopal, it is bad because it offends against the first rule laid down in the *Tagore* case [*Jatindra Mohan Tagore v. Ganendra Mohan Tagore*(1)] in that by limiting the right to maintenance to male descendants it creates an estate unknown to Hindu law. The respondents, in addition to denying the validity of the appellant's contentions, say that the trial Court erred in holding that they are not entitled to maintenance by reason of custom, and maintain their plea that they have a right to maintenance under Hindu law irrespective of custom. The appeal therefore raises all the questions raised in the trial Court except that relating to the status of the respondents.

The provisions with regard to maintenance are contained in clause 5 of the deed of settlement. Owing to criticism of the translations of the document which appear in the printed record the Court had this clause re-translated. The new translation has been accepted by both parties as being correct and, in view of the importance of the clause, I will set it out in full :

" As the said Venkatagiri estate is impartible and as the aforesaid Sri Muttukrishna Yachendrulu Varu, Sri Venkatakrishna Yachendrulu Varu and Sri Venugopala Krishna Yachendrulu Varu and their *purusha santhathi* (male issue, progeny or descendants) are entitled to get allowances from the said estate, we, the aforesaid the Honourable Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C.I.E., Rajah of Venkatagiri, Sri Muttukrishna Yachendrulu, Sri Venkatakrishna Yachendrulu and,

(1) (1872) L.R. Sup. I.A. 47; 9 Beng. L.R. 377.



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on behalf of Sri Venugopala Krishna Yachendrulu, his father and guardian, Sri Rajah Velugoti Kumara Yachama Nayudu Bahadur, C.S.I., appointed the Rajah of Bobbili, namely, Sri Rajah Rao Venkata Swetachalapati Ranga Rao Bahadur Varu, as mediator, to determine the amount of allowance to be given to the said Sri Muttukrishna Yachendrulu, Sri Venkatakrishna Yachendrulu and Sri Venugopala Krishna Yachendrulu and to their *purusha santhathi*. The above-named mediator, fully taking into consideration the status of all the parties, the condition and respectability of the estate and all other matters which are fit to be considered, decided that the said Honourable Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C.I.E., Rajah of Venkatagiri, should pay allowances in the manner fixed herein below :—

In pursuance of that decision, the said Hon'ble Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C.I.E., Rajah of Venkatagiri, and those that succeed to the rule after him, undertake and accept by means of this document to pay allowances every month from the income of that estate, from 6th April 1889 in the manner stated below :—

Sri Muttukrishna Yachendrulu shall be paid at the rate of rupees one thousand (Rs. 1,000) per month for the rest of his life; Sri Venkatakrishna Yachendrulu at the rate of rupees one thousand (Rs. 1,000) per month for the rest of his life; and the minor Sri Venugopala Krishna Yachendrulu, until his minority ceases, by his father and guardian, Sri Rajah Velugoti Kumara Yachama Nayudu Bahadur, C.S.I., and, after his minority ceases, the said Venugopala Krishna Yachendrulu (himself), rupees one thousand (Rs. 1,000) per month, for the rest of his life: The said Hon'ble Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C.I.E., Rajah of Venkatagiri, and the Rajahs that rule in Venkatagiri after him, shall, after the lifetime of the said Sri Muttukrishna Yachendrulu, pay his *purusha santhathi* (male issue, progeny, or descendants) in perpetuity in the manner aforesaid the same allowance, that is, at the rate of rupees one thousand (Rs. 1,000) per month. After the life of the said Sri Venkatakrishna Yachendrulu his *purusha santhathi* shall, in perpetuity, be paid the same allowance amount, that is, at the rate of rupees one thousand

Rs. 1,000) per month, in the aforesaid manner. After the life of the said Sri Venugopala Krishna Yachendrulu, his *purusha santhathi*, shall, in perpetuity, be paid the same allowance amount, that is, at the rate of rupees one thousand (Rs. 1,000) per month, in the aforesaid manner. But, if, at any time, in any one of the branches of the said Sri Muttukrishna Yachendrulu, Sri Venkatakrishna Yachendrulu and Sri Venugopala Krishna Yachendrulu, there be more than one male member, such males, and their *purusha santhathi* shall take the said allowance amount of rupees one thousand in proportion to their respective shares, in the same manner as they would respectively take their other properties separately by way of inheritance according to the Hindu law. Moreover, if in any of the aforesaid three branches of our family, viz., the branch of Sri Muttukrishna Yachendrulu, the branch of Venkatakrishna Yachendrulu, and the branch of the minor Sri Venugopala Krishna Yachendrulu, any male should die without *purusha santhathi*, either by way of *aurasa* or by way of adoption, the allowance amount that was being received by the person who so died without *purusha santhathi* shall go to the gnatis (agnates) who are nearest to him in his own branch according to Hindu law. Should the aforesaid person who dies without *purusha santhathi* leave any widow or widows and maintenance has to be paid to them, only the nearest gnatis who get the allowance of such deceased person in the manner mentioned above, shall be liable therefor. Further, should any of the said three branches of our family become extinct by the total absence of *purusha santhathi* either by way of *aurasa* or by way of adoption, the allowance being paid to that branch shall be stopped subject to the condition that, if there be then a widow or widows left of the last male who died in that branch, one-half of the allowance of rupees one thousand (Rs. 1,000) that was being paid to that male, viz., rupees five hundred (Rs. 500), shall be paid to the widow or widows of the person who so died without *purusha santhathi* as maintenance for life. But should there be female *santhathi* in that branch, it shall not be paid to such female *santhathi*, nor shall it be paid to the *purusha santhathi* of the other two branches or to either of the branches, or in any other manner. As all the matters regarding the expenses incurred from out of the income of the said Venkatagiri estate for Sri Rajah Velugoti Kumara Yachama Nayudu Bahadur, C.S.I., one

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of the parties to this document and the father of the other parties have been settled by the registered Kararnamas entered into mutually on 17th and 19th of March 1888 between our father, Sri Rajah Velugoti Kumara Yachama Nayudu Bahadur, C.S.I., and the Hon'ble Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.O.I.E., Rajah of Venkatagiri, those matters relating to the said Rajah Sri Velugoti Kumara Yachama Nayudu Bahadur, C.S.I., are not referred to in this document. But, as the share and allowance of the minor Sri Venugopala Krishna Yachendru have been settled under this document, the Hon'ble Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.O.I.E., Rajah of Venkatagiri, need not pay for the expenses of Sri Venugopala Krishna Yachendru mentioned in the Kararnamas aforesaid, dated 17th and 19th March 1888."

The Subordinate Judge was of the opinion that the parties did not contemplate the exclusion of illegitimate offspring and, as the words *purusha santhathi* were wide enough to cover illegitimate issue, he considered that the deed should be so construed. I agree with the Subordinate Judge that the intention of the signatories to the document must be gathered from the document itself read in the light of the surrounding circumstances, but I am unable to accept his conclusion.

Now what were the surrounding circumstances? The family was an ancient one and of important standing in the Madras Presidency. Its adult members had all agreed that its estate was impartible and that this should be recognized in a formal deed in which provision should be made for the maintenance of the younger sons and their descendants. While it is true that under Hindu law, especially where sudras are concerned, an illegitimate son is in a very different position to that occupied by an illegitimate son under English law, it cannot be said that illegitimacy is regarded with favour in a respectable Hindu family

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and this much was conceded on behalf of the respondents. In *Subramania Chetti v. Mahalakshmi Ammal*(1) KRISHNAN PANDALAI J. stated that the respect for marriage and the social position of legitimate children is no less among Hindu sudras than among brahmins and Englishmen. In this case, the Court had to consider a deed of settlement in which the settlor had used the word *santhathi*. As he was sitting alone the learned Judge did not decide whether it would cover illegitimate issue of a sudra but observed that as a mere question of construction he would hesitate to say that a share of the inheritance being awarded to illegitimate children of sudras in certain cases was necessarily conclusive of the meaning of a sudra donor of property as to what he meant when he talked of his *santhathi*. In the circumstances surrounding the execution of the deed in the present case it is not likely that the members of the family who subscribed their names to the document had any intention of making provision for illegitimate descendants and, in my opinion, an examination of the document shows a clear intention to exclude them.

As is indicated in the accepted translation of clause 5 of the deed, the words *purusha santhathi* mean "male issue, progeny or descendants" (*purusha* = male, *santhathi* = issue, progeny or descendants) and therefore, used in their widest sense, the words would cover illegitimate descendants. But it is inconceivable that they should be used in this sense in the first operative clause of the document. This part relates to the succession to the *gaddi* and reads as follows:

"As this Venkatagiri estate is impartible and should descend along the eldest line of descent, the said estate, the

(1) A.I.R. 1933 Mad. 659.

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immovable properties connected therewith and the other immovable properties acquired with the income of the said estate should be enjoyed by the oldest of us, four brothers, and the heir of the aforesaid Sri Rajah Velugoti Kumara Yachama Nayudu Bahadur, C.S.I., namely, the aforesaid the Hon'ble Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.O.I.E., Rajah of Venkatagiri, and after him by his son, son's son and other male descendants (*purusha santhathi*) in the eldest line of descent, that if there be no *aurasa* or adopted sons in the branch of the said Hon'ble Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.O.I.E., Rajah of Venkatagiri, and if that branch should become extinct without male issue, such near heir in the eldest line as would, according to law and custom, get the family impartible properties and his descendants should enjoy the same and that as regards all these, namely, the said estate, all the properties connected therewith, rights, powers and privileges, the rulers for the time being shall, according to law and custom, completely possess all the privileges and enjoy them, subject only to the condition of paying allowances to the other members of our family, suitably to their respective status out of the income from the estate and the properties."

Not only is it inconceivable that the members of this ancient family should contemplate an illegitimate son ascending the *gaddi* but it will be observed that the direction with regard to the succession in the event of Rajagopalakrishna's branch becoming extinct follows the use of the words "if there be no *aurasa* or adopted sons". That an illegitimate son can never be *aurasa* is accepted.

Where a word is used in a document in one sense the same meaning must be given to it where it appears elsewhere in the document unless it is evident from the context that a different meaning should be put upon it. The learned Advocate for the respondents had very little to say with regard to the meaning to be attached to the words *purusha santhathi* as used in that part of the document which I have just quoted, but

urged that the expression should be given its widest meaning where it appears in clause 5. There is nothing in the context which warrants the assumption that the words are used in clause 5 in a different sense from the sense in which they are used in the first operative clause. On the contrary, there is again clear indication that the intention was to limit the maintenance allowance to legitimate descendants. The fifth clause provides that, where a male member of any of the three branches should die without *purusha santhathi* "either by way of *aurasa* or by way of adoption", his allowance should go to the *agnates* who are nearest to him in his own branch. The clause further provides that in the event of any branch becoming extinct by the total absence of *purusha santhathi* "either by way of *aurasa* or adoption", the allowance to that branch shall cease altogether, subject to the widow of the last male member of the branch being entitled to receive half the amount for her lifetime. The express reference to *aurasa* issue or sons by adoption leaves no doubt in my mind that the parties only contemplated the right of maintenance being conferred upon legitimate descendants and that they used the words *purusha santhathi* in this sense. Accordingly I hold that the respondents are not entitled to maintenance out of the income of the Venkatagiri estate by reason of the deed of 8th April 1889.

My learned brother shares the opinion which I have expressed with regard to the effect of the deed and therefore it is not necessary to discuss the question whether the document is invalid because it creates an estate unknown to Hindu law. Therefore I will pass on to consider whether the respondents are entitled to maintenance by reason of custom or the provisions of Hindu law, and, if they are, the amount to be paid to them. The claim based on custom does not call

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for much discussion as we concur in the finding of the Subordinate Judge on this question and accept his reasons. The evidence adduced by the respondents is not sufficient to prove either a family or territorial custom and there is evidence in contradiction. It would appear that some zamindaris, mostly Oriya, have made provision for the maintenance of illegitimate children of members of their families, but even if the evidence could be regarded as being sufficient to prove a custom in Oriya zamindaris (these are now for the most part included in the Province of Orissa), it does not follow that such a custom exists in the Velama zamindaris, which, as the Subordinate Judge has pointed out, are numerous in the Kistna, Godavari, Vizagapatam, Nellore and Chittoor districts of the Madras Presidency. In *Hurpurshad v. Sheo Dyal*(1) Sir BARNES PEACOCK in delivering the judgment of the Judicial Committee observed that a custom is a rule which in a particular family or in a particular district has from long usage obtained the force of law. It must be ancient, certain and reasonable and, being in derogation of the general rules of law, must be construed strictly. A custom in a Hindu family to grant maintenance to illegitimate sons could not be regarded as being unreasonable. In fact, the custom would only be following Hindu law. But custom can only be relied on where it is ancient and certain and the evidence here falls very short of proving this. I have no hesitation in concurring in the finding of the learned Subordinate Judge that a custom has not been proved in the present case.

The question whether an illegitimate son is entitled under the Hindu law to maintenance out of an impartible estate is one of considerable difficulty as

(1) (1876) L.R. 3 I.A. 259; 26 W.R. 55.

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the authorities are not in agreement. The question of the right to maintenance of an illegitimate son of a member of a family owning a partible estate has in the main been settled by the decision of the Privy Council in *Vellaiyappa Chetty v. Natarajan*(1). In that case a suit was instituted for past and future maintenance by the illegitimate sons and an illegitimate daughter of one P. M. A. Muthiah Chetty, a sudra by caste, by a continuous concubine. The father who was joint with his uncles and uncles' sons died leaving no separate estate, but the joint family possessed considerable properties. The Privy Council held that the illegitimate son of a sudra by a continuous concubine has the status of a son and in such circumstances he is entitled as a member of the family to maintenance out of joint property in the hands of the collaterals. In delivering the judgment of the Privy Council Sir DINSHAH MULLA observed :

"On a consideration of the texts and the cases on the subject their Lordships are of opinion that the illegitimate son of a sudra by a continuous concubine has the status of a son, and that he is a member of the family; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son; that where the father has left no separate property and no legitimate son, but was joint with his collaterals, as in the present case, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is entitled as a member of the family to maintenance out of that property; that his position in this respect is analogous to that of widows and disqualified heirs to whom the law allows maintenance because of their exclusion from inheritance and from a share on partition, and the Court may, as in their case, award not only future but also past maintenance so far as it is not barred by the law of limitation and may direct the same to be secured by a charge on the joint family property."

(1) (1931) L.R. 58 I.A. 402; I.L.R. 55 Mad. 1.

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The right to maintenance of an illegitimate son of a sudra was here recognised on the ground that he was a member of the joint family. Their Lordships, however, expressed no opinion on the question whether an illegitimate son would have a right to maintenance out of joint family property if the father left separate property or if such property was not sufficient for his maintenance.

Until 1888 it was accepted that the Mitakshara did not permit the holder of an ancestral impartible estate to alienate it without regard to the interests of the joint family, but in that year, in the case of *Sartaj Kuari v. Deoraj Kuari*(1), the Privy Council held that there was a right of alienation under the Mitakshara where there was a custom of primogeniture. It was said that the eldest son did not become a co-sharer with his father in the estate. In *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards*(2), which is known as the *First Pittapur* case, and in *Protap Chandra Deo v. Jagadish Chandra Deo*(3) the Privy Council held that the holder of an impartible zamindari had the right to alienate it by will in the absence of a custom to the contrary. The *First Pittapur* case(2) resulted in the passing of an Act called the Madras Impartible Estates Act, 1902, to restrict the powers of alienation. This Act was replaced by the Madras Impartible Estates Act, 1904, which declares certain estates in this Presidency to be impartible—the Venkatagiri estate is one of them—and provides that the proprietor of an impartible estate shall be incapable of alienating it or binding it by his debts beyond his own lifetime, unless the alienation

(1) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.  
(2) (1899) L.R. 26 I.A. 83; I.L.R. 22 Mad. 383.  
(3) (1927) L.R. 54 I.A. 289; I.L.R. 54 Cal. 955.

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shall be made or the debt incurred under circumstances which would entitle the managing member of a joint Hindu family, not being the father or the grandfather of the other coparceners, to make an alienation of the joint property or incur a debt binding on the shares of the other coparceners independently of their consent. The Act also declares what are permissible alienations. It is not necessary to consider the provisions of the Act in this respect. All that need be said is that the decisions in *Sartaj Kuari's* case(1) and the *First Pittapur* case(2) are no longer effective in this Province so far as the estates mentioned in the Act are concerned. By the Madras Impartible Estates Second Amendment Act, 1934, sections 9 to 15 were added to the Act of 1904. Section 9 mentions the persons who are entitled to maintenance out of an impartible estate governed by the Act. The respondents do not come within the section, but section 12 declares that nothing contained in the Act shall affect the right to maintenance out of an impartible estate and the income thereof of any other relations of the proprietor or any previous proprietor under any law or custom for the time being in force. Therefore the Act leaves untouched any rights which the respondents may have under Hindu law. In fact no contention to the contrary has been raised.

In *Rama Rao v. Rajah of Pittapur*(3), which is known as the *Second Pittapur* case, the Judicial Committee considered the right to maintenance out of an impartible estate. The plaintiff had been adopted by the previous holder of the Pittapur zamindari. The late Raja died leaving a will under which he bequeathed the estate to the defendant who claimed to be his

(1) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.  
(2) (1899) L.R. 26 I.A. 83; I.L.R. 22 Mad. 383.  
(3) (1919) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.

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*aurasa* son. The plaintiff did not admit that the respondent was the son of the late Raja and averred that the estate had been the joint property of himself, his father and the late Raja. On this basis he claimed to be maintained out of the estate. His claim was, however, disallowed. Lord DUNEDIN who delivered the judgment of their Lordships observed that the right to maintenance out of an impartible estate, so far as founded on or inseparable from the right of coparcenary, began where coparcenary began and ceased where coparcenary ceased. An impartible zamindari was the creature of custom, and it was of its essence that no coparcenary existed. This being so, the basis of the claim was gone, inasmuch as it was founded on the consideration that the plaintiff was a person who, if the zamindari were not impartible, would be entitled as of right to maintenance. This proposition did not negative the doctrine that there were members of the family entitled to maintenance in the case of an impartible zamindari. Just as impartibility was the creature of custom, so custom might and did affirm a right to maintenance in certain members of the family. The Board considered that the right of sons to maintenance in an impartible zamindari had been so often recognised that it would not be necessary to prove the custom in each case and expressly approved of the following passage from the judgment of the Calcutta High Court in *Nilmony Singh Deo v. Hingoo Lall Singh Deo*(1) :

"We can find no invariable or certain custom that any below the first generation from the last Raja can claim maintenance as of right."

It was not necessary, however, for the purpose of deciding the *Second Pittapur* case(2) to decide whether

(1) (1879) I.L.R. 5 Cal. 256, 259.  
(2) (1918) L.R. 45 I.A. 148 ; I.L.R. 41 Mad. 778.

the right to maintenance of junior members of the family depended upon custom or to what extent custom had been proved and this was recognised in the next case to which I shall refer.

In *Bairnath Prasad Singh v. Tej Bali Singh*(1), which was decided three years after the *Second Pittapur* case(2), the Judicial Committee had to consider the question of succession to an ancestral impartible estate in a joint Hindu family governed by the Mitakshara and it was held that succession followed the ordinary rule, the eldest member of the senior branch succeeding in preference to the direct lineal descendants of the common ancestor if the latter were more remote in degree. The judgment was delivered by Lord DUNEDIN and, to use the language of Lord BLANESBURGH in *Collector of Gorakhpur v. Ram Sundar Mal*(3), it definitely negatived the view that the decisions in *Sartaj Kuari's* case(4) and the *First Pittapur* case(5) were destructive of the doctrine that an impartible estate could be in any sense joint family property, a view apparently implied in these cases. It was recognised that an impartible zamindari could be the ancestral property of the joint family, but the person "to occupy the *gaddi*" was the eldest of the senior branch. In the course of his judgment Lord DUNEDIN referred to the *Second Pittapur* case(2) in these terms (page 211) :

"Turning next to *Rama Rao v. Rajah of Pittapur*(2) it must be always remembered that the claim for maintenance as put forward was made, not against the head of the family of which the claimant was a member, but against the donee, who on the claimant's own allegation was a stranger to the family. It obviously could not, therefore, succeed unless it

(1) (1921) L.R. 48 I.A. 195 ; I.L.R. 43 All. 228.  
(2) (1918) L.R. 45 I.A. 148 ; I.L.R. 41 Mad. 778.  
(3) (1934) L.R. 61 I.A. 286 ; I.L.R. 56 All. 468.  
(4) (1888) L.R. 15 I.A. 51 ; I.L.R. 10 All. 272.  
(5) (1899) L.R. 26 I.A. 83 ; I.L.R. 22 Mad. 383.

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was of the nature of a real right. Now, it could only be of the nature of a real right, no proceedings having taken place before the estate got into the hands of the donee, if the maker of the claim had before that event been a person who was in some way an actual co-owner of the estate, and any observations which go to the question of maintenance apart from the question of real right may be treated as *obiter dicta*."

There is here a statement by Lord DUNEDIN himself that his observations in the *Second Pittapur* case(1) which go to the question of maintenance "apart from the question of real right" might be treated as *obiter dicta*. Lord DUNEDIN in the course of his judgment referred to the right of junior members of a joint family ruled by the Mitakshara law down to three generations to maintenance from the head of the family until partition takes place. He also referred to those persons who by reason of personal disqualification are not allowed to inherit but are given maintenance in lieu—the idiot, the blind from birth and the mad man—and to the class which is entitled to maintenance on the ground of personal relationship, namely, the widow, the parent and the infant child. It would appear that in using the words "apart from the question of real right" Lord DUNEDIN had in mind such rights as these. The judgment clearly recognised that an impartible zamindari could be regarded as the ancestral property of the joint family and therefore negatived the statement in the *Second Pittapur* case(1) that it was of the essence of an impartible zamindari that no coparcenary existed.

The question of the right to maintenance out of an impartible estate was raised in *Protap Chandra Deo v. Jagadish Chandra Deo*(2). In this case the respondent brought a suit against the appellant claiming an

(1) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.  
(2) (1927) L.R. 54 I.A. 289; I.L.R. 54 Cal. 955.

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estate known as the Dalbhum Raj and mesne profits, the claim being made under the will of the last holder. The family was undivided and governed by the Mitakshara. The estate was impartible and there was a custom of lineal primogeniture. The trial Court and the Calcutta High Court on appeal declared the respondent's title under the will, but held that the appellant who was a member of a junior branch of the family was entitled to maintenance out of the estate at the rate of Rs. 1,200 per mensem. Both parties appealed to the Privy Council which dismissed the appeal by the appellant, but allowed the respondent's appeal on two grounds: first, on the ground that the maintenance of the appellant and his family was already provided for by a khorposh (maintenance) grant of certain villages to his predecessors, which villages were still in his possession, and secondly, on the ground that he had failed to establish a right to maintenance by custom or relationship or in any other way. The second ground was based on the remarks of Lord DUNEDIN in the *Second Pittapur* case(1) without reference to what was said in *Baijnath Prasad Singh's* case(2). The question was also referred to in *Shibaprasad Singh v. Prayagkumari Debee*(3) where Sir DINSHAH MULLA in delivering the judgment of the Board said that in the case of ordinary joint family property the members of the family had (i) the right of partition, (ii) the right to restrain alienations by the head of the family except for necessity, (iii) the right of maintenance and (iv) the right of survivorship. The first of these rights could not exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second was incompatible with the custom

(1) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.  
(2) (1921) L.R. 48 I.A. 195; I.L.R. 48 All. 228.  
(3) (1932) L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399.



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of impartibility, as laid down in *Sartaj Kuari's* case(1) and the *First Pittapur* case(2) and "so also the third, as held in the *Second Pittapur* case(3)". To this extent the general law of the Mitakshara had been superseded, and the impartible estate, though ancestral, was clothed with the incidents of self-acquired and separate property, but the right of survivorship was not inconsistent with the custom of impartibility, and still remained. Here again the *Second Pittapur* case(3) was followed without discussion.

If the question whether the respondents are entitled to maintenance under Hindu law is to be governed by the judgments in the *Second Pittapur* case (3), *Protap Chandra Deo v. Jagadish Chandra Deo*(4) and *Shiba-prasad Singh v. Prayagkumari Debee*(5), the answer must be adverse to them, but it is said that in its judgment in *Collector of Gorakhpur v. Ram Sundar Mal*(6) the Privy Council has restated the law with regard to maintenance and that the earlier cases which I have just mentioned are no longer binding on the Court in this connection. This statement appears to be well founded. In *Collector of Gorakhpur v. Ram Sundar Mal*(6) Lord BLANESBURGH, after stating that the judgment of Lord DUNEDIN in *Bajinath Prasad Singh's* case(7) had definitely negatived the view that the decisions of the Board in *Sartaj Kuari's* case(1) and the *First Pittapur* case(2) were destructive of the doctrine that an impartible zamindari could be in any sense joint family property, went on to observe (page 302):

"One result is at length clearly shown to be that there is no reason why the earlier judgments of the Board should not

- (1) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.
- (2) (1899) L.R. 26 I.A. 83; I.L.R. 22 Mad. 383.
- (3) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.
- (4) (1927) L.R. 54 I.A. 289; I.L.R. 54 Cal. 955.
- (5) (1932) L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399.
- (6) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.
- (7) (1921) L.R. 48 I.A. 195; I.L.R. 43 All. 228.

be followed, such as, for instance, the *Challapalli* case [*Raja Yarlagadda Mallikarjuna Prasad Nayadu v. Raja Yarlagadda Durga Prasad Nayadu*(1)] which regarded their right to maintenance, however limited, out of an impartible estate as being based upon the joint ownership of the junior members of the family, with the result that these members holding zamindari lands for maintenance could still be considered as joint in estate with the zamindar in possession."

Later in the judgment (page 303) Lord BLANESBURGH said:

"The recent decisions of the Board constitute a further landmark in the judicial exposition of the question at issue here. While the power of the holder of an impartible raj to dispose of the same by deed [*Sartaj Kuari's* case(2)], or by will [the *First Pittapur* case(3) and *Protap Chandra Deo v. Jagadish Chandra Deo* (4)] remains definitely established, the right of the junior branch to succeed by survivorship to the raj on the extinction of the senior branch has also been definitely and emphatically re-affirmed. Nor must this right be whittled away. It cannot be regarded as merely visionary. As pointed out in *Bajinath Prasad Singh's* case, when before the Allahabad High Court(5), the junior members of a great zamindari enjoy a high degree of consideration, being known as babus, the different branches holding babuana grants out of the zamindari. Their enjoyment of these grants is attributable to their membership of the joint family, and until the decisions above referred to beginning in 1888 supervened, they had no reason to believe that their rights of succession were being imperilled by their estrangement from the zamindar in possession. Great caution must therefore be exercised in attributing any special consequences to conduct only significant in the light of these decisions now explained."

I read Lord BLANESBURGH's judgment in this way. It recognises that the power of the holder of an impartible estate to dispose of it by deed or will has been definitely established, but at the same time it

- (1) (1900) L.R. 27 I.A. 151; I.L.R. 24 Mad. 147.
- (2) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272, 285.
- (3) (1899) L.R. 26 I.A. 83; I.L.R. 22 Mad. 383.
- (4) (1927) L.R. 54 I.A. 289; I.L.R. 54 Cal. 955.
- (5) (1916) I.L.R. 38 All. 590.

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recognises that an impartible estate can be regarded as joint family property, giving the members of the family a right to maintenance and a right in the junior branch to succeed by survivorship to the estate on the extinction of the senior branch and it leaves the way open to the Court to follow the decisions of the Board earlier than the *Second Pittapur* case(1) on questions relating to maintenance.

The reference by Lord BLANESBURGH to the *Challapalli* case(2) is particularly significant. This was a consolidated appeal arising out of two separate suits for maintenance filed in the District Court of Kistna against the Zamindar of Challapalli by his two younger brothers respectively. The District Judge held that they were entitled to maintenance and to recover arrears for a period of twelve years. This Court on appeal agreed with the District Judge except as regards the arrears of maintenance. It held that the arrears were not claimable, except a certain sum received by the plaintiffs under a previous order of the Court and reduced the amount of arrears from Rs. 56,000 to Rs. 23,000. In delivering the judgment of the Judicial Committee, Sir HENRY DE VILLIERS said :

“Their Lordships fully agree with the High Court that the family of the parties to the present action has not become a divided one in consequence of the proceedings in the previous suit to which reference has already been made. It is true that in that suit a decree was made for the partition of a portion of the family property, but it was a very inconsiderable portion, and had no relation whatsoever to the zamindari estate. As to the zamindari estate, this Board held that it was impartible, and the consequence is that the plaintiffs, as the younger

(1) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.  
(2) (1900) L.R. 27 I.A. 151; I.L.R. 24 Mad. 147.

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brothers of the zamindar, retain such right and interest in respect of maintenance as belong to the junior members of a raj or other impartible estate descendible to a single heir; see *Sartaj Kuari v. Deoraj Kuari*(1). In regard to the amount of maintenance, the Judges of the High Court very properly refused to disturb the finding of the District Judge whose experience in the district they fully recognise.”

The reference to maintenance to be found at page 62 of the report of *Sartaj Kuari's* case(1) in the Indian Appeals consists of a quotation from the judgment in *Sivagnana Tevar, Ramasami Chetti and Kosalarama Pillai v. Periasami*(2) where mention is made of younger brothers

“taking such rights and interests in respect of maintenance and possible rights of succession as belong to the junior members of a raj or other impartible estate descendible to a single heir”.

The Board held that the plaintiffs had a right to maintenance and restored the finding of the District Judge that they were entitled to payment of the amount of arrears for twelve years. There is no reference to custom in the judgment and the decision can only be regarded as being based on the principles of Hindu law.

The judgment in *Collector of Gorakhpur v. Ram Sundar Mal*(3) is definite in regarding the right to maintenance of junior members of the family as being based upon joint ownership of the estate. But what significance is to be attached to the words “however limited” which Lord BLANESBURGH used in conjunction with the right to maintenance? Where the Hindu law gives a right to maintenance the right

(1) (1888) L.R. 15 I.A. 51, 62; I.L.R. 10 All. 272, 285.  
(2) (1878) L.R. 5 I.A. 61; I.L.R. 1 Mad. 312.  
(3) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.

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can only be affected by custom and I do not regard these words as recognising any limitation in principle, but only a possible limitation in a particular case.

Impartibility arises out of custom, but, with the greatest respect to what has been said to the contrary, I do not regard a custom of impartibility as in itself destroying the right of the junior members of the family to maintenance out of the family estate while it remains in the family. The fact that a family from generation to generation has agreed that the ancestral estate shall be held according to the law of primogeniture and thereby has allowed a custom of impartibility to arise does not in itself imply the abandonment by the junior members of their right to maintenance out of the estate. There is a vast difference in the giving up of a right to partition from the giving up of a right to maintenance. Impartibility may lead to enhancement of the prestige of the family and the preservation of the ancestral estate, but loyalty to the family does not demand the giving up of a right to maintenance. To deprive junior members of a joint Hindu family owning an ancestral estate whether partible or impartible of the right to maintenance, there must, it seems to me, be a custom to that effect. Of course if the estate lawfully passes into the hands of strangers the right to maintenance out of the estate will necessarily cease.

There is here no custom depriving junior members of the Venkatagiri family of the right to maintenance and it cannot be denied that the respondents are members of the family. The decision in *Vellaiyappa Chetty v. Natarajan*(1) definitely establishes this. In these circumstances I consider that the respondents

(1) (1931) L.R. 58 I.A. 402 ; I.L.R. 55 Mad. 1.

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are entitled under Hindu law to maintenance out of the estate, if provision has not already been made for them. Has provision then been made for them? In my opinion it has not. It is true that under the deed of 8th April 1889 their father received large sums of money, but these were not paid to him for his maintenance or the maintenance of his family, nor has it been so suggested. Provision was made for maintenance in another part of the document but the provision was limited to him and his legitimate descendants.

It is next to be considered whether the fact that their father left a large estate makes any difference to the respondents' claim. In deciding *Vellaiyappa Chetty v. Natarajan*(1) the Judicial Committee left this question open and no Indian authority has been quoted to us on the subject. The question must then be decided on principle. If a person is entitled in law to be maintained out of an ancestral estate, the possession of private property cannot destroy his right. The fact that he has private means may have bearing on the amount to be paid out of the estate, especially if the estate is a poor one, but that is all. The parties to the deed of 8th April 1889 in fact recognised this as, in addition to the large sums which the younger brothers received under the deed, separate provision was made in it for their maintenance. Accordingly I hold that the fact that their father left them a large fortune does not deprive the respondents of their right to maintenance out of the Venkatagiri estate.

It remains to be considered what allowance should be granted to the respondents and whether they are

(1) (1931) L.R. 58 I.A. 402 ; I.L.R. 55 Mad. 1

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entitled to be paid arrears. The Subordinate Judge considered that if maintenance were payable to the respondents under Hindu law a fitting allowance would be Rs. 250 a month each, being half the amount they would have received had they been legitimate. The decisions of this Court in *Ananthaya v. Vishnu*(1) and *Rathinasabapathi Odayar v. Gopala Odayar*(2) to which the Subordinate Judge has referred in my opinion correctly state the basis for the assessment of the amount. It is not a matter of granting a compassionate allowance. The amount must be fixed with regard to the position of the family. An illegitimate son will not in the ordinary course occupy so prominent a position as a legitimate son and the rule that an illegitimate son of a sudra is only entitled to half of what a legitimate son is entitled to in his father's estate may be taken as a guide in fixing the amount of allowance for his maintenance. I see no reason why the conclusion of the Subordinate Judge should not be accepted and therefore I concur in his finding that a reasonable allowance is Rs. 250 per mensem for each of the respondents.

I also agree with the Subordinate Judge that the respondents are entitled to an allowance for maintenance from the date of their father's death. That date is within the period of limitation and the fact that they were ignorant of their rights—it has not been suggested that their explanation of the delay in the filing of the suit should not be accepted—is not sufficient reason for depriving them of what has accrued. In the *Challapalli* case(3) it was observed that, if the defendant had been misled into the belief that the claim for maintenance had been abandoned and had

(1) (1893) I.L.R. 17 Mad. 160.

(2) (1928) I.L.R. 56 M.L.J. 673.

(3) (1900) L.R. 27 I.A. 151; I.L.R. 24 Mad. 147.

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in consequence not set aside any portion of his annual income to meet the claim, he might have had a good defence to the action, but without some such ground of defence it was impossible to hold that the younger brothers had forfeited an undoubted right merely because they had in the first instance been advised to file a wrong suit and had not claimed maintenance as it fell due. In the present case the appellant does not say that he has been misled by the delay and the defence has been confined to denying the right of the respondents to claim maintenance.

It follows that in my opinion the decree of the trial Court should be varied by the reduction of the aggregate monthly allowance from Rs. 1,000 per mensem to Rs. 500 per mensem and that the arrears should be calculated at the rate of Rs. 500 and not Rs. 1,000 per mensem. It is conceded that if the respondents are entitled to a decree they are entitled to have the amounts payable to them charged upon the estate, and an order to this effect will be embodied in the decree.

I consider that the respondents are entitled to costs in the lower Court and in this Court based on the amount awarded to them under the decree of this Court, they having succeeded on the Hindu law issue. The appellant has succeeded on the issue with regard to the deed and the appeal has resulted in a substantial reduction of the amount payable. In these circumstances I hold that he is entitled to costs in this Court based on the difference in the amount payable under the decree of the trial Court and the amount payable under the decree of this Court.

KRISHNASWAMI AYYANGAR J.—I concur in the judgment just now pronounced by my Lord the CHIEF JUSTICE, which I have had the advantage of reading

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beforehand. In view however of the importance of the questions raised, I would, with respect, add a separate judgment of my own, embodying my reasons for agreeing with the conclusions arrived at by my Lord. Of the points raised in the appeal, two alone appear to my mind to be the most material, and to them accordingly I shall confine my observations.

The first of them is the correct interpretation of the deed of settlement. The whole controversy on this point turns on the meaning of the expression *purusha santhathi* occurring in that part of the deed where provision is made for payment of a maintenance allowance to the descendants of Sri Venugopal. The respondents are his illegitimate sons, i.e., *dasiputras* according to Hindu law. The controversial sentence is as follows :

"After the life of the said Sri Venugopala Krishna Yachendru, his *purusha santhathi* shall, in perpetuity, be paid the same allowance amount, that is, at the rate of rupees one thousand (Rs. 1,000) per month in the above manner."

*Purusha santhathi* is a Sanskrit expression, but commonly used in its original sense in most of the vernaculars of the Presidency. It is a compound of two words, *purusha* meaning male, and *santhathi* meaning issue, progeny or descendants. The expression may accordingly be rendered into "male descendants" or "male issue". So far, both sides agree; but they vitally differ on the question whether the expression comprehends legitimate issue only, or whether, as held by the learned Subordinate Judge, it includes both legitimate and illegitimate issue. In spite of the somewhat emphatic language in which the Subordinate Judge has expressed himself we have been obliged, on a careful consideration of the document in the light of the surrounding circumstances, to

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differ from him. It is complained, and I think rightly, that the learned Judge has paid undue and unjustifiable attention to the heirship of illegitimate sons under Hindu law, instead of regarding it as one only of the several circumstances to be taken into account for ascertaining the intention. The true office of all construction is to discover the intention of the parties as expressed by the words used. Where those words are not sufficiently clear in themselves to fix the intention, the circumstances that surrounded the transaction may and ought to be resorted to, to see if what is not apparent in the document itself is made clear by a knowledge of those circumstances. The law by which the parties are governed may afford a guidance, as, with its aid, it may be possible to ascertain what the executant was aiming at. But caution is necessary in its use, in order to avoid over-emphasising what is after all but one of the several factors to be considered. One may even say that, by itself, it is not of much value. In fact its significance, where it is of value, lies in the light it sheds on the motives and objects, the aims and purposes which prompted the execution of the document, or the choice of the objects of the executant's bounty. As observed by the Privy Council in the case of *Mahomed Shumsool v. Shewukram* (1) :

"In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property."

A knowledge of the law is valuable because it may afford a knowledge of the notions and wishes and through it lead to a discovery of the intention of the parties. In an early decision of the Board, *Sreemutty*

(1) (1874) L.R. 2 I.A. 7, 14; 22 W.R. 409.

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*Soorjeemoney Dossee v. Denobundoo Mullick*(1), it was observed :

"In determining that construction what we must look to, is the intention of the testator. The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition ; nor, so far as we are aware, is there any difference between the one law and the other, as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes ; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case, those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption."

That it is wrong to lay too much emphasis on the law as such is conveyed clearly enough by the language used by their Lordships in the *Balrampur* case [*Sher Bahadur v. Ganga Bakhsh Singh*(2)] where again their Lordships observe :

"The matter for decision in this case being the construction of a codicil to the Maharaja's will, the point is not what is the strict rule of the Hindu religion, or the strict rule of the Chhatti caste" (and, if I may with respect add, the strict rule of the Hindu law either), "but this, namely, what were the wishes and intentions of the testator as revealed by the language of that instrument, viewed through the light of surrounding circumstances."

It may happen that the executant in a particular case was anxious to perpetuate a rule of succession according to a particular system of law, and, where

(1) (1857) 6 M.I.A. 526, 550, 551 ; 4 W.R. (P.C.) 114.  
2) (1913) L.R. 41 I.A. 1 ; I.L.R. 3 All. 101.

this is the case, the rules of that law may assume paramount importance. This is exactly what occurred in the case cited as the following further observations make it clear :

"The testator must have had in mind some law or rule which would apply to fix the succession. What law could this high caste Hindu possibly *have had in mind* for such a purpose other than the Hindu law." (The italics are mine.)

The rule of Hindu law which excludes illegitimate sons from heirship in the case of twice-born Hindus was held in this case to determine the meaning of the word *aulad* (issue) in a gift to an illegitimate son and his *aulad*. Their Lordships explain the reason for their decision as follows :

"It would be strange indeed if the man who had made it his special care to treat this son of his as a Hindu" (he was in fact an illegitimate son by a Muhammadan mistress) "and had succeeded in marrying him to two high caste women, *should intend or desire*, whatever might be the strict letter of the law, to place the offspring of these unions on the same level as the illegitimate children of his son's Muhammadan mistress and make them all equally the objects of his bounty."

From first to last, and all throughout, the quest is to be for the intention behind the language, whatever be the aids resorted to. In fact, even in the *Balrampur* case(1) itself the testator was conducting himself in a way contrary to the injunctions of the Hindu law in that he treated and wanted others to treat his illegitimate son by a Muhammadan mistress as if he were a legitimately-born Hindu, and it was this conduct which primarily disclosed his true intention.

Can it be said that the Hindu law of illegitimate succession furnishes in this case a clue to the intention behind the expression *purusha santhathi* ? Where Hindu law and Hindu sentiment coincide, the

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(1) (1913) L.R. 41 I.A. 1 ; I.L.R. 36 All. 101.

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law would of course be of help. Where they diverge, however, it is the Hindu sentiment that will rule even to the exclusion of the law. The truth of the matter is that there can be little room for doubt that the ordinary notions of a Hindu towards irregular unions and the issue of such unions are not different from those of any other civilised community. There is no denying it that the Hindu religion does not countenance extra-marital relations, and the Hindu law itself looks down with disfavour on illegitimate children, assigning to them only a subordinate rank among the sudras, and denying heirship altogether among the superior castes. It is therefore to the sentiments generally prevalent in the society to which the executant belongs, more than to the law, that regard should be had in questions of this kind. Illicit relations are, until callousness overtakes the parties, carried on on the sly and rarely if ever owned, much less paraded in the public eye. The higher the social rank, the greater the care with which the veil is thrown over them. It is one thing to provide for the issue of a lapse that has occurred. Duty and honour may dictate it. Love and affection, more especially if there be no legitimate children, may even prompt it. But I refuse to believe that a member of the Hindu community, nobleman or commoner, would contemplate with equanimity the possibility of future lapses either in himself or in his descendants and sit down on a solemn occasion to enact a scheme of succession to provide for future illegitimate descendants. Yet, this is in effect the logical consequence of the view taken by the learned Subordinate Judge. He sums up the position in these words :

“The position therefore to my mind seems incontrovertible that the term *santhathi*, when it is used in a document to which sudras are parties intending to create thereby rights in favour of their *santhathi*, within that expression are

comprehended both the legitimate and the illegitimate *santhathi*. In other words *purusha santhathi* of Raja Venugopal would include his illegitimate sons, viz., the plaintiffs.”

The vice of the argument lies in attributing to the members of this proud, ancient family of hereditary noblemen an intention out of keeping with their lineage and social standing and out of joint with the solemnity of what was in all probability the first occasion when they were recording a family usage of impartibility at a family council at which all members of the family including the old and respected father, Sri Kumara Yachama, were present. I must positively decline to accept the proposition of the Subordinate Judge that, so far as the generic term *santhathi* is concerned, which means issue, children or descendants, it must be held when used by sudras to include children both legitimate and illegitimate. It would be almost grotesque to imagine that the executants of this settlement foresaw the likelihood of illegitimate issue being begotten not only by the adult brothers, one of whom was yet unmarried, but also by Raja Venugopal who was at the time a boy of but tender years. It is satisfactory however to note that this suggestion was not advanced either in the Court below or here.

As I have said, the occasion was scarcely of a kind at which a question of illegitimate succession is likely to have been thought of or provided for. It is perhaps worth while in this connection to mention a circumstance not wholly devoid of significance. Sri Kumara Yachama, it is said, had illegitimate offspring, but the document is entirely silent about them. If a provision for their maintenance had been made, it must have been made privately, and, if not, it must have been reserved for private settlement later. Delicate

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personal affairs of the kind would scarcely be dragged into public view, or dealt with at a general settlement of family matters. It is also not without significance that marriage portions suitable to their condition in life have been separately provided for in the settlement deed for the two brothers, Sri Raja Venkatakrishna and Sri Raja Venugopal, who were yet young and unmarried, with a view to their entering into lawful wedlock in due time. If I may say so with respect, I fully endorse the opinion expressed by KRISHNAN PANDALAI J. in *Subramania Chetti v. Mahalakshmi Ammal*(1) which I think furnishes the basis for a correct approach to the question. I may add that the views expressed by that learned Judge are so much in accordance with prevailing sentiment that they merited better consideration at the hands of the learned Subordinate Judge than he has chosen to give them.

Even apart from these considerations, I agree with the learned CHIEF JUSTICE that there is sufficient in the language of the document itself to hold that the words *purusha santhathi*, which are by no means to be regarded as terms of technical legal import, were not intended to be used in a comprehensive sense so as to include both legitimate and illegitimate children as held by the Subordinate Judge. The Subordinate Judge seems to suggest that there is a distinction in the mode of construction between a will and a settlement. If I understand him aright, he seems to be of the opinion that the deed has to be scrutinised not from the background of approach proper for a gift or a will, but rather on the footing that it evidences a recognition by the eldest brother of pre-existing rights in the younger in consideration of the latter in their turn

(1) A.I.R. 1933 Mad. 659.

conceding the impartibility of the estate; in other words, they are not to be regarded as mere volunteers but rather as persons possessing definite rights which the eldest brother was bound to respect. Assuming this to be right, I still fail to understand how this aspect of the matter provides "a definite point from which we have to start". It is unfortunate that the learned Judge has not been more explicit, and we are consequently obliged to labour more or less in the dark as to the precise nature and effect of the distinction which he seems to have had in mind, and the manner in which that distinction has influenced his judgment. For myself I cannot see why the younger brothers should be regarded as having made a great concession, as it is highly improbable that they or any of them seriously believed in the partibility of the estate. In fact, as the deed itself shows, they meekly acknowledged the impartibility of the estate receiving only a share in the cash and jewels, a sum of money for the purchase of a residential house, an inconsiderable marriage provision and no more than a moderate provision for marriage and maintenance. I am unable to see how the fact that it is a deed of settlement and not a will or a gift advances the case of the respondents. I do not know, I can only suspect it, if the learned Judge by his reference to rights and obligations in this context is laying a foundation for the view that the brothers were in a position to extract and did in fact extract from the Raja a recognition of a heritable right in the allowance, similar in character and descendibility to ordinary heritable property, and capable therefore of being taken by issue legitimate as well as illegitimate. If so, I am afraid he must have carried a second error into the construction of the document.

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Now, coming to the words *purusha santhathi* themselves. The word *santhathi* would ordinarily denote legitimate progeny only. If a sufficient expression of intention to the contrary is contained in the document, or is capable of being otherwise collected from it, the word will not by itself exclude the possibility of illegitimate issue coming in, as there is nothing in its etymological sense against such an extension. In current language, however, when a person, be he a sudra or a twice-born, uses the word, he would rarely indeed intend it to denote illegitimate issue. The *prima facie* meaning of *santhathi* as of "children" being legitimate children, that meaning is the one to be attached to it in the spoken as well as in the written word. Where however the word is used as a word of limitation, heirs in general would be indicated by it, and an illegitimate son where he happens to be an heir will no doubt come in. In other words, the law will bring in the illegitimate son as an heir, where a party leaves the law to regulate the succession, without troubling to regulate it himself.

The decisions noticed by the learned Subordinate Judge in this context are not of much value as in those cases the word has only been held to include collaterals or heirs in general, though *santhathi* in its literal sense may denote lineal descendants. No decision has been cited in support of the contention that *santhathi* includes illegitimate descendants in the absence of something definite in the deed or in the surrounding circumstances showing that it was the intention of the executant to use the term in that special sense. In other words, the *prima facie* meaning cannot be made to yield to and make way for another and a possible meaning in the absence of an overriding context or of surrounding circumstances of sufficient

strength. But that is not the case here. On the contrary, it is the primary meaning that I think holds the field to the end. So much for the meaning of the words without reference to the context.

A consideration of the language of certain of the clauses of the deed also leads to the same conclusion. In the first place, in no part of the document is there anything against the natural *prima facie* meaning of the words. What there is tends only to support it. In the operative portion of clause 2 of the deed, the words *purusha santhathi* are employed to lay down succession to the zamindari after the eldest brother, Sri Raja Rajagopala, his son and son's son, and it is in the highest degree unlikely that any but legitimate issue would have been here envisaged or meant. As I have said, it is difficult to imagine that the members of this family would have contemplated the possibility of the failure of legitimate issue in all the four branches. If in this clause *purusha santhathi* bears the meaning of legitimate issue, as I think it does, the same meaning should be attributed to the expression in other parts of the deed as well. It would be wrong to give different meanings to the same expression in different parts of the same document unless the context demands it. It will be seen however that the contrary intention is plainly shown by two other clauses to be found later in the document.

In referring to the events on the happening of which the estate is to devolve on the next senior line it is worthy of note that the devolution is made conditional on the absence of the *aurasa* or the adopted son only, suggesting that the existence of an illegitimate son would not make a difference; whereas if the respondents' argument is right, the collaterals cannot succeed to the estate if there is in existence an

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illegitimate son. The learned Judge considers that the use of the word "members" in the clause "subject only to the condition of paying allowance to the other members of our family suitably to their respective status" suggests the inclusion of illegitimate children. Illegitimate sons may be members of the family according to law, but there does not appear anything in the context to suggest that the word "members" was consciously used or could have been used in the document so as to include illegitimate sons. Here again the learned Judge is obsessed with the membership of the illegitimate son under the law, and has failed to address himself sufficiently to the question of what the intention of the parties is likely to have been. It is doubtful if they were cognizant of the membership theory at all which does not appear to have been clearly grasped even by the Courts at the date of the document. Neither party has suggested that the assistance of a trained lawyer was requisitioned for the preparation of the document and there is no reason to think that the word "members", while it may include females, was intended to bring in illegitimate offspring. It is equally profitless to regard the reference to the rules of Hindu law in certain passages as lending support to the contention that, except in regard to the amount, the allowance was to follow the line of descent laid down by that law. This is merely to give effect again to the law and not to the intention.

It is with the portion of clause 5 extracted in the beginning of this judgment that we are directly concerned. On that clause the respondents almost solely found their case in support of a construction favourable to them. After setting out correctly the rule governing the construction of documents, the Subordinate Judge asks himself the question

"whether there is so strong a probability of intention to exclude, or not to include, the illegitimate sons of the junior brothers, or that a contrary intention cannot be supposed, because we are now discussing the question on the footing that the expression '*purusha santhathi*' prima facie connotes both legitimate and illegitimate children". (The italics are mine.)

He thus starts with a wrong premise, for, as I have endeavoured to explain, this is neither the *prima facie* meaning of the expression as ordinarily understood, nor do the surrounding circumstances, so far as I can see, point to this being the sense in which the parties could be deemed to have used it. In fact he assumes that the words include illegitimate children, and then proceeds to examine the language of the document for the purpose of seeing if there is anything in it against such a predetermined meaning. On account of this wrong approach, the judgment loses a great deal of the value that would otherwise belong to it.

What appears to be a decisive argument against the Subordinate Judge's view is contained in two other clauses of the deed where the words *purusha santhathi* are followed by the expression *either by way of aurasa or by way of adoption*. In the one, it is provided that, on the death of any male member in any of the three branches without *purusha santhathi* *either by way of aurasa or by way of adoption*, the allowance should go to the *gnatis* nearest to him in his own branch according to Hindu law. By the second, it is directed that, on the extinction of any of the three branches by the total absence (i.e., completely) of *purusha santhathi* either by way of *aurasa* or by adoption, the allowance which was being paid to that branch should be stopped to the extent of a half, a half alone, namely Rs. 500, being payable as

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maintenance for life to the widow or widows of the last person in the branch who died without *purusha santhathi*. The italicised words, either by way of *aurasa* or by way of adoption, in those clauses do seem to explain when according to the deed a person is to be regarded as dying without *purusha santhathi*. That event in the language of the parties themselves happens when he should die without male issue either by way of *aurasa* or by way of adoption. In *aurasa* we have once again a word whose strict etymological import is perhaps wider than its ordinary or even legal meaning. The etymological meaning is, "produced from the breast, born of oneself, or legitimate". But whatever its literal meaning, it is clear that both Manu and Yagnavalkya define the word as denoting the son born of lawful wedlock only. According to Manu, Chap. IX, 166 :

स्वे क्षेत्रे संस्कृतायान्तु स्वयमुत्पादयेद्वियम् ।

तमौरसं विजानीयात् पुत्रं प्रथमकल्पितम् ॥

"Whoever is begotten by a man himself on a lawfully married (purified by marriage) wife of his own, he should be known as an *aurasa* son regarded as the foremost among sons."

Yagnavalkya is still more explicit (Chap. 11, 128) :

औरसो धर्मपत्नीजः तत्समः पुत्रिकासुतः ।

"An *aurasa* (son) is he who is born of a *dharma pathni* (lawfully wedded wife) . . ."

This is in fact how the word is also commonly understood ; see *Sadu v. Baiza and Genu*(1) and *Subramania Ayyar v. Rathnavelu Chetty*(2). All doubt is completely dispelled by the use of the word along with, and in contrast to, an adopted son in the phrase "by way of *aurasa* or by way of adoption". In this collocation, *aurasa* can only mean legitimate son, and

(1878) I.L.R. 4 Bom. 37 (F.B.). (2) (1917) I.L.R. 41 Mad. 44 (F.B.).

this is not disputed. If this view is correct, it would necessarily follow that the existence of an illegitimate son notwithstanding, the allowance would, in the one case, pass over to the nearest collaterals (*gnatis*) in the branch, and, in the other, be partially stopped, if there be neither a legitimate nor an adopted son. The illegitimate son is thus left out of account, and the whole scheme of devolution seems to be built up by taking into account legitimate descendants only. In the light of this explanation which is found in the document itself, it is not permissible to overlook the meaning suggested by it in favour of any other meaning. The learned Judge does not deal with this point directly but goes on to consider the meaning of the word *gnatis* occurring in the first of these clauses which word, according to him, includes illegitimate sons also. He then goes on to hold that on failure of the legitimate or adopted son, the *gnatis* including the illegitimate son would take the allowance, and thus the illegitimate son is let in after the *aurasa* and the adopted sons by the use of the word *gnati*. Here again the learned Judge has not taken the ordinary colloquial meaning of a word in constant use. *Gnati* is rendered as agnate, which term again the official interpreter rightly explained as referring to a collateral agnatic relation. It is unusual to refer to a brother as a *gnati* in a joint family though literally in Sanskrit the word does include a brother also. The question in reality is not whether an illegitimate brother is a *gnati* or not for purposes of succession, but whether the word is used in that unusual sense in the deed. Before us, however, the argument mainly was that this clause has no application, as the case is governed by the earlier clause referred to already, but we are unable to shut our eyes to an interpretation which the document itself furnishes.

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As regards the second of the clauses above referred to, the extinction of the branch takes place by the total cessation of male descendants either by way of *aurasa* or by adoption, and, it is to be noted, in spite of the possible existence of illegitimate sons as in the previous clause. On this clause, two answers are found in the judgment of the Subordinate Judge, both of which however appear to be laboured and unconvincing. He thinks that the use of the word "completely", which is the same as the word "total" in the official translation, shows that the use of the words *aurasa* or adopted was merely illustrative and so they do not exclude the illegitimate issue. He also goes back to the first clause where the expression by way of *aurasa* or by adoption does not accompany the words *purusha santhathi* and says :

"Mr. Srinivasa Ayyangar, plaintiff's Counsel, further argued that if the intention was to restrict the applicability of the term *purusha santhathi* only to legitimate progeny, either born or adopted, in the first clause itself which contains the disposition to *purusha santhathi* of Raja Venugopal, the qualifying words *aurasa* or adopted would have been used in that clause alone. This certainly is an argument, the force of which it is difficult to minimise."

For my part I am unable to see much force in that argument. Indeed, in the light of the knowledge gained by a consideration of the later clauses, it is easy to understand the true meaning of the words *purusha santhathi* wherever they occur, even if they are not accompanied by the phrase *aurasa* or adopted son. The earlier clause would thus receive a meaning to which no reasonable exception could be taken. I may perhaps in this connexion refer to the rule of construction under the English law stated by COTTON L.J. in *Megson v. Hindle*(1) in a form specially

(1) (1880) 15 Ch. D. 198, 205.

appropriate even to another and a different system which, unlike that system, recognises a limited right of heirship in the illegitimate son. He says :

"To take a case out of the common rule that only legitimate children can take under a gift to 'children' there must be on the face of the will such a strong probability of the testator's intending to include illegitimate children that a contrary intention cannot be imputed to him."

If we substitute *purusha santhathi* for "children" in this passage, we have a statement of the law which eminently fits into this case. I do not understand the Privy Council as laying down the law differently in the *Balrampur* case(1) where they meant, I think, merely to illustrate the proposition that the presence of special circumstances may lead to a different conclusion. Section 100 of the Indian Succession Act may also be remembered in this connexion.

I regret I am unable to attach weight to most of the considerations which have weighed with the learned Subordinate Judge in his construction of the deed of settlement, and accordingly feel constrained to differ from him. The deed does not, and I think was not intended to, confer rights on illegitimate sons, whose rights, if any, must be sought elsewhere, viz., the Hindu law.

The second contention urged by the learned Counsel for the respondents is that, under the Hindu law, and apart from the deed of settlement, the respondents who are the illegitimate sons of Sri Raja Venugopal are entitled to maintenance out of the impartible estate. The learned Subordinate Judge did not accede to this contention. But, as we are of a different opinion, it is necessary to go into this question in some detail. The subject is one of considerable complexity and difficulty on account of the

(1) (1913) L.R. 41 I.A. 1; I.L.R. 36 All. 101, 121, 122.

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vicissitudes which have attended the course of decisions regarding the basic principles of the law relating to impartible estates. It is only fair to say that we would have had a great deal of difficulty in arriving at the conclusion at which we have arrived but for the latest pronouncement of the Judicial Committee in *Collector of Gorakhpur v. Ram Sundar Mal*(1). The clear light which this decision has thrown on the subject has dispelled our doubts as to the law to be applied to the decision of this case.

The paternity of the respondents is not now in dispute, nor is it disputed that they fulfil the description of *dasiputras* in Hindu law, capable of inheriting to their putative father, Raja Venugopal. The Venkatagiri family of which Raja Venugopal was a member belongs to the Velama community, a subdivision of the sudra caste amongst Hindus. The estate is by custom impartible and descendible to the eldest representative in the eldest line according to the rules of lineal primogeniture. The appellant has conceded that it is held as joint family property, a concession which has been recorded by the learned Judge and not been questioned in the appeal. His contention is that under the Hindu law the junior members in a joint family of which the senior member alone is the sole holder of an impartible estate have no right apart from custom to be maintained out of the estate or its income. Proof of the custom would not, of course, be insisted upon if the claimant were a brother or son, as in such a case the custom has been so often judicially noticed that it is no longer necessary to adduce proof of it; the *Second Pittapur* case(2). But if the claimant is a more distant relation, he must, it is

(1) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.  
(2) (1918) L.R. 45 I.A. 148, 155; I.L.R. 41 Mad. 778.

argued, make out a custom entitling him to maintenance before he can succeed.

The right of illegitimate sons to maintenance out of the partible assets of the joint family to which he belongs has now been finally settled by the decision of the Privy Council in *Vellaiyappa Chetty v. Natara-jan*(1). The relevant passage in their Lordships' judgment has been extracted in the judgment of my Lord. That passage, if I may say so with respect, is clear and telling, and has finally set at rest all controversy regarding the jural basis of an illegitimate son's right of maintenance under the Hindu law. It is now established that that right springs out of his membership of the putative father's family, a membership which necessarily carries with it a legal right to be maintained out of the common assets. Where the family consists of illegitimate and legitimate sons and no collaterals, his rights are higher, but this aspect of his rights is of no materiality in this case. As held in the *Second Pittapur* case(2), the right of coparceners to maintenance out of the coparcenary property is an inherent quality of that property. What was described in this case as the inherent quality of the coparcenary property as regards a full coparcener has, it seems to me, been extended by *Vellaiyappa Chetty's* case(1) to an illegitimate son by reason of his membership of the family, though his membership is inferior to that of a legitimately-born son.

To this extent the right of an illegitimate son is practically conceded. The Subordinate Judge appears to accept the position so far; for he has said:

"If, in the present case, the claim for maintenance, let us assume, had been directed against not impartible property,

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(1) (1931) L.R. 58 I.A. 402; I.L.R. 55 Mad. 1.  
(2) (1918) L.R. 45 I.A. 148, 155; I.L.R. 41 Mad. 778.

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but against partible property, then clearly, if the plaintiff's father Raja Venugopal had left no separate property, since he left no legitimate issue (in fact he died unmarried) the plaintiffs would clearly be entitled, according to *Vellaiyappa Chetty v. Natarajan*(1), to maintenance from the defendant who is their collateral in possession of the joint family property."

The qualification mentioned here and having reference to the separate property of the putative father is the matter on which their Lordships did not and were not called upon to express an opinion. This question does arise for consideration in the present case as admittedly the father has died leaving considerable separate property which has passed into the hands of the respondents under his will.

It is, however, difficult to see how this circumstance can operate to deprive them of their right to be maintained out of the estate, if otherwise they have the right. They have the right because they are members of the family, and the right will subsist so long as the membership continues. Neither their status as members nor their right to maintenance which is a consequence of that status can be imperilled by the accident of their coming into possession of the separate property of their father. What was urged was that, even if the right be held to exist, yet the very nature of that right is such that effect should not be given to it where the claimant is well supplied in this regard from other sources. In other words, there is no need to maintain persons who are already well maintained by others or from other sources. The correctness of this proposition was examined by this Court in *Lingayya v. Kanakamma*(2) and *Kodandarami Reddi v. Chenchamma*(3) and the conclusion was

(1) (1931) L.R. 58 I.A. 402 ; I.L.R. 55 Mad. 1.

(2) (1913) I.L.R. 38 Mad. 153.

(3) (1929) 59 M.L.J. 531.

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reached that it is unsound. Both these cases related to a claim by the widow of a deceased coparcener, but the decision must be held to govern the present case, as the basis of the claim, whether it is by a widow or by an illegitimate son, is identical. I may also mention that on this point the Subordinate Judge has himself come to the same conclusion.

The question then is whether there is any difference in the principle to be applied because it is not partible property but an impartible estate against which the maintenance is claimed. Illegitimacy by itself being no longer after *Vellaiyappa Chetty's* case(1) an obstacle to the recognition of maintenance rights, the question narrows itself to this: Is there anything in the nature or incidents of an impartible estate, anything so special and peculiar that it necessarily displaces the junior member's right to maintenance, which is, as the Privy Council described it, an inherent quality of coparcenary property? The learned Subordinate Judge is of the opinion that the difficulty lies not in the respondents being of illegitimate descent but in their being beyond the admissible degree of relationship. The contention of the learned Counsel for the appellant on this point was almost entirely founded on the decision of the Privy Council in the *Second Pittapur* case(2). According to him this decision of the Privy Council concludes the question against the respondents, and in favour of the appellant. On the other hand, it is contended for the respondents that the authority of this case has been greatly circumscribed and must now be regarded as confined to the actual decision contained in it and no more.

It is therefore necessary to examine the soundness of this argument, and to see whether there is in the

(1) (1931) L.R. 58 I.A. 402 ; I.L.R. 55 Mad. 1.

(2) (1918) L.R. 45 I.A. 148, 155 ; I.L.R. 41 Mad. 778.

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later cases an exposition of principles at variance with what appears to be stated in the *Second Pittapur* case(1). That case related to a claim to maintenance by the son of the adopted son of the last holder of the Pittapur estate, an impartible zamindari in the Northern Circars. The estate was held by a devisee under the will of the last holder, who claimed to be his *aurasa* son. The sonship had been denied by the claimant's father and was also denied by the claimant. The claim was made to rest on an allegation of co-ownership with the last holder, which was not affected, it was urged, by the estate getting into the hands of a stranger under the will. The claim was rejected. The plaintiff did not attempt to prove that there was any custom affecting this zamindari which enjoined the making of grants to any persons, nor did he put his case on any claim resting on relationship. It was by reference to the general law that he attempted to sustain the claim, suggesting that that law cast a real, and not a mere personal, burden which followed the property into whosoever's hands it passed. This was a patently extravagant proposition as the burden does not become real until the estate is charged by act of parties or by decree of Court. In rejecting the claim, their Lordships held, as the concluding paragraph of the judgment shows, that a claim of the kind not based on relationship must fail, quoting the following extract from SANKARAN NAIR J.'s judgment in the High Court :

"The plaintiff does not advance any claim based on relationship. He refuses to admit any relationship . . . As there was no community of interest the property is not burdened with his claim in the hands of a donee."

This passage does suggest that their Lordships threw out the claim on both grounds, namely, the

(1) (1918) L.R. 45 I.A. 148, 155; I.L.R. 41 Mad. 778.

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absence of relationship and the absence of co-ownership. In fact, the greater part of the judgment is devoted to the discussion of the question whether there was in law a coparcenary in respect of an impartible estate. At pages 153 and 154 the following observations occur :

"It is settled that in an impartible zamindari there is no coparcenary, and consequently no person existed who as coparcener could object to an alienation of the whole subject by the *de facto* and *de jure* holder . . . It follows that the right to maintenance, so far as founded on or inseparable from the right of coparcenary, begins where coparcenary begins and ceases where coparcenary ceases . . . An impartible zamindari is the creature of custom, and it is of its essence that no coparcenary exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who, if the zamindari were not impartible, would be entitled as of right to maintenance."

These observations, there can be no doubt, *prima facie* do touch and govern the principle of the law to be applied in the present case, and they appear to negative the possibility of a coparcenary in relation to an impartible estate. In fact they embody the logic underlying the decisions of the Privy Council in *Sartaj Kuari's* case(1) and the *First Pittapur* case(2) and this Court would have been powerless to pass them by but for the later decisions of the Board. Before referring to them it may not be out of place to remember it was a new interpretation of the law that was ushered in by these decisions. In the *Second Pittapur* case(3) itself it was observed :

(1) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.  
(2) (1899) L.R. 26 I.A. 83; I.L.R. 22 Mad. 383.  
(3) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.

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"It is beyond doubt that the decisions in the Madras Courts prior to the case of *Sartaj Kuari v. Deoraj Kuari* (1) embodied the theory that there was joint property in an impartible zamindari, which only fell short of coparcenary because, by custom, partition was inadmissible. It is needless to cite or examine the authorities as their Lordships do not apprehend that there is any doubt as to this statement being correct. It will be sufficient to quote a fragment of the decision of the Court of appeal in that case itself: 'It must be conceded that the complete rights of ordinary coparcenary-ship in the other members of the family to the extent of joint enjoyment and the capacity to demand partition are merged in—or perhaps, to use a more correct term, subordinated to—the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership.'"

This change is also noticed in *Abdul Aziz Khan v. Appayasami Naicker* (2) where again their Lordships observed:

"It was the accepted law in Madras that the holder of an impartible zamindari, who was himself a member of an undivided family, could not alienate or encumber the corpus of the estate so as to bind his coparceners, except for justifiable especial causes. Prior to 1889 there had been a series of decisions to this effect in the Madras Courts; but in that year, following the judgment of this Committee in the case of *Sartaj Kuari v. Deoraj Kuari* (1), the High Court of Madras overruled those decisions, *Beresford v. Ramasubba* (3), and it has recently been held by this Committee in the *First Pittapur* case (4) that impartible zamindaris in the Presidency of Madras are not inalienable in the absence of proof of some special family custom or tenure attaching to the zamindari, and having that effect."

- (1) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.  
(2) (1903) L.R. 31 I.A. 1, 9; I.L.R. 27 Mad. 131.  
(3) (1889) I.L.R. 13 Mad. 197.  
(4) (1899) L.R. 26 I.A. 83; I.L.R. 22 Mad. 383.

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In short the change over was from one legal theory to another. According to the earlier, there is nothing incongruous in a joint family holding an impartible estate though its essential character of impartibility necessarily displaced the right to common enjoyment and partition. But succession and maintenance in no way impinging on impartibility were not struck at by it. The joint ownership remained as a live, though dormant, force, active not only in the matter of succession and maintenance, but also in regard to the restraint on alienation. Such was the view which had been consistently taken before 1889. Looking at it purely from the standpoint of legal theory, it is difficult to find fault with it; *Naraganti Acham-magaru v. Venkatachalapati Nayanivaru* (1). Indeed Lord DUNEDIN seems tacitly at any rate to concede so much in *Baijnath Prasad Singh's* case (2).

According to the other theory of which *Sartaj Kuari's* case (3) and the *Second Pittapur* case (4) are the exponents, there can be no real coparcenary or joint ownership in impartible property and in strict legal theory, two such conflicting incidents as impartibility and co-ownership cannot co-exist side by side in the same estate at the same time. The holder must be the full and sole proprietor as he is in fact unrestrained in his enjoyment of the estate and uncontrolled in his power of disposal over it. Such an extensive right can be understood only if the estate is regarded as his separate or self-acquired property. True, the successor is to be ascertained by calling into aid the rule of survivorship peculiar to

- (1) (1881) I.L.R. 4 Mad. 250, 266.  
(2) (1921) L.R. 48 I.A. 195, 212; I.L.R. 43 All. 228.  
(3) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.  
(4) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.

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joint property, but that is not because of an actual, living, unity of title; it is merely a fiction to be imagined for the nonce, a mere survival perhaps from an archaic system which has perished; *Rajah of Ka'ahasti v. Achigadu*(1).

On the former of these two theories the claim to maintenance could be sustained; the latter would negative it. A choice has therefore to be made between these opposite theories, a choice which has been rendered easy by the decision of the Board in *Baijnath Prasad Singh's* case(2) and in the *Collector of Gorakhpur's* case(3). In them, the Privy Council appear to have unmistakably made the choice themselves. It would not therefore be right for us to refuse to follow the interpretation given in these later decisions, whatever our view might have been in the absence of these decisions.

As will be shown presently, the authority of *Sartaj Kuari's* case(4) and of the cases which had accepted the school of thought reflected in it holds good only in so far as the power of absolute disposal recognised in them is concerned. It is an anomaly no doubt that there could be a co-ownership which is at the same time capable of being destroyed by a unilateral and capricious disposal of the property by the head of the family. But law can scarcely be logical where it is moulded and modified to give effect to intruding custom. It is not the function of this Court for that reason to cavil at an established principle if it has the support of the Judicial Committee. Its illogicality, if any,

(1) (1905) I.L.R. 30 Mad. 454.  
(2) (1921) L.R. 48 I.A. 195, 212, I.L.R. 43 All. 228.  
(3) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.  
(4) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.

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has to be mended only by resort to legislation. In fact that is what happened in Madras. Soon after the decision of the Privy Council in the *First Pittapur* case(1) when this Presidency awoke to the new interpretation of the law, the local Legislature effected by a statute a restoration of the law to what it was all along understood to have been. The Madras Impartible Estates Acts, II of 1902 and II of 1904, both contain provisions enacted for the purpose of replacing on the holder for the time being the restraint on alienation which had been displaced as a result of *Sartaj Kuari's* case(2). More recently, by an amending Act (XII of 1934) express provision was made recognising a right of maintenance in favour of legitimate descendants up to the third degree, while, in regard to others, the law was left where it was.

*Baijnath Prasad Singh's* case (3), decided in 1921, is a definite landmark in the evolution of the law relating to impartible estates. The question there raised related to the succession to an ancient impartible estate, the contest being between the senior lineal descendant of the common ancestor of the last holder on the one hand, and his uncles who were therefore collaterals one degree nearer but of a junior branch on the other. The family was undivided. Their Lordships upheld the superior claim of the former, observing

"that this zamindari being ancestral property of the joint family, though impartible, the successor falls to be designated according to the ordinary rule of the Mitakshara Law, and that the respondent, being the person who in a joint family would, being the eldest of the senior branch, be

(1) (1899) L.R. 26 I.A. 83; I.L.R. 22 Mad. 383.  
(2) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.  
(3) (1921) L.R. 48 I.A. 195; I.L.R. 43 All. 228.



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the head of the family, is designated in this impartible Raj to occupy the gaddi."

The entire case law was most carefully considered by Lord DUNEDIN who had himself as a member of the Board delivered the judgment in the *Second Pittapur* case(1). The argument, that impartible estates must be held to be governed by the ordinary rule of law applicable to separate or self-acquired property as the logical and inevitable conclusion resulting from *Sartaj Kuari's* case(2) and the *Second Pittapur* case (1), was in terms rejected. Lord DUNEDIN observed :

"The question of how to select the head of the family in a joint family is part of the general law. That the custom of impartibility does not touch it is shown by the long list of authorities above cited, and there is in their Lordships' view no necessary or logical deduction from the decisions in *Sartaj Kuari's* case(2) and *Rama Rao v. Rajah of Pittapur*(1) which forces them to an opposite conclusion."

The first of these cases was distinguished on the ground that what was decided in it was that in an impartible Raj there was no *such* co-ownership in the other members as to give them a title to prevent alienation by the holder; and that the right of the other members that was being considered was a *presently existing* right and not *the chance* which each member might have of a succession emerging in his favour in the future which, it was said, was obviously outside the inquiry. As regards the *Second Pittapur* case(1) it was observed that the claim for maintenance as put forward was made, not against the head of the family of which the claimant was a member, but against a stranger donee, against whom it could not

(1) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.  
(2) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.

prevail unless it was of the nature of a real right. Their Lordships added :

"Now it would only be of the nature of a real right, *no proceedings having taken place before the estate got into the hands of the donee*, if the maker of the claim had before that event been a person who was in some way an actual co-owner of the estate, and any observations which go to the question of maintenance apart from the question of real right may be treated as *obiter dicta*." (The italics are mine.)

The italicized words appear to suggest that there was or might have been an enforceable claim against the estate so long as it was in the hands of the previous holder but it failed as against the donee because the claim had not been converted into a charge before the gift was made. But this construction cannot, I admit, be said to be clear enough for being acted upon more especially on account of the views expressed in the two later decisions of the Board to which I shall refer presently. It is more pertinent for the present purpose to enquire what in fact were the observations in the *Second Pittapur* case(1) which in their Lordships' opinion deserved to be treated as *obiter dicta* according to *Bajjnath Prasad Singh's* case(2). As I understand it, the position taken up by Lord DUNEDIN was this. The estate had passed into the hands of a stranger who had taken it absolutely under the will of the previous holder. Being a stranger to the family he cannot be made liable for the maintenance, unless the estate itself had been, previous to the transfer, subject to a charge. There was no charge for a mere maintenance claim under Hindu law. In other words, it was not of the nature of a real right. True he was a coparcener, but his coparcenership or co-ownership had been

(1) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.  
(2) (1921) L.R. 48 I.A. 195; I.L.R. 43 All. 228.

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overwhelmed by the custom of impartibility to such an extent that it ceased to be a full or actual co-ownership. It was not in fact an actual co-ownership at any time, but it was less of it after *Sartaj Kuari's* case(1) which had negated his right even to interdict an unjustifiable alienation in spite of its resulting in a total destruction of all his right. A discussion of such a limited co-ownership had no bearing on the claim as against the stranger, as it could not influence the decision in any event one way or the other. So it followed that the observations in the *Second Pittapur* case(2) regarding the absence of coparcenary rights in an impartible estate were really unnecessary, and were accordingly to be treated as *obiter dicta*. Having thus disposed of the theory of a total absence of all coparcenary right in the junior members, Lord DUNEDIN felt himself at liberty to examine the question afresh, and came to the conclusion that a limited coparcenary did exist in an impartible joint family estate and governed the choice of a successor to it. In so far therefore as the *Second Pittapur* case(2) spelt the negation of a coparcenary in such an estate as being incompatible with impartibility, it has ceased to be a binding authority. That is why, it seems to me, Lord DUNEDIN criticised the use of the words coparcenary and coparceners as applied to a joint family under the Mitakshara, and said that it is necessary not to fasten the attention on the word "coparcenary" but rather to inquire what actually was decided in *Sartaj Kuari's* case(1). That again is the reason why turning to the *Second Pittapur* case(2) his Lordship stated that it must be remembered that the claim put

(1) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.  
(2) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.

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forward was made not against the head of the family of which the claimant was a member, but against a stranger. It is no longer possible to regard the *Second Pittapur* case(1) as governing a claim to maintenance where the claimant is a coparcener and a member of the joint family and not a mere stranger. Deprived as an ancestral impartible estate undoubtedly was of some of its essential attributes, coparcenary still remained, submerged but not destroyed, yet sufficiently alive to regulate succession. Whether it has been left with sufficient strength to support a claim to maintenance also, is a question which cannot be deemed to have been concluded by this case, but remained open for future decision. The power of independent disposal recognised by *Sartaj Kuari's* case(2) was however affirmed, with the observation that that case had stood too long to be disturbed.

The nature of the coparcenary right in relation to an impartible estate once again arose for consideration by the Privy Council in *Protap Chandra Deo's* case(3). The main appeal before the Board was directly concerned with the validity of a disposition by will by which the last holder had diverted the succession away from the appellant who would in the ordinary course have taken it by survivorship, as the family was undivided and the estate ancestral. The will was upheld. No other conclusion could have been arrived at without overruling *Sartaj Kuari's* case(2) and the cases that followed it and this their Lordships declined to do. The inconsistency between the two lines of cases, the one accepting, and the other negating, the co-ownership theory, was again urged, but in vain,

(1) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.  
(2) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.  
(3) (1927) L.R. 54 I.A. 289; I.L.R. 54 Cal. 955.

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as *Bajinath Prasad Singh's* case(1) was considered fatal to the contention. But of special significance to the present appeal are, it is urged, the observations of the Board made in the cross-appeal of the respondent objecting to the High Court's order regarding the appellant's claim to maintenance. Their Lordships negatived it. The express approval of the decision in the *Second Pittapur* case(2) coupled with the non-recognition of relationship as a ground of claim in itself does seem to go far to support the appellant's contention. But as against this it was argued before us that, in view of the finding that the claim had been satisfied by a suitable provision already made, the reference to custom and relationship as the basis of the claim should not be regarded as a binding decision.

In *Shibaprasad Singh v. Prayagkumari Debee*(3) the question whether co-ownership can be said to be an attribute of a joint but an impartible estate was once again raised and considered. Their Lordships reaffirmed the principle of *Bajinath Prasad Singh's* case(1), which did not in fact enunciate a new principle, as again and again pointed out by the Board. The applicability of the Mitakshara joint family law was once again reiterated, their Lordships observing that the right of survivorship is not to be regarded as a mere *spes successionis*, but a right capable of being renounced and surrendered. Any lingering doubt based on the observation of their Lordships in *Bajinath Prasad Singh's* case(1), where they spoke of co-ownership as not amounting to a *presently existing right*, and as giving rise to a mere *chance* of succession, was

(1) (1921) L.R. 48 I.A. 195; I.L.R. 43 All. 228.

(2) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.

(3) (1932) L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399.

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dispelled. This of course sounds the death knell of the view that joint ownership in regard to an impartible estate is a mere myth. But here again observations do occur regarding maintenance on which the appellant naturally enough founds himself. Referring to the four incidents which usually come up for consideration when an impartible estate is claimed as being held by a joint family, their Lordships analysed the legal position and held that out of those incidents, namely, (i) the right to partition, (ii) the right to restrain alienation by the head of the family except for necessity, (iii) the right of maintenance, and (iv) the right of survivorship, the first three should be held to have been superseded by custom; and that consequently an impartible estate though ancestral must be deemed to have become clothed by custom with the incidents of self-acquired and separate property. The meaning of their Lordships' observations is plain, namely, that the right of maintenance must be regarded as incompatible with impartibility and cannot therefore be substantiated except by proof of a custom. But it is no disrespect to their Lordships to say that what was said about maintenance in this case was by way of a reconciliatory statement of differing views as they were, rather than a definite decision that one was right and the other wrong.

*Collector of Gorakhpur v. Ram Sundar Mal*(1) contains the latest exposition of the law by the Judicial Committee in a way which, in my opinion, leaves no more doubt as to the principle on which this appeal falls to be decided. Without it, I am free to admit, the decision of this case must be the other way. It may

(1) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.

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be that the question of maintenance was not the question that called for a direct decision in this case either, which in fact related to a question of succession. But that is not a criticism to which this Court at any rate can attach weight. It was Lord BLANESBURGH who delivered the judgment but the Board included Sir JOHN WALLIS whose intimate familiarity, if I may say so with respect, with the peculiarities of the law relating to impartible estates is so well known, that an added importance attaches to the general position of the law categorically stated in the shape of seven propositions. Of these Nos. 1, 2, 3 and 7 are of the utmost importance for the present purpose. Propositions Nos. 1 and 2 do not call for special notice as they are general in character and refer only to the error of thinking that a custom of impartibility is destructive of the co-ownership of the junior members of the joint family. But Nos. 3 and 7 are couched in unambiguous language and mark, as I think, a definite restoration of the law such as it was understood to be before *Sartaj Kuari's* case(1). That law, as I understand it, recognised the right of a junior member, however remote, to maintenance out of the joint family estate, as a consequence of his membership alone and without proof of a custom. The words "at length", and "now" used in the third proposition and the observation in the seventh that the recent decisions of the Board constitute a further landmark in the judicial exposition of the question at issue show that while they were quite conscious of the contrary theories which had found expression in the *Second Pittapur* case(2) and the two other cases cited above [*Protap*

(1) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.  
(2) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.

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*Chandra Deo's* case(1) and *Shibaprasad Singh v. Prayagkumari Debee*(2)] their Lordships definitely declined to perpetuate them. The true basis of the right of maintenance, namely, the joint ownership of the junior members according to the Mitakshara law, was at last accepted and the *Challapalli* case(3), which had been decided without reference to custom, was cited as illustrative of that view though it had been understood in a different sense in the *Second Pittapur* case(4). The seventh proposition quite clearly re-affirmed the dethronement of the theory of fictional co-ownership in far more positive language than even that used in *Protap Chandra Deo's* case(1) and their Lordships proceeded to derive the right to maintenance from membership of the family as the result from a cause where the family was joint.

I regard this case as finally setting at rest all controversy on the subject of impartible estates. The status of the junior members has at long last been vindicated and with it also the attendant right to maintenance arising out of it, though it might be defeasible by an alienation supervening, unless made a charge on the estate in the meanwhile. For it is clear that freedom from restraint on alienation, whether illogical and incongruous or not, remains supreme, at any rate in those provinces where legislation has not been resorted to. The learned Judge in the Court below is of the opinion that the *Second Pittapur* case(4) governs the question of maintenance, as, on this point, it had not been departed from in the two later cases

(1) (1927) L.R. 54 I.A. 289; I.L.R. 54 Cal. 955.  
(2) (1932) L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399.  
(3) (1900) L.R. 27 I.A. 151; I.L.R. 24 Mad. 147.  
(4) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.

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referred to above [*Protap Chandra Deo's* case(1) and *Shibaprasad Singh v. Prayagkumari Debee*(2)] and must be held not to have been departed from even in the last one either. He thinks that in the use of the qualifying phrase "however limited" in the third proposition of their Lordships in the *Collector of Gorakhpur's* case(3) there is a sufficient expression of intention to leave the right of maintenance to be still regulated by the *Second Pittapur* case(4). In the first place, such a construction seems to be opposed to the general tenor of exposition adopted in the judgment, and attaches no significance to the use of the words "at length" and "now" by their Lordships; secondly, and, in view of their Lordships' obvious disinclination to accept the soundness of the several principles enunciated in the *Second Pittapur* case(4) and the earlier cases which it purported to follow, a re-statement of the law became necessary for the purpose of redeeming it from the confusion which had resulted from those cases. This their Lordships did in the clearest way possible so as to avoid misunderstanding in the future. Thirdly, there is no warrant for reading into the words "however limited" a meaning out of tune with the theme of the judgment. It is quite possible to give full effect to those words by regarding them as a reference to the defeasibility of the right by alienation which is a limitation imposed by *Sartaj Kuari's* case(5) or, what is more probable, their Lordships might have used the words by way of a necessary caution in view of the possibility of some limitation

- (1) (1927) L.R. 54 I.A. 289; I.L.R. 54 Cal. 955.  
(2) (1932) L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399.  
(3) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.  
(4) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.  
(5) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.

existing in the law itself, without deciding, as their Lordships were not called on to decide, whether it in fact existed or not.

The learned Subordinate Judge also refers to RAMESAM J.'s judgment in *Commissioner of Income-tax v. Zamindar of Chemudu*(1) as also lending support to his view. In that case the question was whether the money received as maintenance by the uncle of the holder of an impartible estate was taxable as money received by him as a member of a Hindu undivided family within section 14 (1) of the Income-tax Act, 1922. The answer was in the affirmative. The decision did not, as it could not, take note of the *Collector of Gorakhpur's* case(2) which came later. The right of junior members other than the son of the last owner did not arise for consideration either, and was not in fact considered. If I may say so with respect, the sentence extracted from the judgment by the learned Subordinate Judge seems to my mind to lay down the contrary of what he has said about it. I am free to confess that for myself I regard the reference in the *Second Pittapur* case(3) to the *Challapalli* case(4) as one made for the purpose of explaining that the latter case should be regarded as truly based on custom and not on law, only that the custom was one which did not require proof on account of its having been frequently acted upon by Courts. RAMESAM J. however thinks that Lord DUNEDIN intended to say that the right to maintenance was not the creature of custom, but an incident of the law which had not yet in that respect been encroached upon by

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- (1) (1934) I.L.R. 57 Mad. 1023.  
(2) (1934) L.R. 65 I.A. 286; I.L.R. 56 All. 468.  
(3) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.  
(4) (1900) L.R. 27 I.A. 151; I.L.R. 24 Mad. 147.

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custom; see *Subbayya Thevar v. Marudappa Pandian*(1). This, of course, is the view which has been since expounded in the *Collector of Gorakhpur's* case(2) though I doubt whether Lord DUNEDIN meant to convey that sense in the following passage:

"As to the zamindari estate, the Board held it was impartible, and the consequence is that the plaintiffs as the younger brothers of the zamindar retain such right and interest in respect of maintenance as belong to the junior members of a Raj or other impartible estate descendible to a single heir."

It may be observed in passing that if the right to maintenance is based on the law, no proof except of course of the necessary relationship need be given. It is only where the law does not confer the right [*Raja Rup Singh v. Rani Baisni*(3)] a special custom recognising the right has to be established by the production of the kind of proof [*Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar*(4)] required to establish a custom at variance with the law. In the *Second Pittapur* case(5), which proceeded on a theory which must now be deemed to have been at last exploded, the claim failed as there was no proof of the custom. Now that the law has been ascertained or, to be more correct, re-ascertained, as favouring the recognition of the right of a member, the only question for consideration is whether the respondents are members of the family, and that question has to be answered, as already mentioned, in the affirmative.

There are no degrees of relationship to be taken note of for the purpose of maintenance, for, in a joint

(1) I.L.R. [1937] Mad. 42.  
(2) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.  
(3) (1884) L.R. 11 I.A. 149; I.L.R. 7 All. 1.  
(4) (1872) L.R. Sup. I.A. 1; 14 M.I.A. 570.  
(5) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.

family living in union, every member, however remote, has the right to be maintained out of the common property as is even now the case in the Malabar tarwads not subjected to a division under Madras Act XXII of 1933. The right to maintenance is indeed the mode in which the right of ownership in the tarwad property is most effectively enforced by the junior members. The incidents of the joint holding of tarwad property approximate closely to those that attached to an impartible estate according to the decisions prior to *Sartaj Kuari's* case(1). The karnavan of a Malabar tarwad occupies a position similar in several respects to that of the holder of an impartible estate. There is so much that is common to the Mitakshara joint family law and the Marumakkathayam law that the latter may be regarded without much violence either to principle or legal history as representing but a school of Hindu law as SUNDARA AYYAR J. thought, in spite of its being based on the matriarchal instead of the patriarchal theory of joint family. It is as difficult on principle to limit the right of maintenance to a few only of the members as it is to limit the membership itself in the one case as in the other, for, after all, maintenance is the necessary resultant of membership. The position would be different if the family is governed by the Dayabhaga, or even by the Mitakshara law if the estate is the separate or the self-acquired property of the holder.

The Privy Council having in their latest pronouncement resuscitated in express terms the principle of the decision in the *Challapalli* case (2), it is desirable to see precisely what the nature and character of that principle is. The relevant observations have been

(1) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.  
(2) (1900) L.R. 27 I.A. 151; I.L.R. 24 Mad. 147.

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extracted above, and are not now to be understood as they were sought to be interpreted in the *Second Pittapur* case(1). On the contrary, they have now to be taken as a statement of the law according to which junior members have a right to maintenance by law and there is no need any longer to prove a custom to make it out. Emphasis is not to be placed on the claim being a claim by younger brothers, which of course was the fact in the particular case, but on the right under the law admitted to inhere in the junior members.

Some of the earlier cases may now be noticed as they show that Lord BLANESBURGH's exposition is in accord with the law regarding maintenance as understood before *Surtaj Kuari's* case(2). The *Hunsapore* case [*Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*(3)] was decided on the finding that the estate was the separate and self-acquired property of the last holder. The successful heir was a grandson by the eldest son in whose favour the last holder had also executed a will. The decision apparently proceeded on the footing that the Mitakshara law was applicable. The observations at the end of page 39 of the report to the effect that there are no inchoate rights of inheritance in the junior members of the family and that they did not by birth acquire community of interest with their grandfather must be understood with reference to the finding that the estate was the separate estate of the grandfather who was the last holder. At the same time there is in the judgment a reference to the right of maintenance of junior members, though the estate descended and was held

(1) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.

(2) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.

(3) (1867) 12 M.I.A. 1.

according to the rule of primogeniture. This reference is perhaps capable of being explained away on the ground that it may be regarded as an incident established by custom in that case, though there is in fact no reference in the judgment to any such specific custom. *Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochia Venkondora*(1), a decision of the Privy Council, applied the rule in the *Shivagunga* case [*Katama Natchiar v. The Rajah of Shivagunga*(2)] with this difference that whereas in the *Shivagunga* case(2) the estate was found to be the separate property of the last holder, the finding in this case was that it was the joint estate of the respondent and the appellant's husband. The appellant failed because the respondent took the estate by survivorship. In this case, there was a grant to the common ancestor of the family, which referred to the provision of *vasaties* (landed gifts) to the three brothers, who were the junior members of the family, by way of maintenance. Referring to this provision, their Lordships made the significant observation:

"These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a Raj or impartible estate in favour of the junior members of the family; who, but for the impartibility, would be coparceners with him."

In *Sivagnana Tevar, Ramasami Chetti, and Kosalarama Pillai v. Periasami*(3), referring to the succession of the eldest of three brothers to an impartible estate, the Board observed that the estate must be taken to have descended to him as ancestral estate and that

"he would therefore necessarily be joint in that estate, so far as is consistent with its impartible character, with his two younger brothers, the latter taking such rights and interests in

(1) (1870) 13 M.I.A. 333.

(2) (1863) 9 M.I.A. 539.

(3) (1878) L.R. 5 I.A. 51; I.L.R. 1 Mad. 312.

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respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindu family in the case of a Raj or other impartible estate descendible to a single heir."

The observations in the three cases referred to above seem definitely to acknowledge a right of maintenance as inherent in the junior members of a joint family holding an impartible estate as family property. The matter is further dealt with in *Naraganti Achammagaru v. Venkatachalapati Nayanivaru*(1) where the statement of the law occurs at page 266 :

"But where, from the nature of the property, possession is left with one coparcener, the others are not divested of co-ownership. Their necessary exclusion from possession imposes on the co-owner in possession two obligations to his coparceners in virtue of their co-ownership—the obligation to provide them with maintenance and the obligation to preserve the corpus of the estate. The rights of possession and maintenance are to this extent distinct and inconsistent that they cannot co-exist and be enjoyed by the same persons, that the one is a right to the immediate perception of the fruits of the property, the other a right to an indirect benefit, but both rights have a common origin, unity of ownership."

As I have said there is nothing inherently incongruous in the theory thus expounded. But so far alone as the obligation to preserve the corpus of the estate for the benefit of the junior members is concerned, it must now be taken that it has been finally negatived by *Sartaj Kuari's* case(2), the *First Pittapur* case(3) and *Protap Chandra Deo's* case(4) already referred to. In *The Udayarpalayam* case(5) confirmed by the Privy Council in [*Kachi Kaliyana Rengappa Kalakka Thola Udayar v. Kachi Yuva Rengappa*

- (1) (1881) I.L.R. 4 Mad. 250.  
(2) (1888) L.R. 15 I. A. 51; I.L.R. 10 All. 272.  
(3) (1899) L.R. 26 I.A. 83; I.L.R. 22 Mad. 383.  
(4) (1927) L.R. 54 I.A. 289; I.L.R. 54 Cal. 955.  
(5) (1901) I.L.R. 24 Mad. 562.

*Kalakka Thola Udayar*] *The Udayarpalayam* case(1) and in *Venkatachella Reddiar v. Venkatachella Reddiar*(2) the nephew of the last zamindar, that is a member beyond the first degree, was held entitled to maintenance out of the estate as a junior member. In the second of these cases, the decision of the Privy Council in the *Challapalli* case(3) was referred to as recognising the legal right to maintenance of the junior members of a Raj or other impartible estate, the learned Judges, one of whom was WALLIS J., as he then was, observing that, so far as their knowledge extended, the claim was in accordance with the usage prevailing in Southern India. In the next decision of the Madras High Court in *Tirumal Rao Saheb v. Rangadani Rao Saheb*(4) a claim for maintenance was successfully advanced by a person who was more than three degrees removed from the common ancestor but who was still a member of the joint family along with the holder. A great portion of the elaborate judgment delivered in this case was taken up with a discussion of the effect of *Sartaj Kuari's* case(5), and a conclusion was reached almost parallel to that reached later by the Privy Council. The remoteness of the plaintiff's relationship which was without success made the ground of attack was not however the remoteness beyond the first degree mentioned in the *Second Pittapur* case(6), but a remoteness of more than three degrees which it was contended dissipated the coparcenary right even in an ordinary Hindu joint family. The contention was negatived but what is of interest for the present purpose is that even so remote a collateral as a claimant beyond the third

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- (1) (1905) L.R. 32 I.A. 261; I.L.R. 28 Mad. 508.  
(2) (1909) 20 M.L.J. 394.  
(3) (1900) L.R. 27 I.A. 151; I.L.R. 24 Mad. 147. (4) (1912) 23 M.L.J. 79.  
(5) (1888) L.R. 15 I. A. 51; I.L.R. 10 All. 272.  
(6) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.



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degree was recognised as entitled to maintenance. This decision was followed in a later case in *Rangappa Kalakka v. Kulandai Ayal*(1) where the proposition that the junior members of a joint family holding an impartible estate are entitled to maintenance out of the impartible property was accepted and extended to the case of the widow of such a member.

As I understand these cases, it appears to me that there is no warrant for holding that a junior member, though he may be neither a brother nor a son, is to be regarded as disentitled to maintenance out of the impartible estate when it is held by a family of which he is a member. If the estate does not belong to a joint family but is the separate or self-acquired property of the holder, the rule is of course different; *Subbayya Thevar v. Marudappa Pandian*(2). In such a case, any junior member irrespective of the degree of relationship must, if he can, make out his right only by proof of a custom. It may be that, if he is a brother or a son, a custom in his favour will be presumed on account of the rule mentioned at the bottom of page 154 in the *Second Pittapur* case(3), namely :

"When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case."

Indeed, where the law itself favours the claim there is no necessity for relying upon a custom which, if it did exist, would coincide with it.

In conclusion I may also mention that it is a matter of some satisfaction that our decision on the question of Hindu law is in accordance with what the members of this family themselves seem to have thought right.

(1) (1914) 26 M.L.J. 205.

(2) I.L.R. [1937] Mad. 42.

(3) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.

In the deed of settlement, there is not the slightest indication that junior members beyond the first degree were regarded as not entitled to maintenance out of the estate. The deed was, as is quite apparent, primarily brought about for settling a claim to partition put forward by two of the four brothers and not for the purpose of resolving a disputed question of maintenance. It recited :

"The Rulers for the time being shall, *according to law and custom*, completely possess all the privileges and enjoy them, subject only to the condition of paying allowance to the other members of our family suitably to their respective status, out of the income from the estate and the properties."

And again, in clause 5, it is stated :

"As the said Venkatagiri estate is impartible and as the aforesaid Sri Muthukrishna Yachendrule Varu, Sri Venkata Krishna Yachendrule Varu and Sri Venugopala Krishna Yachendrule Varu and *their male descendants are entitled to get allowances from the said estate*, we . . . appointed the Raja of Bobbili, as mediator, to determine the amount of allowance to be given to the said Sri Muthukrishna Yachendrule, Sri Venkata Krishna Yachendrule and Sri Venugopala Krishna Yachendrule and to their male descendants."

These two extracts from the deed show that the parties to it and their advisers, namely, Sri Kumara Yachama and the Maharaja of Bobbili, understood the law and custom to be that the other members of the family in general and not merely the sons and brothers of the holder were entitled to be maintained. A further significance arises out of the fact that the deed was also the result of a consultation with the father, Sri Kumara Yachama, which preceded the settlement, who, as the document states it, *knew everything and who had considerable experience*.

Another circumstance on which some point was made for the respondents was that the deed is dated 8th April 1889. It was said that the effect of *Sartaj*

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*Kuari's* case(1), though anterior in date, was not realized in Madras till October of the following year, when alone it became known by reason of the decision in *Beresford v. Ramasubba*(2). So it was contended that it must be held that the parties acted on the view of the law as it was understood prior to *Sartaj Kuari's* case(1) and effect should accordingly be given to it. There is authority for this proposition, it was urged, in *Abdul Aziz Khan v. Appayasami Naicker*(3). Whether there is any substance in this argument or not I do not think it necessary, in the view I have taken, to discuss, as independently of it the claim of the respondents seems sufficiently well-founded.

The result of the case law on the question of maintenance of a junior member may now be summed up thus. Till the decision in *Sartaj Kuari's* case(1) his right to maintenance by reason of his membership of the family was open to no doubt in spite of the family property being impartible. That case for the first time recognised in the holder a power of unrestrained disposal over the estate in derogation of the rights of the other members of the family which were held not to exist, as there could be no right by birth where there is no right to partition. The later cases have not interfered with the power of absolute disposal recognised by this case, but on the contrary have affirmed it. In so far as the question of succession is concerned, the Privy Council have clearly and unambiguously re-asserted the existence of a real and not merely a visionary coparcenary in the members of the family. In regard to maintenance, which is an ordinary incident of partible property, there are no decisions which can

(1) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.

(2) (1889) I.L.R. 13 Mad. 197.

(3) (1903) L.R. 31 I.A. 1; I.L.R. 27 Mad. 181.

now be treated as ruling the point. There have been two cases in which the question of maintenance arose for decision, namely, the *Second Pittapur* case(1) and *Protap Chandra Deo's* case(2). The first of these cases, though a direct decision, must now be regarded as having proceeded on the entire absence of relationship between the parties and is not therefore to be regarded as authority in a case where a relationship and membership is set up and found, the present being such a case. The observations in the second of the cases, though clear in themselves and may and ought to be treated as binding, have been counteracted and neutralised by the latest pronouncement of their Lordships in the *Collector of Gorakhpur's* case(3), which has cleared the way for the application of the rule in force before the advent of the doctrine propounded in *Sartaj Kuari's* case(4) and the other cases including the *Jeypore* case [*Maharajah of Jeypore v. Vikarama Deo Garu*(5)] which followed it, and which spelt the absence of co-ownership in the junior members of a family holding an impartible estate. We are therefore bound to give effect to the principle of the latest decision of the Privy Council, and, so doing, we must uphold the respondents' claim.

For the reasons explained above, I am of opinion that the respondents are under the Hindu law entitled to maintenance from the impartible estate in the hands of the appellant. On the other points that arise in the case, I have nothing to add to the judgment of my Lord the CHIEF JUSTICE.

G.R.

(1) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.

(2) (1927) L.R. 54 I.A. 289; I.L.R. 54 Cal. 955.

(3) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.

(4) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.

(5) (1919) 37 M.L.J. 188; 24 C.W.N. 226 (P.C.).

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## APPELLATE CRIMINAL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice  
Madhavan Nair, Mr. Justice Varadachariar,  
Mr. Justice Wadsworth and Mr. Justice  
Lakshmana Rao.

DISTRICT MAGISTRATE, TRIVANDRUM, PETITIONER,

v.

K. C. MAMMEN MAPPILLAI AND FIVE OTHERS,  
RESPONDENTS.\*

Habeas Corpus—English common law writ of—High Court's power to issue—Code of Criminal Procedure (Act V of 1898), sec. 491—Effect of—Single Judge of High Court—Application for common law writ or for directions under sec. 491—Power to hear and dispose of—Appellate Side Rules (Madras High Court), Rr. 2 and 2-A—Intra or ultra vires—English Extradition Act, 1870—Applicability of, to case falling under Chapter III of Indian Extradition Act (XV of 1903)—Order directing issue of writ of habeas corpus passed without jurisdiction—Null and void, if—Indian Councils Act, 1861.

Held by the Full Bench: (i) The High Court has no power to issue a writ of *habeas corpus* as known to the English Common Law. Its powers are confined in this respect to those conferred by section 491 of the Code of Criminal Procedure, which gives authority to issue directions "of the nature of a *habeas corpus*".

The High Courts Act of 1861 authorised the Legislature, if it thought fit, to take away the powers which the High Court obtained as the successor of the Supreme Court and, by Acts of the Legislature lawfully passed in 1875 and subsequent years, the Legislature has taken away the power to issue the prerogative writ of *habeas corpus* in matters contemplated by section 491 of the Code of Criminal Procedure of 1898.

\* Criminal Miscellaneous Petition No. 1003 of 1938.

*In re Govindan Nair*(1) and *In re Kochunni Elaya Nair*(2) overruled.

*Mahomedalli Allabux v. Ismailji Abdulali*(3) disapproved.

*Girindra Nath Banerjee v. Birendra Nath Pal*(4) approved.

*Eshugbayi Eleko v. Government of Nigeria* (Officer Administering)(5) explained and distinguished.

The abolition of the right to issue a prerogative writ is not a matter which can be deemed to affect the allegiance to the Crown within the meaning of the last proviso to section 22 of the Indian Councils Act of 1861. This provision only refers to laws "which directly affect the allegiance of the subject to the Crown as by a transfer or qualification of the allegiance, or a modification of the obligations thereby imposed".

*Bugga v. King-Emperor*(6) referred to.

The penultimate proviso to section 22 of the Indian Councils Act of 1861 does not restrict the powers of the Legislature and affect its right to abolish the prerogative writ of *habeas corpus*.

*Empress v. Burah*(7) referred to.

(ii) Rules 2 and 2-A of the Appellate Side Rules of the Madras High Court are *intra vires* the powers of the Court and an application for a Common Law writ of *habeas corpus* or for directions under section 491 of the Code of Criminal Procedure cannot be heard and disposed of by a single Judge of the High Court.

In the view that the right to issue the prerogative writ of *habeas corpus* has been taken away, the said rules must be deemed to refer to an application for directions of the nature of *habeas corpus* and there can be no question that they are *intra vires*. But even if the right to issue the prerogative writ has not been abolished the Legislature can regulate the procedure which governs its issue. The rule-making powers conferred on the High Courts by Legislature are sufficiently wide to entitle the Court to say that even an application for a prerogative writ shall go before two Judges.

Chapter III of the Indian Extradition Act XV of 1903, which is intended to apply only to the surrender of fugitive

(1) (1922) I.L.R. 45 Mad. 922 (F.B.).

(2) (1921) I.L.R. 45 Mad. 14. (3) (1926) I.L.R. 50 Bom. 616.

(4) (1927) I.L.R. 54 Cal. 727. (5) [1928] A.C. 459.

(6) (1920) I.L.R. 1 Lah. 326 (P.C.). (7) (1878) I.L.R. 4 Cal. 172 (P.O.).

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criminals to Native States in India, has not been made part of the English Extradition Act, 1870, under section 18 of the English Act. To a case falling under Chapter III of the Indian Act the English Act has therefore no application and in such a case a Judge of this Court has not the same powers as a Judge of the King's Bench in regard to the issue of a writ of *habeas corpus*.

(iii) Where an order directing a writ of *habeas corpus* to be issued has been passed without jurisdiction, it is null and void and can be disregarded.

*In the matter of Abdool Sobhan*(1), *In re Kunhammad Haji*(2), *In re Soma Naidu*(3) and *Narayan Vithal Samant v. Janakibai*(4) referred to.

The circumstances in which the reference to the Full Bench was made, the questions of law referred and the arguments of Counsel are set out fully in the judgment of his Lordship the CHIEF JUSTICE.

*T. R. Venkatarama Sastri* for petitioner.

*K. Bhashyam Ayyangar* for *V. T. Rangaswami Ayyangar* for respondents 1, 5 and 6.

*K. Krishnaswami Ayyangar* and *T. S. Venkatesa Ayyar* for respondents 2 to 4.

*Advocate-General (Sir A. Krishnaswami Ayyar)* for the Crown.

### JUDGMENT.

LEACH C.J.—This Full Bench has been constituted to decide a matter referred under Rule 2 of the rules applying to this Court in its appellate jurisdiction by BURN and STODART JJ. sitting as a Bench dealing with criminal cases. The matter involves the important question whether this Court has the power to issue a writ of *habeas corpus* as known to the English Common Law or whether its powers are confined in this respect to those conferred by section 491 of the Code of

(1) (1881) I.L.R. 8 Cal. 63.

(2) (1922) I.L.R. 46 Mad. 382.

(3) (1923) I.L.R. 47 Mad. 428.

(4) (1915) I.L.R. 39 Bom. 604 (F.B.).

Criminal Procedure, which gives authority to issue directions "of the nature of a *habeas corpus*". There are other questions involved in the reference and for their proper appreciation it is necessary to set out the course of events.

The respondents are the directors of the Travancore National and Quilon Bank Limited, a company registered under the laws of the State of Travancore. A petition for the compulsory winding up of the company was recently granted by this Court and official liquidators have been appointed. On the night of 20th October 1938 the respondents were arrested in Madras in pursuance of extradition warrants issued under section 7 of the Indian Extradition Act, 1903, for their arrest and surrender to the police of the Travancore State for production before the District Magistrate, Trivandrum, which is the capital of the State. It was alleged that the respondents had committed within the State of Travancore offences under the sections of the Travancore Penal Code corresponding to sections 409, 418, 420, 477 A, 109 and 114 of the Indian Penal Code and the District Magistrate at Trivandrum ordered their arrest. The extradition warrants were directed to the Chief Presidency Magistrate, Madras, and under his orders the Assistant Commissioner of Police, Crime Branch, Madras, arrested the respondents. The respondents were produced before the Chief Presidency Magistrate at 8-30 a.m., on the 21st October and the intention was to send them under arrest to the frontier of the Travancore State by the train leaving Madras at 11 a.m. Before the respondents were brought before the Chief Presidency Magistrate an application had been made to PANDRANG ROW J. for the issue of a writ of *habeas corpus* and for an interim order prohibiting their removal from Madras.

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The application was made under section 491 of the Code of Criminal Procedure as the heading of the petition shows. The matter being urgent, the learned Judge granted the interim order asked for and directed the Chief Presidency Magistrate to detain the respondents in his custody pending the further orders of the High Court, which meant pending the hearing of the main application. The interim order was served on the Chief Presidency Magistrate and the respondents were detained in accordance with the order. Later in the day the Crown Prosecutor presented a petition asking that the interim order be vacated on the ground that it had been passed without jurisdiction and was therefore null and void. The petition having been filed, the Crown Prosecutor applied to me in Chambers to hear it. As I considered that sitting alone I had no power to deal with the matter, I declined to do so. The Crown Prosecutor then applied to PANDRANG ROW J. to vacate his own order. The learned Judge heard the arguments the next morning, the 22nd October, but refused to withdraw the interim order intimating that he would give his reasons on Monday, the 24th October. The main application was in the list for that day of BURN and STODART JJ. who composed the Bench dealing with criminal matters. Rule 2-A of the rules of this Court in its appellate jurisdiction requires an application for a writ of *habeas corpus* to be placed before the Bench dealing with criminal matters. The Court usually sits at 10-45 a.m. but PANDRANG ROW J. delivered his judgment at 10-30 a.m. on the 24th October. Not only did he refuse to vacate the interim order but he held that Rule 2-A of the Appellate Side Rules was *ultra vires* and that he alone had power to deal with the main application which he treated as an application for the

issue of the prerogative writ of *habeas corpus* and not as an application under section 491 of the Code of Criminal Procedure. He considered that he had power to issue a writ of *habeas corpus* as known to the Common Law and based this decision on *Eshugbayi Eleko v. Government of Nigeria* (Officer Administering)(1) and on *In re Govindan Nair*(2). In the first case the Privy Council held that each Judge of the High Court of Justice established by the Judicature Act, 1873, has jurisdiction to issue a writ of *habeas corpus* and is bound to hear and determine the application on its merits, even when another Judge has refused a similar application. The same principle applied in the case of Judges of the Supreme Court of Nigeria. In the second case a Full Bench of this Court (SCHWABE C.J., OLDFIELD and COURTTS TROTTER JJ.) held that this Court had power to issue a writ of *habeas corpus* outside Madras.

When the main application was called for hearing before BURN and STODART JJ., Counsel for the respondents took the objection that the Court had no power to deal with the matter as PANDRANG ROW J. was seized of it and a copy of the judgment of PANDRANG ROW J. was produced. Counsel who appeared for the District Magistrate of Trivandrum on the other hand contended that PANDRANG ROW J. had never directed that the substantive petition should be placed before him and he had never intended to dispose of it sitting alone. In view of the conflicting contentions, BURN and STODART JJ. communicated with PANDRANG ROW J. with a view to ascertaining how the matter really stood. PANDRANG ROW J. replied that the main application was pending before him

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(2) (1922) I.L.R. 45 Mad. 922 (F.B.).

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and that in his view he had power to dispose of it. In these circumstances the learned Judges who formed the Bench decided that they could not go on with the hearing of the application as it was already before another Judge. On the 26th October PANDRANG ROW J. ordered that a writ of *habeas corpus* should issue to the Chief Presidency Magistrate directing him to produce the respondents before him at 10-45 a.m. on the 28th October. In view of this order, the District Magistrate of Trivandrum filed an application asking the Court to declare that the orders passed by PANDRANG ROW J. on the 21st, 24th and 26th October had been passed without jurisdiction and were void and of no legal effect and to quash them. The application was placed in the list for the 27th October of BURN and STODART JJ., who still composed the Bench dealing with criminal matters. The hearing commenced that day but, as there was no time to hear the arguments advanced on behalf of the respondents and as PANDRANG ROW J. had made the writ returnable the next day, the Court directed that the operation of the writ should be stayed till the further orders of the Court. At the request of Counsel for the respondents the Bench adjourned the further hearing of the case until the 31st October. The hearing was concluded on the 1st November.

It was contended on behalf of the District Magistrate that the issue of a writ of *habeas corpus* was without jurisdiction. The Legislature had taken away the right of the Court to issue a writ of *habeas corpus* and the powers of the Court were confined to those conferred by section 491 of the Code of Criminal Procedure. If the Court had power to issue a Common Law writ of *habeas corpus*, Rule 2-A of the Appellate

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Side Rules was nevertheless *intra vires* the power of the Court and binding on all the Judges. It was further contended that, even if a single Judge had power to issue a Common Law writ, the proper procedure had not been followed in the present case. The learned Judges were satisfied that the Legislature had taken away the power of the Court to issue a writ of *habeas corpus* in a case like the present one and were also satisfied that Rule 2-A of the Appellate Side Rules was *intra vires*, but, as they were bound by *Govindan Nair's case*(1) and as the matter involved a decision on three important questions, they referred the application for decision by a Full Bench under Rule 2 of the Appellate Side Rules. In their judgment referring the matter the learned Judges stated the three questions as follows :—

“(i) Can this High Court or any Judge of it issue the Common Law writ of *habeas corpus* in any of the cases covered by section 491 of the Criminal Procedure Code ?

(ii) Can an application for a Common Law writ of *habeas corpus* or for directions under section 491 of the Criminal Procedure Code be heard and disposed of by a single Judge of this Court ? In other words, are Rules 2 and 2-A of the Appellate Side Rules *intra* or *ultra vires* ?

(iii) If a single Judge has power to issue a Common Law writ of *habeas corpus*, is the writ issued by our learned brother PANDRANG ROW J. on the 26th October liable to be quashed by this Court for the reason that it has been issued in contravention of the rules in force in the High Court in England ? ”

The answers to the first two questions depend upon the interpretation to be placed on legislation in England and in India and, in view of the judgment in *Govindan Nair's case*(1) and other decisions of this Court, I

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propose to examine the various enactments in some detail.

In 1861 the Parliament passed an Act (24 and 25 Vict. C. 104) authorising the establishment of High Courts of Judicature in India. Section 1 declared it to be lawful for the Crown, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish High Courts at Fort William in Bengal, Madras and Bombay for the respective Presidencies. Section 9 of the Act stated that each of the High Courts to be established under the Act

“shall have and exercise all such Civil, Criminal, Admiralty, and Vice-Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, original and appellate, and all such Powers and Authority for and in relation to the Administration of Justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid grant and direct, subject, however, to such Directions and Limitations as to the Exercise of original Civil and Criminal Jurisdiction beyond the Limits of the Presidency Towns as may be prescribed thereby; and, save as by such Letters Patent may be otherwise directed, and subject and without Prejudice to the Legislative Powers in relation to the Matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all Jurisdiction and every Power and Authority whatsoever in any Manner vested in any of the Courts in the same Presidency abolished under this Act at the Time of the Abolition of such last-mentioned Courts”.

The Supreme Court at Madras which had been created by Letters Patent granted on 26th December 1800 was abolished and the High Court was constituted under Letters Patent issued under the Act on 26th June 1862. The preamble to the Letters Patent followed the provisions of section 9 of the Act and the operative clauses were also in accordance with the statute. On 28th December 1865 fresh Letters Patent were issued to the Court. They embodied the

provisions of the original Letters Patent but contained the further clause (44):

“And we do further ordain and declare that all the provisions of these our Letters Patent are subject to the Legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations, and also of the Governor-General in cases of emergency under the provisions of an Act of the Twenty-fourth and Twenty-fifth years of Our Reign, chapter sixty-seven, and may be in all respects amended and altered thereby.”

It is manifest that the Court was given the same jurisdiction, power and authority which the Supreme Court possessed, but subject and without prejudice to the legislative powers of the Governor-General in Council. Counsel who appears for the first respondent would have the Court hold that the Indian High Courts Act does not contemplate the abolition of the right to issue prerogative writs, but only confers the power of regulating the issue. This contention ignores the express words of the statute and of the Letters Patent, and therefore is obviously fallacious. It is not necessary for the purpose of deciding the present application to consider whether the Supreme Court did in fact possess the power of issuing prerogative writs and I will assume that it had.

Section 81 of the Code of Criminal Procedure of 1872 provided that any European British subject who was detained in custody by any person, and who considered such detention unlawful, might apply to the High Court for an order directing the person detaining him to bring him before the Court to abide such further order as might be made by it. The section also provided that the High Court might issue such orders throughout the territories over which it had jurisdiction, and over such other places as the

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Governor-General in Council might direct. The section, however, only applied to European British subjects. Section 82 prohibited a High Court or any Judge thereof issuing a writ of *habeas corpus*, *mainprise*, *de homine replegiando*, or any other writ of the like nature beyond the Presidency-town. The section was inserted as the result of the decision of NORMAN J. in *In the matter of Ameer Khan*(1) that the Supreme Court at Calcutta had power to issue writs of *habeas corpus* to persons in the mufassal and that the same power was continued to the High Court. In inserting section 82 the Legislature wished to make sure that prerogative writs should not issue beyond Presidency-towns.

The Criminal Procedure Code of 1872 was followed by the Criminal Procedure Code of 1875. In that year the High Courts were empowered to issue directions of the nature of a *habeas corpus*. The section conferring these powers was section 148 and as it has a very important bearing I will quote it in full. It read as follows :—

“Any of the High Courts of Judicature at Fort William, Madras, and Bombay may, whenever it thinks fit, direct—

(a) that a prisoner, legally committed and within the local limits of its ordinary original criminal jurisdiction, be brought before it to be bailed :

(b) that a person within such limits be brought up before the Court to be dealt with according to law :

(c) that a person illegally or improperly detained in public or private custody within such limits be set at liberty :

(d) that a prisoner detained in any gaol situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court :

(1) (1870) 6 Beng. L.R. 392.

(e) that a prisoner detained as aforesaid be brought before a Court-Martial or any Commissioners acting under the authority of any commission from the Governor-General in Council, for trial, or to be examined touching any matter depending before such Court-Martial or Commissioners respectively :

(f) that a prisoner within such limits be removed from one custody to another for the purpose of trial :

(g) that the body of a defendant within such limits may be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment ;  
and neither the High Court nor any Judge thereof shall hereafter issue any writ of *habeas corpus* for any of the above purposes.

Each of the said High Courts shall, as soon as conveniently may be, frame rules to regulate the procedure in cases under this section ; and till such rules are framed, the practice of such Courts as to the obtaining, granting, and serving of writs of *habeas corpus*, and as to the returns thereto, shall apply in such cases.

Nothing in this section applies to persons detained under Bengal Regulation III of 1818, Madras Regulation II of 1819, or Bombay Regulation XXV of 1827, or the Acts of the Governor-General in Council No. XXXIV of 1850 or No. 111 of 1858.”

It will be observed here that the power of the High Court or any Judge to issue a writ of *habeas corpus* for any of the purposes mentioned in the section was expressly taken away and the High Courts were given legislative authority to frame rules to regulate the procedure contemplated by the section. Clauses (b) and (c) correspond to clauses (a) and (b) of section 491 (1) of the Code now in force.

The Criminal Procedure Code of 1882 omitted the prohibition against the writ of *habeas corpus* and also made the rule-making clause read :

“Each of the said High Courts may from time to time frame rules to regulate the procedure in cases under this section.”

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In other respects section 148 of the Act was reproduced. The omission of the words

"Neither the High Court nor any Judge thereof shall hereafter issue any writ of *habeas corpus* for any of the above purposes"

did not, however, alter the law. Section 2 of the Act provided that the enactments mentioned in the first schedule should be repealed to the extent specified,

"but not so as to restore any jurisdiction or form of procedure not then existing or followed, or to render unlawful the continuance of any confinement which is then lawful".

The whole of the Act of 1875 was repealed except section 144 and so much of section 146 as related to informations, but by virtue of section 2 of the new Act the repeal of section 148 did not restore any former jurisdiction or procedure and in effect continued the prohibition in the Act of 1875 against the issue of prerogative writs.

The Criminal Procedure Code of 1898 repealed the Code of 1882 but reproduced section 491 as it stood in the Code of 1882 and section 2 was to the same effect as section 2 of the earlier Code. Section 2 of the Code of 1898 has since been repealed but the prohibition against the issue of prerogative writs contained in the Code of 1875 still continues. Section 6 of the General Clauses Act of 1897 provides that where that Act, or any Act of the Governor-General in Council or Regulation made after the commencement of that Act, repeals any enactment, the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect unless a different intention appears, and section 7 says that in any Act of the Governor-General in Council or Regulation, made after the commencement of the General Clauses Act, it shall be necessary, for the purposes of reviving, either wholly or partially, any enactment wholly or

partially repealed, expressly to state that purpose. Section 7 applies also to all Acts of the Governor-General in Council made after the third day of January 1868, and to all Regulations made on or after the fourteenth day of January 1887. Section 2 of the Code of Criminal Procedure of 1898 was repealed by the Amending and Repealing Act of 1914, but section 4 provided that the repeal should not affect the existing position. The object of the repeal of section 2 of the Code of 1898 was to remove from the statute book a redundant provision. The effect of the General Clauses Act and the Repealing and Amending Act of 1914 is therefore to keep in operation the prohibition of the Code of 1875.

By section 30 of the Criminal Law Amendment Act of 1923, sub-section 1 and clause (a) of section 491 of the Code of 1898 were altered to read as follows:

"Any High Court may, whenever it thinks fit, direct—

(a) that any person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law."

Previously, clause (a) only referred to the ordinary original civil jurisdiction of the High Court. The Act of 1923 extended the clause to cover its appellate criminal jurisdiction. The effect is that any High Court can now give directions of the nature of *habeas corpus* throughout the whole of its jurisdiction. The Act of 1923 also did away with the distinction between European and British Indian subjects in such matters.

The High Courts Act of 1861 authorised the Legislature if it thought fit to take away the powers which this Court obtained as the successor of the Supreme Court and Acts of the Legislature lawfully passed in 1875 and subsequent years leave no doubt in my mind that the Legislature has taken away the power to issue the

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prerogative writ of *habeas corpus* in matters contemplated by section 491 of the Code of Criminal Procedure of 1898. RANKIN C.J. and MAJUMDAR J. came to the same conclusion in *Girindra Nath Banerjee v. Birendra Nath Pal*(1) and I respectfully agree with them that the Legislature has used the most specific terms in carrying out its intention. The respondents have their remedy under the Code of Criminal Procedure and it is admitted that their case comes within clause (a) or clause (b) of section 491 (1).

Before I leave the question of the powers of the Legislature, I must refer to a further argument advanced by the learned Advocate for the first respondent in this connection. He says that, inasmuch as the last proviso to section 22 of the Indian Councils Act of 1861 prohibits the Governor-General in Council making laws which may affect any part of the unwritten laws or constitution of the United Kingdom whereon may depend in any degree the allegiance of any person to the Crown, the Legislature has no power to abolish the prerogative writ of *habeas corpus*. The abolition of the right to issue a prerogative writ is not a matter which can be deemed to affect the allegiance to the Crown. This provision only refers to laws

"which directly affect the allegiance of the subject to the Crown as by a transfer or qualification of the allegiance, or a modification of the obligations thereby imposed".

The words which I have quoted are taken from the decision of the Privy Council in *Bugga v. King-Emperor*(2) where a similar argument was advanced. The learned Advocate has not advanced before us the argument which was raised before BURN and STODART JJ. that the penultimate proviso to section 22 of the Indian Councils Act restricted the powers

(1) (1927) I.L.R. 54 Cal. 727.

(2) (1920) I.L.R. 1 Lah. 326 (P.C.).

of the Legislature and affected its right to abolish the prerogative writ of *habeas corpus*. The argument was not accepted by the learned Judges and their answer has evidently satisfied the respondents. I agree with what the learned Judges say and have only to add that the argument was negatived by the Privy Council in *Empress v. Burah*(1).

The decision of the Judicial Committee in *Eshugbayi Eleko v. Government of Nigeria* (Officer Administering)(2), on which PANDRANG ROW J. so much relied in holding that he had jurisdiction in the matter, has in our opinion no application. The decision in that case would, of course, be binding upon this Court if the position were the same in British India as it is in Nigeria. In Nigeria the right to issue the prerogative writ of *habeas corpus* still exists, but here the right has been taken away. *Govindan Nair's* case(3) on which the learned Judge also relied was binding on him, but I consider that it was wrongly decided and should be overruled. The attention of the learned Judges who decided *Govindan Nair's* case(3) was not drawn to the provisions of the Code of 1872 and the succeeding enactments which affected the question under consideration. If attention had been drawn, I have no doubt that the decision would have been a different one, but, be that as it may, the decision cannot be allowed to stand in the light of the statutory prohibition which exists against the issue of the writ. The same objection applies to *In re Kochunni Elaya Nair*(4) and *Mahomedalli Allabux v. Ismailji Abdulali*(5) as RANKIN C.J. pointed out in *Girindra Nath Banerjee v. Birendra Nath Pal*(6).

(1) (1878) I.L.R. 4 Cal. 172 (P.C.). (2) [1928] A.C. 459.

(3) (1922) I.L.R. 45 Mad. 922 (F.B.).

(4) (1921) I.L.R. 45 Mad. 14. (5) (1926) I.L.R. 50 Bom. 616.

(6) (1927) I.L.R. 54 Cal. 727.

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This brings me to the question whether Rules 2 and 2-A of the Appellate Side Rules are *ultra vires*. Rule 2 provides that certain matters which are set out in the rule may be heard and determined by a Bench of two Judges, provided that if both Judges agree that the determination involves a question of law, they may order that the matter, or the question of law, be referred to a Full Bench. The rule expressly includes an application for the issue of a writ of *habeas corpus*. As in my view the Court has no power to issue a prerogative writ of *habeas corpus* in a matter such as is now before us, the rule must be deemed to refer to an application for directions of the nature of *habeas corpus*, and this observation applies to Rule 2-A. The right to make rules cannot be doubted. Section 13 of the High Courts Act of 1861 empowered a High Court established under the Act to make its own rules and provide for the exercise by one or more Judges, or by Division Courts constituted by two or more Judges, of the original and appellate jurisdiction vested in the Court. Section 14 provided that the Chief Justice should from time to time determine what Judge in each case should sit alone, and what Judge of the Court whether with or without the Chief Justice should constitute the several Division Courts. Similar provisions are embodied in section 108 of the Government of India Act, 1915, and the provisions of that section remain in force by virtue of section 223 of the Government of India Act, 1935. Moreover rule-making powers were conferred upon the High Court in matters of the nature of *habeas corpus* by the Code of 1875 and succeeding Codes have continued the powers. If the right to issue the prerogative writ has been taken away there can be no question that the rules are *intra vires*, but even if the right has not been abolished the Legislature can regulate the procedure which governs its

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issue. The argument advanced by Counsel for the first respondent when dealing with the High Courts Act of 1861 in effect recognised this. The rule-making powers conferred on the High Court by Legislature are wide and are sufficiently wide to entitle the Court to say that even an application for a prerogative writ shall go before two Judges. The English rules in fact recognise the right to place restrictions. In the Order of Reference it is pointed out that in England no application for a writ of *habeas corpus* on a warrant of extradition shall be made to a Judge in Chambers during the sittings. I would hold that both rules are *intra vires* the powers of the Court and in these circumstances it is not necessary to enter upon a discussion of the question whether the writ issued by PANDRANG Row J. on 26th October 1938 is liable to be quashed on the ground that it has been issued in contravention of the rules in force in England.

Counsel for the first respondent has advanced an argument based on the provisions of the English Extradition Act, 1870. This Act contemplates the right to apply for a writ of *habeas corpus* in certain circumstances and section 17 (4) directs that a Judge of any Court exercising the like powers as the Court of King's Bench exercises in England may exercise the power of discharging a criminal in the circumstances contemplated by the section. It is said that this Act applies to India and therefore a Judge of this Court has the same powers as a Judge of the King's Bench when it is the question of the issue of a writ of *habeas corpus* in an extradition matter. The Act can only come into operation where an arrangement has been made by the Crown with a Foreign State with respect to the surrender to such State of fugitive criminals. By virtue of the provisions of section 18 a law passed

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by a British possession may be incorporated in the Act, and section 23 saves the power of the Governor-General of India in Council to make treaties for the extradition of criminals with Indian Native States and to carry into execution the provisions of such treaties. India has its own Extradition Act, namely Act XV of 1903, which has been drafted on the assumption that the Native States in India are not foreign within the meaning of the English Act of 1870. The Indian Act contains no reference to *habeas corpus* and only Chapter II which deals with the surrender of fugitive criminals in the case of Foreign States has been incorporated in the English Act, *vide* the notification published in the *Gazette of India*, dated 14th May 1904. Chapter III of the Indian Act relates to surrender of fugitive criminals in case of States other than Foreign States and is intended to apply only to the surrender of fugitive criminals to Native States in India. The present case falls under Chapter III and, as this chapter has not been made part of the English Act under section 18, the English Act cannot be deemed to apply here.

Counsel for respondents 2 to 4 has advanced the argument that this Court has no power to quash the order of PANDRANG ROW J. inasmuch as it was passed in the exercise of criminal jurisdiction and the order of a Judge sitting alone in criminal matters cannot be the subject of an appeal or revision. There is authority for the granting of a motion to quash a writ of *habeas corpus* wrongly issued—*In re Bombay, Justices of*(1) and *Crawford's case*(2)—but, as I hold that the Common Law writ of *habeas corpus* does not run in British India, it is not necessary for me to discuss this point. The question has to be approached from the

(1) (1829) 1 Knapp 1; 12 E.R. 222.  
(2) (1849) 13 Q.B. 613; 116 E.R. 1397.

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point of view of an application under section 491 of the Code of Criminal Procedure and the answer is that the order passed has been passed without jurisdiction and can be disregarded. If authority for this is wanted, it is to be gathered from the decisions in *In the matter of Abdool Sobhan*(1), *In re Kunhammad Haji*(2), *In re Soma Naidu*(3) and *Narayan Vithal Samant v. Janakibai*(4).

As the order of PANDRANG ROW J. directing a writ of *habeas corpus* to be issued was an order passed without jurisdiction, it must be disregarded and the application which the respondents have filed under section 491 of the Code of Criminal Procedure must be dealt with by the Bench dealing with criminal matters. As it is within my authority to do so, I direct that the application be placed before that Bench on Monday, 7th November 1938.

MADHAVAN NAIR J.—I agree.

VARADACHARIAR J.—I agree.

WADSWORTH J.—I agree.

LAKSHMANA RAO J.—I agree.

Solicitors for petitioner : *King and Partridge*.

A.S.V.

(1) (1881) I.L.R. 8 Cal. 63. (2) (1922) I.L.R. 46 Mad. 382.  
(3) (1923) I.L.R. 47 Mad. 428. (4) (1915) I.L.R. 39 Bom. 604 (F.B.).

[Criminal Miscellaneous Petition No. 985 of 1938 made under section 491 of the Code of Criminal Procedure by the arrested persons then came on for hearing before BURN and STODART JJ. on 7th November 1938 when their Lordships delivered the following

### JUDGMENT :—

The Full Bench have decided that PANDRANG Row J.'s order of the 26th October issuing the writ *nisi* in this case was passed without jurisdiction and was consequently null and void. We are therefore proceeding, as directed by his Lordship the Chief Justice, to dispose of the application made under section 491, Criminal Procedure Code (Criminal Miscellaneous Petition No. 985 of 1938).]

### APPELLATE CRIMINAL.

*Before Mr. Justice Burn and Mr. Justice Stodart.*

IN THE MATTER OF C. P. MATTHEN AND THREE  
OTHERS, PETITIONERS.\*

1938,  
November 7.

*Indian Extradition Act (XV for 1903), sec. 7—Extradition warrant issued by Resident for Madras States under—Persons arrested pursuant to—Application under sec. 491 of Criminal Procedure Code (Act V of 1898) by—Questions for determination in—Legality of warrant—Compliance by Resident with rules 4 and 5 of rules framed under sec. 22 of Extradition Act—Presumption as to.*

The Chief Presidency Magistrate, Madras, arrested the petitioners, resident in Madras, pursuant to warrants issued by the Resident for the Madras States under section 7 of the Indian Extradition Act of 1903 directing him to arrest the

\* Criminal Miscellaneous Petition No. 985 of 1938.

petitioners. The warrants were all in the same form and they ran as follows: "Whereas . . . director of the Travancore National and Quilon Bank, Ltd., which is now under liquidation, who is now reported to be residing at . . . stands charged with offences punishable under sections 410, 419, 421, 480 and also sections 99 and 104 of the Travancore Penal Code corresponding to sections 409, 418, 420, 477A, 109 and 114 of the Indian Penal Code committed in the Travancore State, you are hereby directed to apprehend the said . . . and surrender him to the Frontier Police Station, Travancore State, for production before the District Magistrate, Trivandrum." When the petitioners were produced before the Chief Presidency Magistrate, Madras, an application was made to him on their behalf for making a reference under section 8A of the Act. While he was considering that application, his proceedings were interrupted by the service upon him of a stay order made by a learned Judge of the High Court directing him to keep the petitioners in custody and not to send them away. Thereupon he remanded three of the petitioners to the Penitentiary and the fourth to the General Hospital. On an application made by the petitioners under section 491 of the Criminal Procedure Code contending that they had been illegally or improperly detained in custody and that therefore they should be brought up before the High Court in order that they might be released,

*held*: (i) The only point that was material was whether the custody in which the petitioners were was illegal or improper. The Chief Presidency Magistrate's custody of them was clearly legal and proper *prima facie*.

Under section 7 of the Indian Extradition Act the Magistrate had no option but to execute the warrants. He was obliged to order the arrest of the petitioners for whom the warrants had been issued and his custody of them was perfectly legal and proper. The fact that the petitioners had been in British India at the time at which the offences with which they were charged were said to have been committed, if proved, would be a good defence to the charges, but it was not relevant to the question whether the custody in which they were being detained was legal or illegal.

(ii) There was no illegality or impropriety connected with the issue of the warrants in question.

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The procedure before the Political Agent prescribed by rules 4 and 5 of the rules made under the Indian Extradition Act in cases falling under Chapter III thereof takes the place of the preliminary enquiry and other proceedings provided in Chapter II of the Act in the case of criminals whose extradition to Foreign States is required. Since those rules have by virtue of section 22 (3) of the Act the force of law, it must be presumed that the Political Agent had complied with the rules before issuing the warrants in question. The said warrants did not show that the rules had not been complied with.

*K. Bhashyam Ayyangar for V. T. Rangaswami Ayyangar for petitioners.*

BURN J.

The JUDGMENT of the Court was delivered by BURN J.—This is an application under section 491 of the Criminal Procedure Code on behalf of four persons who have been arrested on warrants issued by the Resident, Madras States. Section 491 (1) empowers this High Court, whenever it thinks fit, to direct (a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law and (b) that persons illegally or improperly detained in public or private custody within such limits be set at liberty. The contention on behalf of the four prisoners is that they have been illegally or improperly detained in custody and that therefore they should be brought up before this Court in order that they may be released. This application was made on 21st October 1938 and was supported by an affidavit sworn by Poulouse Matthen, son of one of the prisoners, in these terms:

“I, Poulouse Matthen, son of Mr. C. P. Matthen, aged 21, residing at ‘Marble Hall’, 25, Sterling Road, Nungambakkam, Madras, do make oath and say as follows:—

(i) I am the first petitioner herein, and the second petitioner is the son of Mr. K. C. Mammen Mappillai.

(ii) I state that the present application has been filed for the issue of a writ of *habeas corpus* in respect of (1) my father,

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Mr. C. P. Matthen, (2) the second petitioner's father, Mr. K. C. Mammen Mappillai, (3) Mr. K. M. Eapen, and (4) Mr. K. V. Varghese, who have been served last evening with an extradition warrant from Travancore, charging them with certain offences under the Penal Code, and I state that in pursuance of such a warrant, they have been arrested and are now in the custody of the Chief Presidency Magistrate, Madras, and are to be taken to Travancore by the Shencottah Passenger leaving Egmore Station at 11 a.m.

(iii) I state that the warrant issued apparently for a criminal offence, as that would be the only medium through which such a course could be taken, is really for a political offence and I am advised that for a political offence no warrant could be issued for extradition from British India where the arrested persons have been living.

(iv) I state that the purpose for which the warrant appears to have been issued is alleged offences under the Penal Code, Travancore, in connection with the winding up proceedings relating to the Travancore National and Quilon Bank Limited, of which my father was the Managing Director and Mr. Mappillai was the Chairman, Board of Directors.

(v) I state that this alleged purpose is only a make-believe inasmuch as it has been openly proclaimed in the Travancore State Press Communication issued that the Travancore National Bank is aiding the Travancore State Congress and in fact a circular had been issued in the State itself to that effect.

(vi) Further, I state that on 25th April 1938 a circular was issued under the authority of the Commissioner of Police, Travancore, that Mr. C. P. Matthen is a political to be watched inside and outside the State. Moreover, Mr. Mammen Mappillai is the proprietor of the Malayalam paper, ‘Manorama’, which had been forfeited for publishing articles of a political nature, and the press has been forfeited, the licence having been cancelled.

(vii) I state that the abovesaid circumstances would abundantly prove that the warrant of extradition is only with a view to bring the four arrested persons within the State limits so that they may be charged for alleged political offences and exposed to all kinds of humiliation and disgrace besides personal ill-treatment such as to endanger health and safety.

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(viii) I state that the political conditions in the Travancore State are such that no one charged or alleged to be concerned in any political offence is safe and that anything may happen to them.

(ix) I state that the alleged charge that they have wrongly dealt with a sum of one crore of rupees is obviously untenable and unfounded, and they have absolutely no idea of evading law and they will subject themselves to their examination as soon as normal conditions of peace are restored especially as they are sought to be politically involved.

(x) I state that Mr. K. C. Mammen Mappillai is aged sixty-five and is having serious trouble with piles and is not at all in a fit position to stand travel and was under treatment when he was suddenly arrested.

(xi) I state that the issue of a warrant and the arrest are not justifiable nor are they done in the interest of public justice but with a view to clap them in jail for political offences and the Travancore Government are bent upon bringing them to trouble by securing their physical presence within the State.

(xii) I state that in the Madras High Court in connection with the proceedings relating to the Bank it had been found by VENKATARAMANA RAO J. that a major portion of the assets as ascertained by the liquidators is good and that the consideration of re-starting the Bank is worthy of attention.

(xiii) I state that the arrest and detention of the four persons in custody are contrary to law and it is necessary that they should, in the interests of their personal safety and health, be ordered to be brought before this Honourable Court for orders.

(xiv) It is, therefore, just and necessary that this Honourable Court should be pleased to order the issue of a writ directing that Messrs. C. P. Matthen, K. C. Mammen Mappillai, K. M. Eapen and K. V. Verghese, now within the limits of this Honourable Court, arrested by the Chief Presidency Magistrate, Egmore, under an extradition warrant issued by the Travancore State and kept under his custody at Egmore, be ordered to be brought up to this Honourable Court for being dealt with according to law and directing them to be set at liberty and that such other orders be passed as

may be necessary in the interests of justice, as, otherwise, the petitioner will be put to considerable loss and hardship.

(Signed) C. M. Poullose.

Solemnly affirmed at Royapettah this 21st day of October 1938 and signed his name in my presence.

(Signed) A. V. Ramalingam Ayyar,  
Diwan Bahadur."

No attempt has been made before us to prove the allegations made in this affidavit to the effect that these proceedings have been taken for the extradition of these four prisoners for a political offence. There is nothing in this affidavit to indicate that the prisoners are being illegally or improperly detained in custody. In a further affidavit sworn on the 26th October, the same deponent stated as follows:—

"I, Poullose Matthen, son of C. P. Matthen, aged 21 years, residing at 'Marble Hall', 25, Sterling Road, Nungambakkam, Madras, do make oath and say as follows:

(i) I am the petitioner herein and I have filed the application praying for the issue of a writ of *habeas corpus* in respect of (1) my father C. P. Matthen, (2) Mr. K. C. Mammen Mappillai, (3) Mr. K. M. Eapen, and (4) K. V. Verghese.

(ii) I state that the aforesaid four persons were arrested on the night of 20th October 1938 by the police at the instance of the Chief Presidency Magistrate, Madras, to whom an extradition warrant has been issued by the Resident, Travancore State, directing that they be apprehended and handed over to the Frontier Police of Trivandrum for production before the District Magistrate, Trivandrum. The warrants were not, however, even shown to the arrested persons, and the substance thereof was ascertained only next morning in the office of the Chief Presidency Magistrate.

(iii) I state that the extradition warrant issued by the Resident purported to state, in so far as I have been able to gather, that charges have been laid as against them for having committed offences of breach of trust by bankers, falsification of accounts, cheating and abetment thereof as Directors of

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the Travancore National and Quilon Bank Ltd. now in liquidation.

(iv) I state that the fourth person is not at all a Director of the Bank and the offences with which they are charged are made to appear as if they have been committed in Travancore.

(v) I state that the Travancore National Bank was no doubt incorporated in Travancore in 1912 and the Quilon Bank in 1919 but the latter went into voluntary liquidation and both the Banks were amalgamated in September 1937 under the name and style of the Travancore National and Quilon Bank Ltd., till it went into liquidation.

(vi) I state that even though it was incorporated in Travancore State, Madras was the central place of business and the branches were all controlled from Madras only where all the Bank accounts were kept. In fact in the application now pending in this Honourable Court for reconstruction of the Bank it was observed by VENKATARAMANA RAO J. as follows : 'The policy of the Bank was directed from the central office (at Madras)' as aforesaid and from the affidavit filed by Mr. K. M. Eapen, the centre of administrative control was in Madras, all the branches including the branches in Travancore and other States have to send their statements of accounts and other returns to the central office at Madras and they have to take orders from the central office for all matters connected with the business in their respective branches. All the information regarding the assets and liabilities of all the branches was available at Madras and only those books which were statutorily required to be kept under the Travancore Companies Regulation were kept at the Registered office at Quilon.

(vii) I further state that of the eighty branches of the Bank, forty branches existed in the Madras Presidency, eighteen in the Travancore State and the remaining were situated in Bombay, Ceylon, and other places. The bulk of the business was in the Madras Presidency and about one and a half crores of rupees represents the assets outside the Travancore State.

(viii) I state that the liquidation and winding up proceedings had been filed in this Honourable Court and Official Liquidators having been appointed, their first report shows that about eighty-eight per cent of the assets is good.

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(ix) I state that under those circumstances no offence of any of the kinds above referred to, such as, criminal breach of trust, falsification of accounts, or cheating, could have been committed by the aforesaid four persons in the Travancore State and the warrant is illegal. They have ever since the beginning of 1937 come over to Madras and have been permanently staying with their families at Madras only with a view to have direct supervision over all the branches, and for discharging their functions in connection with other institutions as well.

(x) I state that in any view the offences could at all be alleged to have been committed in Madras only within the jurisdiction of British Indian Courts and no offence could be said to have been committed in the Travancore State justifying issue of the extradition warrants. I state that neither the complaint nor any materials on which the charges are said to have been laid are available and, in the absence of any reference thereto, I state that the issue of the warrant itself is illegal and contrary to the statute, as there is nothing to indicate how the offences are said to have been committed in the Travancore State before demanding extradition. On account of the secrecy of the entire proceedings and rush of events I have not been able to ascertain the particulars on which the offence or offences could be said to have been committed within the jurisdiction of the Native State.

(xi) I state that the warrant itself is defective and is not in conformity with the provisions of the statute under which it purports to have been issued.

(xii) I further state that the political situation at present in Travancore is tense, and the Bank is somehow or other sought to be connected with the Travancore State Congress, as is apparent from a circular issued by the State, and my father, Mr. C. P. Matthen, was by a circular, dated 25th April 1938, declared to be a political to be watched inside and outside the State while the Malayalam paper 'Manorama' run by the second of the arrested persons was forfeited for publishing articles of a political nature, the press itself has been confiscated and the licence cancelled.

(xiii) I state that under the above circumstances it is not proper to issue the extradition warrant as, if under colour



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of such a warrant they are taken to the State limits, they would be arrested for alleged political offences and exposed to the greatest and most humiliating hardships both for their person as well as for their reputation. They have absolutely no intention to evade law and will be ready to answer any charge if lawfully made.

(xiv) I state that the issue of an extradition warrant in the light of the above state of facts is not only illegal but is also improper. In fact, the learned Advocate-General of this Honourable Court on behalf of the Official Liquidator, Quilon, had requested for a month's time to send a report as regards the condition and affairs of the Bank and time was granted till 7th November 1938 and without any report or examination of the fourth of the arrested persons who had attended Court, the criminal charges have been levelled and they were to have been removed with dramatic speed.

(xv) I further state that the second of the arrested persons, Mr. K. C. Mammen Mappillai, is aged sixty-five and is suffering from strangulated piles and is confined in the General Hospital, Madras, and the doctor has advised that he may have to remain there for some time more.

(xvi) I applied for the issue of a writ of *habeas corpus* at a time when none of us had any idea of the nature and scope of the warrants of extradition. In fact, the Official Liquidator, Quilon, has been here to find out if any information could be available from the liquidators appointed by this Honourable Court inasmuch as there were no materials available to him from the records there to bring home any offence against the arrested persons.

(xvii) I further state that owing to the strong and powerful influence of the Dewan of Travancore, who is bent on bringing the arrested persons to trouble on account of their supposed connection with the State Congress which is considered as a disloyal and subversive political organisation formed to secure the removal of the Dewan and question the supreme authority of the State, the Resident has either been persuaded or induced to believe that offences had been committed by the arrested persons without any definite or reliable particulars before him.

(xviii) I further have every reason to believe that none of the essential conditions necessary to be observed before

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issuing the warrants under the Act has been complied with or even shown to have been taken into account, and that the warrants were got issued on account of the peculiar position he was placed in, in relation to the State and the governing authorities.

(xix) It is therefore apparent that considerations other than legal or proper have weighed with the Resident in issuing the warrants and, if the true state of affairs or real and tangible particulars had been placed before him without any other consideration, the warrants would not have been issued as against the arrested persons who are respectable and law-abiding citizens holding responsible positions in life.

(xx) I further state that, if the charges relating to their connection with the Bank of which Madras was the central source should be levelled against them and tried in any Court of British India, they are ready and willing to vindicate their position and I am advised that they could be tried only in Courts of British India and not in the State for any consequences that could have ensued therefrom. I apprehend that no justice would be available to them from Courts subordinate to the State which has been apparently taking direct interest in the case.

(xxi) Further, there are ample provisions in the Penal Code of British India for punishing the offenders for all or any of the offences they are charged with and the atmosphere that has been sedulously created in the Travancore State against the arrested persons leaves no ray of hope that there will be justice meted out to them, and the Resident, being perfectly aware of all the circumstances and being in touch with the State, acted improperly in ordering the issue of the warrants for extradition.

(xxii) It is therefore just and necessary that this Honourable Court should be pleased to call for all the records relating to extradition and to order the issue of a writ of *habeas corpus* directing that Messrs. C. P. Matthen, K. C. Mammen Mappillai, K. M. Eapen and K. V. Verghese, arrested by and in the custody of the Chief Presidency Magistrate, Egmore, under extradition warrants issued by the Resident, Travancore State, be ordered to be brought up and set at liberty and that such other orders may be passed in the interests of justice, as, otherwise, I will be put to serious loss and hardship."

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The only allegation in this affidavit which, we think, requires notice is that in the eleventh paragraph in which it is stated that the warrant itself is defective and is not in conformity with the provisions of the statute under which it purports to have been issued. The other allegations are, in our opinion, irrelevant for the present purpose. If it is proved, for example, that the prisoners have been in British India at the time at which the offences with which they are charged are said to have been committed, that would be a good defence to the charges. It is not, however, relevant to the question whether the custody in which they are now detained is legal or illegal. The allegations about the political situation in Travancore are also quite irrelevant.

The warrants upon which the prisoners have been arrested have been produced before us and Mr. Bhashyam Ayyangar for the prisoners has invited us to say that an examination of the warrants will show that they have been illegally or improperly issued. The warrants are all in the same form and they run as follows :

"Whereas Director of the Travancore National and Quilon Bank Limited, which is now under liquidation, who is now reported to be residing at stands charged with offences, punishable under sections 410, 419, 421, 480 and also sections 99 and 104 of the Travancore Penal Code, corresponding to sections 409, 418, 420, 477 A, 109 and 114 of the Indian Penal Code, committed in the Travancore State, you are hereby directed to apprehend the said . . . and surrender him to the frontier police station, Travancore State, for production before the District Magistrate, Trivandrum.

Herein fail not.

(Signed) \_\_\_\_\_  
Resident for the Madras States."

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These warrants have been issued under section 7 of the Extradition Act of 1903, Travancore being a State which is not a Foreign State and the allegation being that the persons whose arrest is required are in British India. Mr. Bhashyam Ayyangar has pointed out that in Chapter II of the Extradition Act which deals with the surrender of fugitive criminals in case of Foreign States, there is provision made for a preliminary enquiry by the Magistrate in British India before extradition is ordered. The Magistrate is obliged to hold an enquiry in the same manner as if the case were one triable by the Court of Session or the High Court, he is obliged, if he thinks that a *prima facie* case is made out, to commit the criminal to prison to await the orders of the Government of India. He is obliged also to report the result of his enquiry to the Government of India and await their orders. In Chapter III, there is no such provision for an enquiry by a Magistrate in British India. It is however provided in the rules made under the Act, which by section 22, sub-section (3), have effect as if enacted by the Act, that in such cases as the present, the Political Agent (*vide* rule 4) shall in all cases before issuing the warrant under section 7 satisfy himself by preliminary enquiry that there is a *prima facie* case against the accused person. By rule 5 the Political Agent is required before issuing the warrant under section 7 to decide whether the warrant shall provide for the delivery of the accused persons to the Political Agent or to a British Officer subordinate to him with a view to his trial by the Political Agent, or to an authority of the State with a view to his trial by the State Courts. Sub-rule 2 of rule 5 requires the Political Agent to take certain matters into consideration before coming to a decision. By rule 7 the

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Political Agent is required to satisfy himself in the case of an accused person who has been made over for trial to the Court of the State that the accused person receives a fair trial and that the punishment inflicted on conviction is not excessive or barbarous and, if he is not so satisfied, he shall demand the restoration of the person to his custody pending orders of the Governor-General in Council. It is clear therefore that this procedure before the Political Agent in cases falling under Chapter III takes the place of the preliminary enquiry and other proceedings provided in Chapter II in the case of criminals whose extradition to Foreign States is required. The warrants issued in this case do not show that the Political Agent has obeyed the rules framed for his procedure under the Act. Mr. Bhashyam Ayyangar invites us to hold that the Political Agent or some one else on his behalf should be called upon to satisfy us that everything required by the rules has been done. He even contends that the form of the warrants shows that the Political Agent has not complied with the rules. The warrant merely states that so and so stands charged with offences. Mr. Bhashyam Ayyangar suggests that this implies that the Political Agent has not made an enquiry such as is prescribed under rule 4 already alluded to. We do not think we shall be justified in making any such presumption. On the contrary, since the rules have the force of law, we think it is right to presume that the Political Agent has complied with the rules before issuing the warrants. The warrants do not in our opinion show that the rules have not been complied with.

The question which we have to consider is whether the prisoners are being illegally or improperly detained in the custody of the Chief Presidency Magistrate.

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This, we think, is a simple question in this case. Section 7 of the Extradition Act, sub-section 1, says that, where an extradition offence has been committed or is supposed to have been committed by a person not being a European British subject in the territories of any State not being a Foreign State and such person escapes into or is in British India and the Political Agent in or for such State issues a warrant addressed to the District Magistrate of any district in which such person is believed to be or, if such person is believed to be in any Presidency-town, to the Chief Presidency Magistrate of such town, for his arrest and delivery at a place and to a person or authority indicated in the warrant, such Magistrate shall act in pursuance of such warrant and may give directions accordingly. In the face of this provision of law, it is clear to us the Chief Presidency Magistrate has no option in the matter. When he receives the Political Agent's warrant, he is obliged to act in pursuance of it and to obey it. It has been pointed out by Mr. Bhashyam Ayyangar for the prisoners that in section 8-A there is a provision made for the accused person who is arrested making a statement to the Chief Presidency Magistrate and provision is made that the Magistrate, if he thinks fit, may, before proceeding further, report the case to the Central Government and, pending the receipt of orders on such report, may detain such accused person in custody or release him on his executing a bond with sufficient sureties for his attendance when required. In the report made by the learned Chief Presidency Magistrate to the writ *nisi* issued by PANDRANG ROW J. he has reported that the four prisoners were produced before him at 9 a.m. on 21st October 1938. He says further that Mr. V. Rajagopalachariar who appeared

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for the arrested persons wanted him to make a reference under section 8-A of the Indian Extradition Act to the Local Government (in accordance with the Adaptation of Indian Laws Order, the word "Central" must now be substituted for the word "Local" in section 8-A) and pending reference to enlarge the prisoners in custody on bail. This application was opposed by Mr. Jayarama Ayyar who appeared on behalf of the Travancore Government. While the learned Magistrate was hearing the petition, Rao Bahadur V. T. Rangaswami Ayyangar produced the order passed by PANDRANG ROW J. directing the Magistrate to keep the prisoners in his custody and not to send them away. The Magistrate therefore remanded three of the four prisoners to the Penitentiary and one who was said to be suffering from strangulated piles to the General Hospital. It is clear therefore that the learned Magistrate was interrupted by our learned brother's stay order while he was considering the desirability or otherwise of making a reference to the Government under section 8-A. The learned Magistrate expressed the view that under section 7 he had no option but to execute the warrants and that he had acted so far in strict conformity with the provision of law. In this we support the learned Magistrate. We consider that he was obliged to order the arrest of the persons for whom warrants were issued and that his custody of them is perfectly legal and proper.

The only criticisms of the warrants of which we feel obliged to take any notice are, firstly, that the warrants are not dated, and secondly, that the direction in the warrants to surrender the prisoners to the frontier police station of the Travancore State is somewhat indefinite. It is represented by Mr. Bhashyam

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Ayyangar for the prisoners, and, we think it is highly probable, that there is more than one police station on the frontier between British India and the Travancore State. The warrant does not instruct the Magistrate in terms with regard to the particular frontier police station at which the prisoners should be delivered nor does it indicate the officer to whom they are to be handed over. But we have already pointed out that the learned Magistrate, when his proceedings were interrupted by the service upon him of our learned brother's stay order, was considering an application for making a reference under section 8-A of the Act, and it is quite conceivable, we think, that this is a point upon which the Magistrate might have thought it necessary to make a report to the Government. We note however that the warrants require the prisoners to be surrendered at the frontier police station for production before the District Magistrate of Trivandrum. For all practical purposes it seems to us that this indefiniteness with regard to the frontier police station is not a matter of any importance.

On the only point that is material, namely, whether the custody in which the prisoners are is illegal or improper, we are quite clear that his custody of them was legal and proper *prima facie*, and we see no reason to suppose that there is any illegality or impropriety connected with the issue of the warrants for the arrest of these prisoners. We therefore dismiss this application under section 491.

A.S.V.

## PRIVY COUNCIL.

MATTHEN AND OTHERS, APPELLANTS,

v.

THE DISTRICT MAGISTRATE OF TRIVANDRUM  
AND ANOTHER, RESPONDENTS.J.C.\*  
1939,  
April 3 and  
July 3.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Habeas corpus—*Code of Criminal Procedure* (Act V of 1898), sec. 491—*Jurisdiction of High Court to issue common law writ of habeas corpus*—*High Court at Madras, Appellate Side Rules*—Rule 2-A—*Applicability of rule to applications under sec. 491 of the Code of Criminal Procedure*—*Extradition*—*Indian Extradition Act* (XV of 1903), sec. 7 (1)—*Requirements of*—*Locus standi of Magistrate to whom arrested persons are to be ultimately delivered in matters in the High Court relating to arrest.*

The High Court has no jurisdiction to issue the common law writ of *habeas corpus* in cases falling within section 491 of the Code of Criminal Procedure.

*Girindra Nath Banerjee v. Birendra Nath Pal*(1) approved.

Rule 2-A of the Appellate Side Rules of the High Court at Madras is *intra vires* and applies to applications under section 491 of the Code of Criminal Procedure.

All that section 7 (1) of the Indian Extradition Act requires in respect of the place at which and the person or authority to whom the arrested person is to be delivered is a sufficient indication to the person to whom the warrant is addressed to enable him to act in pursuance of it and, therefore, a warrant issued by the Political Agent in Travancore directing the Chief Presidency Magistrate of Madras to arrest a person and surrender him to the frontier police station of Travancore State for production before the District Magistrate of Trivandrum complies with the section. The matter is placed beyond doubt by the Government Order that arrested persons should be handed over at the nearest frontier police station.

\* Present: LORD THANKERTON, LORD PORTER and SIR GEORGE LOWNDERS.  
(1) 1927) I.L.R. 54 Cal. 727.

A warrant sufficiently indicates the crime if it names the section of the Indian Penal Code which defines the crime.

The District Magistrate of Trivandrum, being the person to whom the arrested persons are to be ultimately delivered, has a *locus standi* to move the High Court to obtain the delivery of the arrested persons to him.

APPEAL by Special Leave (No. 102 of 1938) from (i) a judgment of the Full Bench of the High Court (November 4, 1938), (ii) a judgment of the Division Bench implementing the judgment of the Full Bench in Criminal Miscellaneous Petition No. 1003 of 1938 (November 7, 1938) and (iii) a judgment of the Division Bench dismissing Criminal Miscellaneous Petition No. 985 of 1938 (November 7, 1938).\*

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

Pritt K.C., Sidney Smith and Krishna Menon for appellants.—PANDRANG ROW J. acted correctly in entertaining the application for a writ of *habeas corpus* as he was bound by the decision of the Full Bench in *In re Govindan Nair*(1). The Government of Madras through the Crown Prosecutor by a petition (No. 990) moved the Court to vacate the order staying execution of the warrants. That petition was dismissed and the Government did nothing thereafter, but the District Magistrate of Trivandrum applied for a revision of the order of PANDRANG ROW J.

If the District Magistrate had no *locus standi* in the matter, proceedings on his petition would be a nullity and the order of PANDRANG ROW J. would stand, subject, of course, to the question whether the High Court has jurisdiction to issue the common law writ of *habeas corpus*.

It is submitted that the District Magistrate of Trivandrum has no *locus standi* in this matter. He moved under section 561 A of the Code of Criminal Procedure. An application under that section would be valid if made by a party interested. Here, the only parties interested are the parties named in the warrants—the Chief Presidency Magistrate, the

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\* [Vide pages 708 to 743 *supra*.]

(1) (1922) I.L.R. 45 Mad. 922 (F.B.).

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Resident and the Government of Travancore. It is a principle of civil and criminal law that only parties interested can intervene. In relations between States, citizens cannot in their individual capacity intrude.

As regards the question of the applicability of Rule 2-A of the Appellate Side Rules, it is submitted that the rule should be read as meaning what it says. The circumstances in which the rule was passed may be looked at. It was passed when the High Court thought it had jurisdiction to issue the common law writ of *habeas corpus* by reason of the decision in *Govindan Nair's case*(1). The rule was directed to applications for the common law writ, but, in so far as it limits the jurisdiction to a Divisional Bench, it is submitted that it is *ultra vires*.

In the face of the reasons given in *Girindra Nath Banerjee's case*(2) and in the decision of the Full Bench in the present proceedings, it would be difficult to maintain that the High Court now has jurisdiction to issue a writ of *habeas corpus* in cases falling within section 491 of the Code.

Assuming the High Court has no jurisdiction to issue a writ of *habeas corpus* in this case and PANDRANG ROW J.'s order was, therefore, a nullity, the application was made under section 491 of the Code and falls to be dealt with under that section. Section 491 is not specifically mentioned in the rules and the application would come in under Rule 1 (7) as one that should go before a single Judge and PANDRANG ROW J. could deal with it.

If the appellants are right on the question of the *locus standi* of the District Magistrate of Trivandrum and on their submission on the rules, the case should go back to PANDRANG ROW J.

The next question is whether the warrants are *ex facie* defective and whether the High Court has jurisdiction to examine on evidence the validity of the warrants.

[LORD THANKERTON.—Have you looked at *Carlin's case*, *Carlin v. Government of Cape Colony*(3) ?]

PRIET K.C.—I will do so.

(1) (1922) I.L.R. 45 Mad. 922 (F.B.). (2) (1927) I.L.R. 54 Cal. 727.  
(3) (1885) 12 Rettie, Johnstone, Patten, Maconochie and Fraser  
(Justiciary, Court of) 50.

The warrants are, it is submitted, defective in that they do not show that an extraditable offence has been committed or is supposed to have been committed. They say the appellants are "charged" with offences which are indicated by a mere reference to sections of the Indian Penal Code. That is not a sufficient statement of the offences to enable an accused to make a statement which he is entitled under the Act to make on being produced before the Chief Presidency Magistrate. The warrants are also indefinite as to the place at which and the person or authority to whom the arrested persons are to be delivered, unless a police station can be called a person. [*Carlin's case*(1) was referred to and distinguished.] The High Court can examine on evidence the validity of a warrant; *Mabel Ferris v. Emperor*(2). It is a principle of the law of extradition that, if the accused can be tried in the place where he is, he should not be extradited and the appellants are, therefore, entitled to show that the offences of which they are accused may have been committed in Madras.

*Sidney Smith* followed.—On the question of the jurisdiction of the High Court to interfere, there are several decisions. [*Sandal Singh v. District Magistrate of Dehra Dun*(3) was referred to.]

The appellants are not going so far as to say that the Court can enquire into the steps taken by the Resident. It is not necessary for them to do so. But where it is apparent on the face of the warrant that the provisions of the Legislature have not been given effect to, the High Court can interfere; *Rudolf Stallmann, In re*(4). It is submitted that there has been here a disregard of statutory directions which is apparent on the face of the warrant. The statute requires that the person or authority to whom and the place at which the arrested person is to be delivered is to be stated in the warrant. Person or authority, it is submitted, means a named person or a person described by his office. As regards the place, there is an uncertainty in the warrant. If there is more than one frontier police station, there is a choice and the choice must be made, under the Act, by the

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(1) (1885) 12 Rettie, Johnstone, Patten, Maconochie and Fraser  
(Justiciary, Court of) 50.  
(2) (1928) I.L.R. 53 Bom. 149.  
(3) (1933) I.L.R. 58 All. 409, 415. (4) 1911) I.L.R. 39 Cal. 164, 180.

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Political Agent. It is not enough to say that what he meant was understood. The Act must be strictly complied with. In a criminal case, subject to certain exceptions, any one may set the law in motion. Extradition stands on a different footing. It is a matter between two Governments and it is not open to any one to intervene.

*Sir William Jowitt K.C. and Foster* for the District Magistrate of Trivandrum, first respondent.—[Reference was made to the history of Rule 2-A and the notification of the rule in the Gazette.] The rule was made under section 491 of the Code and intended to apply to applications under section 491. The warrant was for the production of the arrested persons before the District Magistrate of Trivandrum. When a person is before a Court he is in the custody of the Court. Here the District Magistrate is the person who is to have the custody. In English proceedings some officer of the Foreign State appears. The District Magistrate of Trivandrum is an official of that State and had a right to appear. Anyone may come to the Court to set right an irregularity. He has been brought here as a respondent.

As regards the warrant, the omission of the date is immaterial as nothing turns on knowing the date. There is no question of limitation. No form of warrant is prescribed and there is nothing to follow. There is no hardship in this case. It is said there should have been a description of the offences charged. If the appellants did not know with what offences they were charged, the affidavits they have exhibited show a very shrewd guess as to what they were. The route is never indicated in an extradition warrant. The place is sufficiently indicated. The warrant must be read with the Government Order that delivery should be at the nearest frontier police station. Police station would include the person to whom delivery is to be made. [Reference was made to *Ex parte Terraz*(1).]

*Millard Tucker K.C., Wallach and Megaw* for second respondent adopted the argument for the first respondent. *Sidney Smith* replied.

The JUDGMENT of the Judicial Committee was delivered by LORD THANKERTON.—This is an appeal

(1) (1878) 4 Ex. D. 63.

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from (1) a judgment of the Full Bench of the High Court of Madras, dated 4th November 1938, in Criminal Miscellaneous Petition No. 1003 of 1938, which, on a reference by a Division Bench of the same Court, held that the orders of PANDRANG ROW J., a single Judge of the Court, on an application for a writ of *habeas corpus* and relative applications, and dated 21st, 24th and 26th October 1938, made in Criminal Miscellaneous Petitions Nos. 986, 990 and 985 of 1938 respectively, were null and void, (2) a judgment and order of the said Division Bench, dated 7th November 1938, made in Petition No. 1003 in implement of the above judgment, and (3) a judgment and order of the said Division Bench, dated 7th November 1938, made in Petition No. 985, dismissing the application for a writ of *habeas corpus*.

The appellants challenge the validity of certain warrants issued by the Resident for the Madras States under section 7 of the Indian Extradition Act (XV of 1903) to the Chief Presidency Magistrate of Madras, under which they were arrested, and they ask to be discharged. The course of procedure which has been followed has raised important questions as to the jurisdiction of the High Court of Madras to issue a writ of *habeas corpus* in the present case, and as to the competency of a single Judge of the High Court to issue such a writ or the analogous writ under section 491 of the Code of Criminal Procedure (V of 1898).

The warrant against the first appellant was in the following terms :

“ To the Chief Presidency Magistrate,  
Madras.

Whereas Mr. C. P. Matthen, Director of the Travancore National and Quilon Bank, Limited (which is now under liquidation), who is now reported to be residing at Marble

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Hall, Sterling Road, Nungambakkam, Madras, stands charged with offences punishable under sections 410, 419, 421, 480 and also sections 99 and 104 of the Travancore Penal Code corresponding to sections 409, 418, 420, 477 A, 109 and 114 of the Indian Penal Code committed in the Travancore State, you are hereby directed to apprehend the said Mr. C. P. Matthen and surrender him to the frontier police station of the Travancore State for production before the District Magistrate, Trivandrum.

Herein fail not.

(Signed) C. P. Skrine,  
Resident for the Madras States."

The warrants against the other three appellants were in the same terms. The fourth appellant denies that he is a director of the bank, but that is not material at this stage. It will be noted that the warrants were not dated. The appellants were all arrested in Madras on the instructions of the Chief Presidency Magistrate, who is the second respondent in this appeal, on 20th October 1938. The Travancore National and Quilon Bank was formed by the amalgamation of two banks and was incorporated in Travancore in September 1937, though the head office was in Madras and the larger part of its business would appear to be carried on in the Madras Presidency. The appellants, who are Travancore subjects, had taken up residence in Madras in 1937, in order to conduct the business there. The District Magistrate, Trivandrum, referred to in the warrants, is the first respondent in this appeal.

Learning that the appellants were to be taken to Travancore by a train leaving at 11 a.m. on 21st October 1938, and having in view that the High Court did not sit until 10-45 a.m., the sons of the first and second appellants presented a petition (No. 985 of 1938) under section 491 of the Code of Criminal Procedure for a writ of *habeas corpus* in respect of all the appellants

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early on the morning of that day to PANDRANG ROW J., a Judge of the High Court, at his residence. This petition was supported by an affidavit by the son of the first appellant, and along with it a further petition (No. 986 of 1938) was presented to the Judge asking for a stay of execution of the warrants. On the latter petition (No. 986 of 1938), PANDRANG ROW J. made the following order, viz. :

"As the matter is extremely urgent the Chief Presidency Magistrate, Egmore, should detain these prisoners in his custody and not send them away from Madras pending further orders of the High Court."

The appellants had meanwhile been produced before the Chief Presidency Magistrate, and made an application for a reference to the Local Government under section 8 A of the Indian Extradition Act. While this application was in course of being heard, the order passed by PANDRANG ROW J. was produced and the Magistrate thereupon remanded the appellants to custody.

Subsequently on the same day, the Crown Prosecutor presented a petition (No. 990 of 1938), praying that the order of PANDRANG ROW J. on Petition No. 986 be vacated, mainly on the ground that it was passed without jurisdiction, as, under Rule 2-A of the Appellate Side Rules of the High Court, jurisdiction under section 491 of the Criminal Procedure Code could only be exercised by a Bench of the High Court, and not by a single Judge. This petition, No. 990, was heard by PANDRANG ROW J. on 22nd October 1938, and on the 24th October the learned Judge made an order in Petition No. 990 refusing to vacate the order for stay in Petition No. 986, and dismissing Petition No. 990. The learned Judge held himself to be bound by the decision of a Full Bench of the High



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Court of Madras in *In re Govindan Nair*(1) to the effect that the High Court had jurisdiction at common law to issue a writ of *habeas corpus*, and he held that such jurisdiction was vested in each of the Judges of the High Court, and could not be taken away by Rules.

On the same day, 24th October 1938, the first of these petitions, No. 985, came before a Bench of the High Court (BURN and STODART JJ.), who refused to proceed with the matter, as PANDRANG ROW J. was seized of it. In answer to the Court, Counsel for the applicants stated categorically that the application was for a common law writ of *habeas corpus* and not a petition to the High Court to exercise its powers under section 491 of the Criminal Procedure Code. On 26th October 1938, PANDRANG ROW J. heard Petition No. 985, and made an order that a writ of *habeas corpus* should issue to the Chief Presidency Magistrate, returnable before himself on 28th October 1938, and a writ *nisi* was accordingly issued.

On the same day, 26th October 1938, the District Magistrate, Trivandrum, the first respondent in this appeal, presented a petition (No. 1003 of 1938) to the High Court, under section 561 A of the Code of Criminal Procedure and section 223 of the Government of India Act, 1935, praying that the orders of PANDRANG ROW J., dated 21st, 24th and 26th October 1938, should be quashed as having been made without jurisdiction, and calling the present appellants as respondents. This petition was supported by an affidavit by the Superintendent of Police, C.I.D., Travancore.

This petition, No. 1003, came on for hearing on the 27th October before BURN and STODART JJ., who, as the hearing could not be completed on that day,

(1) (1922) I.L.R. 45 Mad. 922 (F.B.).

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made an order suspending the operation of the writ *nisi*, issued under the order of PANDRANG ROW J., dated the 26th October, and staying further proceedings on Petition No. 985 until the further orders of the Court should be known, with a direction to the second respondent to keep the prisoners in his custody till further orders.

After the further hearing on Petition No. 1003, BURN and STODART JJ., on 2nd November 1938, referred the following questions of law to a Full Bench:

“(i) Can this High Court or any Judge of it issue the common law writ of *habeas corpus* in any of the cases covered by section 491 of the Criminal Procedure Code ?

(ii) Can an application for a common law writ of *habeas corpus* or for directions under section 491 of the Criminal Procedure Code be heard and disposed of by a single Judge of this Court ? In other words : Are Rules 2 and 2-A of the Appellate Side Rules *intra* or *ultra vires* ?

(iii) If a single Judge has power to issue the common law writ of *habeas corpus*, is the writ issued by our learned brother PANDRANG ROW J. on the 26th October liable to be quashed by this Court for the reason that it has been issued in contravention of the rules in force in the High Court in England ?” In stating their reasons for the order of reference, the learned Judges dealt with the contentions submitted to them as follows :—The petitioner, the first respondent in this appeal, submitted three contentions : in the first place, that the High Court has no jurisdiction to issue the common law writ of *habeas corpus* in cases, which admittedly include the present case, covered by section 491 of the Criminal Procedure Code ; the learned Judges held themselves bound to reject this contention by reason of the decision of the Full Bench in *Govindan Nair's* case(1), already referred to, but gave reasons why they thought that

(1) (1922) I.L.R. 45 Mad. 922 (F.B.).

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it should be reconsidered. In the second place, the petitioner maintained that, even if the High Court had still power to issue the common law writ of *habeas corpus*, nevertheless Rule 2 was *intra vires* and binding on all Judges of the Court, and that, accordingly, a single Judge had no power to deal with such proceedings; the learned Judges held this to be well founded. In the third place, the petitioner maintained that even if a single Judge has jurisdiction to issue the common law writ of *habeas corpus*, the procedure in this case had not been proper in that PANDRANG ROW J. had made the writ returnable to himself and not to the Court, during term time, which was in contravention of the rules in force in the High Court in England, which would apply in the case of a common law writ in the High Court of Madras; the learned Judges agreed with this contention. The respondents—the present appellants—maintained two arguments: first, that in a criminal matter, such as this one, there was no right of appeal, but the learned Judges held that the Court was entitled to entertain the petition by virtue of section 561 A of the Criminal Procedure Code. In the second place, the respondents objected to the *locus standi* of the petitioner, who had not been a party to the application for a writ; the learned Judges rejected this objection. Having regard to the importance of three of the questions argued before them, the learned Judges made the reference already mentioned.

On 4th November 1938, the Full Bench (SIR LIONEL LEACH C.J., MADHAVAN NAIR, VARADACHARIAR, WADSWORTH and LAKSHMANA RAO JJ.) having heard arguments, made an order in which the questions were answered as follows:

“(i) The common law writ of *habeas corpus* does not run in British India in a case like this. Assuming that the Court

formerly had the power to issue a writ of *habeas corpus* in a case like this, that power has been taken away and the powers conferred by section 491 of the Code of Criminal Procedure substituted.

(ii) Rules 2 and 2-A of the Appellate Side of this Court are *intra vires* the Court's powers.

(iii) PANDRANG ROW J.'s order issuing a rule *nisi* was passed without jurisdiction and is consequently null and void.

(iv) The position therefore is that the application filed by the respondents under section 491 of the Code of Criminal Procedure must be dealt with in accordance with the rules of the Court which means that it must be dealt with by the Criminal Bench.”

In the same order the learned CHIEF JUSTICE directed that the application under section 491 (No. 985) should be placed before the Criminal Bench on the following Monday, the 7th November. The reasons of the Full Bench for their judgment were subsequently given on the 8th November in a judgment delivered by the CHIEF JUSTICE.

The proceedings in Petition No. 1003 were resumed by BURN and STODART JJ. on 7th November 1938, when they made an order in accordance with the answer of the Full Bench, setting aside the order of PANDRANG ROW J. in Petition No. 985, dated 26th October 1938, which directed the issue of the writ *nisi* already referred to.

On the same day, 7th November 1938, BURN and STODART JJ. dealt with Petition No. 985, which came before them under the direction of the CHIEF JUSTICE. After hearing arguments and considering the affidavits the learned Judges delivered judgment and made an order dismissing the petition.

This appeal is taken against (i) the judgment of the Full Bench, dated 4th November 1938, on the questions referred to them in Petition No. 1003, (ii) the judgment of the Division Bench, dated 7th November

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1938, in Petition No. 1003, and (iii) the judgment of the Division Bench, dated 7th November 1938, dismissing Petition No. 985.

Counsel for the appellants submitted four contentions, viz. :—

(1) That the first respondent had no *locus standi* in the matter raised in the appellants' Petition No. 985, and that, for the same reason, his Petition No. 1003 was incompetent and should not have been entertained.

(2) That Rules 2 and 2-A of the Appellate Side Rules were *ultra vires*, or, in any event, were not applicable to the present case.

(3) That the warrants were illegal and invalid for the following reasons, (a) that there is definite jurisdiction in the High Court to examine, on evidence, whether the conditions laid down by the Extradition Act and the rules made thereunder for issue of the warrants have been complied with, (b) that, when thus examined, it would be found that such conditions had not been complied with, (c) that, in any event, the warrants were *ex facie* invalid, in respect that—

- (i) they did not show that the conditions had been complied with,
- (ii) they did not show sufficiently with what offences the appellants were charged, or when they were committed,
- (iii) they did not sufficiently show where and to whom the appellants were to be delivered up, and
- (iv) they were undated.

(4) That jurisdiction to issue the common law writ of *habeas corpus* in a case such as the present still subsisted, and that PANDRANG ROW J. had jurisdiction to order the issue of the writ *nisi*.

On the first contention, their Lordships are clearly of opinion that the first respondent was entitled to intervene in the appellants' Petition No. 985, and that the Petition No. 1003 was competently presented by him. Counsel for the appellants referred to the rules made by the Governor-General in Council, under section 22 of the Indian Extradition Act, 1903, as to the Procedure of Political Agents for Surrender of Accused Persons to Native States (No. 1862 I.A., dated 13th May 1904), and in particular rule 2, which provides as follows :

" 2. The Political Agent shall not issue a warrant under section 7 of the said Act except on a request preferred to him in writing either by or by the authority of the person for the time being administering the Executive Government of the State for which he is a Political Agent, or by any Court within such State which has been specified in this behalf by the Governor-General in Council, or by the Governor of Madras or Bombay in Council, as the case may be, by notification in the official Gazette."

He maintained that the only parties who were entitled to take part in the proceedings relative to the warrants in the present case were (a) the appellants, (b) the second respondent, the Chief Presidency Magistrate, (c) the British Resident for the Madras States, and (d) the Government of Travancore. But their Lordships are of opinion that the terms of the warrants show that the authority to whom, in terms of section 7 of the Act, the appellants are to be delivered, is truly the first respondent, who will control their custody, though the police of Travancore at the frontier station will receive the delivery on his behalf. Rule 7 of the rules above referred to makes this sufficiently clear; it provides as follows :

" 7. In the case of an accused person made over for trial to the Court of the State, the Political Agent shall satisfy himself that the accused receives a fair trial, and that the punishment inflicted on conviction is not excessive or

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barbarous; and if he is not so satisfied he shall demand the restoration of the prisoner to his custody, pending the orders of the Governor-General in Council."

It is clear that if occasion arose for such an application in the present case, it would fall to be made to the Court of the first respondent. Their Lordships are of opinion that the first respondent is entitled to vindicate his right to obtain the custody of the appellants, and that this contention of the appellants fails.

It will be convenient to dispose next of the fourth contention of the appellants. On this point their Lordships agree with the conclusions of the Full Bench in the present case which are stated in the judgment delivered by the learned CHIEF JUSTICE as follows:

"The High Courts Act of 1861 authorized the Legislature if it thought fit to take away the powers which this Court obtained as the successor of the Supreme Court, and Acts of the Legislature lawfully passed in 1875 and subsequent years leave no doubt in my mind that the Legislature has taken away the power to issue the prerogative writ of *habeas corpus* in matters contemplated by section 491 of the Code of Criminal Procedure of 1898."

Indeed Counsel for the appellants stated that he found difficulty in pressing this contention, and the reasoning of the learned CHIEF JUSTICE, on which he based the above conclusion, is so clear and convincing, including his narration of the legislative Acts referred to in his conclusion, that their Lordships are content to adopt it, as also to state that, like the learned CHIEF JUSTICE, they are in entire agreement with the judgment of RANKIN C.J. in *Girindra Nath Banerjee v. Birendra Nath Pal*(1). Accordingly the appellants' fourth contention also fails. It follows that the appellants' Petition No. 985 must be treated as an

(1) (1927) I.L.R. 54 Cal. 727.

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application under section 491 of the Code of Criminal Procedure.

The second contention of the appellants related to the Appellate Side Rules of the Madras High Court. Section 491 of the Code of Criminal Procedure, so far as material, provides:

"491. (1) Any High Court may, whenever it thinks fit, direct—

(b) that a person illegally or improperly detained in public or private custody within such limits" (i.e., the limits of its appellate criminal jurisdiction) "be set at liberty;

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section."

The material rules of the Appellate Side Rules are as follows:—

"2. The following matters may be heard and determined by a Bench of two Judges: provided that if both Judges agree that the determination involves a question of law they may order that the matter, or the question of law, be referred to a Full Bench:—

(4) (c) for issue of a writ of *habeas corpus*.

2-A. All applications for writ of *habeas corpus* shall go before a Bench of Judges dealing with criminal work."

In view of their Lordships' opinion, already expressed, as to the incompetence of the issue of a common law writ in the present case, the appellants' contention that these rules are *ultra vires* so far as they affect the issue of such a writ, does not arise, but the appellants maintain that, on proper construction, these rules do not apply to an application for directions under section 491, which they maintain is not covered by the words "all applications for writ of *habeas corpus*". Their Lordships are unable to accept this contention, and their view is confirmed by the terms of the statutory notifications in the *Fort St. George Gazette* as to Rule 2-A which first appeared in a somewhat different form in the *Gazette*, 1925, Part II, page 307, under

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date 3rd January 1925\*, in which it is expressly described as an amendment to the rules regulating proceedings under section 491 (1) of the Code of Criminal Procedure, and it was as follows:

"All applications for writ of *habeas corpus* shall go before a Bench of three Judges, of which the Chief Justice, unless otherwise ordered, shall be one."

The alteration of the rule to its present form appeared in the Gazette, 1929, Part II, page 1309, under date 17th August 1929†, and the description of the amendment is identical with that in the earlier notification. Accordingly, PANDRANG ROW J., as a single Judge, had no jurisdiction to deal with Petition No. 985.

It only remains to deal with the appellants' contentions as to the warrants:—In the first place, they

\* FORT ST. GEORGE GAZETTE, 1925, Part II, page 307,  
dated 3rd January 1925.

By virtue of the powers conferred by section 491 (2) of the Code of Criminal Procedure, 1898, as amended by Criminal Law Amendment Act, XII of 1923, section 108 of the Government of India Act, 1915, and all other powers hereunto enabling, the High Court hereby makes the following amendments to the rules regulating proceedings under section 491 (i) of the Code of Criminal Procedure, 1898:—

*Rules of the High Court, Appellate Side, 1905.*

Omit Rule 2 (4) (c).

Add the following as Rule 2-A—

"All applications for writ of Habeas Corpus shall go before a Bench of three Judges, of which the Chief Justice, unless otherwise ordered, shall be one."

† FORT ST. GEORGE GAZETTE, 1929, Part II, page 1309,  
dated 17th August 1929.

By virtue of the powers conferred by section 491 (2) of the Code of Criminal Procedure, 1898, as amended by Criminal Law Amendment Act, XII of 1923, section 108 of the Government of India Act, 1915, and all other powers hereunto enabling, the High Court hereby makes the following amendments to the rules regulating proceedings under section 491 (i) of the Code of Criminal Procedure, 1898:—

*Rules of the High Court, Appellate Side, 1905.*

Substitute the following for rule 2-A—

"All applications for writ of Habeas Corpus shall go before a Bench of Judges dealing with criminal work."

maintained that the Court is entitled to examine, on evidence, whether the conditions laid down by the Extradition Act and the rules made under section 22 of the Act have been complied with, and that the appellants were entitled to an opportunity to satisfy the Court (a) that the offences must have been committed in Madras, and (b) that, in reality, the Travancore authorities desired to get the appellants into their jurisdiction in order to charge them with political offences, which would not be extraditable offences. It must be remembered that the warrants are issued by the agent of the Government of India, and not by an agent of the Travancore State, and this executive act is safeguarded in various ways by the Act and by the rules. For instance, rule 4 provides that the Political Agent shall, in all cases before issuing a warrant under section 7 of the Act, satisfy himself, by preliminary inquiry or otherwise, that there is, *prima facie*, a case against the accused person. The appellants do not suggest that the Resident did not so satisfy himself in the present case. But, if such a suggestion were to be made, their Lordships are of opinion that it would not be properly the subject of inquiry by the Court, but should be stated to the Magistrate on an application to him to report to the Local Government under section 8-A of the Extradition Act. Their Lordships see no reason why the offences charged cannot have been committed in Travancore, and what they have stated above directly applies to the suggestion that the true object of the extradition is to enable the appellants to be charged with political offences. It may be added that a bogus trial of the offences, in respect of which the extradition is made, would appear to fall within rule 7, and to make it the duty of the Political Agent,

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in such an event, to demand the restoration of the prisoners to his custody.

Lastly, the appellants contend that the warrants are illegal *ex facie* in respect (a) that they do not sufficiently show with what offences the appellants were charged or when they were committed, (b) that they do not sufficiently identify the place where, and the person to whom, the appellants were to be delivered up, and (c) that they are undated.

As regards (a), no form of warrant is prescribed by the Extradition Act or the rules, and the warrants clearly describe the offences with which the appellants are charged, which is all that is required by the ordinary form of warrant of arrest prescribed by section 75 and Form II of Schedule V of the Code of Criminal Procedure. Their Lordships may also refer to the explanation to section 477-A of the Indian Penal Code. This objection fails. As regards (b), section 7 (1) of the Extradition Act uses the words, "for his arrest and delivery at a place and to a person or authority indicated in the warrant", and their Lordships are of opinion that all that is required is that the place and person shall be sufficiently indicated to enable the Chief Presidency Magistrate, to whom the warrants are addressed, to act in pursuance of such warrants and to give directions accordingly. It is clear that the second respondent has no difficulty in this regard, and, if there were any doubt on the warrants taken by themselves, which their Lordships are not prepared to assume, the matter is placed beyond doubt by the Government of Madras (Home Department) Order No. 1293, dated 10th March 1938, under which the Government direct that in future all persons extradited should be handed over at "the nearest frontier police station in the Travancore State". That order was

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addressed, among others, to the second respondent. There can be no difficulty in identifying the nearest frontier police station of the Travancore State for production before the District Magistrate, Trivandrum, and, in their Lordships' opinion, a police station is a perfectly lucid description of the authority to whom the surrender is to be made. Contention (c) as to the absence of date also fails, in their Lordships' opinion. While it undoubtedly would be the usual and better practice to date the warrants, no provision in the Act or the rules appears to require directly or implicitly that the warrants must be dated; no period is expressed as running from the date of the warrants. This disposes of all the appellants' objections to the validity of the warrants.

Their Lordships have now stated the reasons which led them on 3rd April 1939 to humbly advise His Majesty that the appeal should be dismissed.

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

Solicitors for first respondent: *Sanderson Lee & Co.*

Solicitors for second respondent: *The Solicitor, India Office.*

C.S.S.

## APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice  
Krishnaswami Ayyangar and Mr. Justice Somayya.

KOLACHALA KUTUMBA SASTRI (PLAINTIFF),  
PETITIONER,

v.

LAKKARAJU BALA TRIPURA SUNDARAMMA  
(DEFENDANT), RESPONDENT.\*

*Court Fees Act (VII of 1870), as amended by Madras Act V of  
1922, sec. 7 (iv-A) and v—Suit for cancellation of docu-  
ment and for possession—Proper section applicable—  
Basis of calculation for court-fee.*

In a suit for the cancellation of a deed of conveyance which  
the plaintiff had executed and for possession of the land covered  
by the deed,

held that the plaintiff should value his relief in accordance  
with the provisions of section 7 (iv-A) and not in accordance  
with the provisions of section 7 (v) of the Court Fees Act of  
1870, as amended by Madras Act V of 1922, and that the  
stamp fee to be paid must be based not on the amount stated  
in the conveyance but on the market value of the property at  
the date of the plaint.

*Venkatanarasimha Raju v. Chandrayya*(1) and *Venkatasiva  
Rao v. Satyanarayanamurty*(2) overruled.

*Balireddi v. Abdul Satar*(3) and *Venkatakrishnayya v. Sheikh  
Alli Sahib*(4) approved.

PETITION under section 115 of Act V of 1908 and  
section 224 of the Government of India Act praying the  
High Court to revise the order of the Court of the  
District Munsif of Tenali, dated 28th July 1938, and  
made in Checkslip No. 931-3-1-N of 1938 in Original  
Suit No. 434 of 1935.

\*Civil Revision Petition No. 898 of 1938.

(1) (1928) 53 M.L.J. 267.

(2) (1932) I.L.R. 56 Mad. 212.

(3) (1935) I.L.R. 59 Mad. 240.

(4) (1938) 48 L.W. 277.

*V. Subramanyam* for petitioner.—In this case the plaintiff  
filed a suit for the cancellation of a sale deed on the ground  
of want of consideration, undue influence and fraud and for  
possession of the properties covered by the sale deed. He  
valued the suit under section 7 (v) of the Court Fees Act. This  
was objected to on the ground that section 7 (iv-A) of the Act  
applied as there was a prayer for cancellation of the sale deed.  
The objection is not sound and valid. In substance the suit  
is mainly for possession.

[THE CHIEF JUSTICE.—But you cannot get possession  
until the document is cancelled.]

Section 7 (v) provides specially for calculating the court-fees  
in suits for possession of lands. The method of calculation as  
provided by the statute should be followed. In section 7 (iv) (c)  
which refers to immovable properties the basis of calculation  
is that provided in section 7 (v). Section 7 (iv-A) does  
not refer to suits where possession is asked for. As the main  
prayer is for possession of lands the court-fee paid by the  
plaintiff under section 7 (v) is correct. The decisions in  
*Venkatanarasimha Raju v. Chandrayya*(1) and *Venkatasiva Rao  
v. Satyanarayanamurty*(2) lend support to this view.

[*Balireddi v. Abdul Satar*(3) and *Venkatakrishnayya v.  
Sheikh Alli Sahib*(4) were referred to as holding the other view  
that section 7 (iv-A) applied and that the market value of the  
property should be the basis of calculation for the court-fee  
to be paid in such cases.]

*T. Krishna Rao* for Government Pleader (*B. Sitarama Rao*)  
for Government was not called upon.

*Y. Suryanarayana* for *K. Kotayya* for first and second  
respondents was not called upon.

Third respondent was not represented.

The JUDGMENT of the Court was delivered by  
LEACH C.J.—The question which the Court is called LEACH C.J.  
upon to consider in this case is whether in a suit for the  
cancellation of a deed of conveyance and for possession  
of the property the plaintiff should value his relief in

(1) (1928) 53 M.L.J. 267.

(2) (1932) I.L.R. 56 Mad. 212.

(3) (1935) I.L.R. 59 Mad. 240.

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accordance with the provisions of section 7 (iv-A) or those of section 7 (v) of the Court Fees Act. The plaintiff in this case filed a suit in the Court of the District Munsif of Tenali for a decree setting aside a conveyance which he had executed and for possession of the land covered by the deed, pleading that he had been induced to sign the instrument as the result of undue influence and fraud. On the basis that the plaint fell for the purpose of valuation within paragraph (v) of the section he affixed a stamp fee of the value of Rs. 34-13-0. The District Munsif considered that paragraph (iv-A) applied, which meant a court-fee of Rs. 119-15-0. Paragraph (v), as amended by the Madras Act of 1922, requires that in a suit for the possession of land the relief shall be valued at ten times the annual revenue payable to Government where such revenue is settled but not permanently, and that is the position here. By the amending Act paragraph (iv-A) was inserted. This paragraph requires the court-fee in a suit for the cancellation of a conveyance to be calculated on the value of the property. The case has been placed before a Full Bench because there are conflicting decisions of this Court on the question whether on a suit of this nature the valuation should be according to the market value or whether the relief should be valued in accordance with one of the methods mentioned in paragraph (v).

In *Venkatanarasimha Raju v. Chandrayya*(1) KRISHNAN and ODGERS JJ. held that the value contemplated in section 7 (iv-A) was not the market value. It was said that where it was sought to set aside a decree affecting immovable property, the value of the relief should be calculated on the basis

(1) (1926) 53 M.L.J. 267.

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of a suit falling within paragraph (v). The reason given was that as the Act itself contained rules for the valuing of suits for possession of immovable property it was proper to take a method indicated by the Act in preference to any other method. A decision to the same effect was given in *Venkatasiva Rao v. Satyanarayanamurty*(1) by a Division Bench consisting of REILLY and ANANTAKRISHNA AYYAR JJ., but the judgments in that case do not add anything to what was said in the earlier case. These decisions were followed by KING and STODART JJ. in a recent unreported case (Second Appeal No. 592 of 1932).

The same question was raised before VENKATASUBBA RAO J. in *Balireddi v. Abdul Satar*(2). The learned Judge considered that the proper method of calculating the value of the subject-matter of a suit falling under paragraph (iv-A) was the market value. He felt that he was not bound by the previous Bench decisions because the case before him related to mortgages and sale deeds whereas *Venkatanarasimha Raju v. Chandrayya*(3) and *Venkatasiva Rao v. Satyanarayanamurty*(1) related to decrees affecting immovable property. The decision of VENKATASUBBA RAO J. was followed by WADSWORTH J. in *Venkatakrishnayya v. Sheik Alli Sahib*(4).

We consider that the view taken by VENKATASUBBA RAO J. in *Balireddi v. Abdul Satar*(2) is preferable to that taken in *Venkatanarasimha Raju v. Chandrayya*(3). Paragraph (iv-A) deals with suits where it is necessary for the plaintiff to seek the cancellation of a decree or of a deed. Paragraph (v) relates merely to suits for possession. In a suit for possession it is not always

(1) (1932) I.L.R. 56 Mad. 212.

(3) (1926) 53 M.L.J. 267.

(2) (1935) I.L.R. 59 Mad. 240.

(4) (1938) 48 L.W. 277.



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necessary to set aside a decree or a document. Where a suit is merely for possession the Act says how the value of the subject-matter shall be arrived at. When adding paragraph (iv-A) to section 7 the Legislature did not say that in a suit falling within the new paragraph the valuation of the subject-matter should be arrived at in accordance with the method indicated in paragraph (v). It said that a suit within paragraph (iv-A) should be valued according to the value of the property, and the value of the property, unless there is an indication to the contrary, must mean its market value. By the Amending Act of 1922, paragraph (iv) (C) was also amended. Before the amendment this paragraph provided that in a suit to obtain a declaratory decree or order, where a consequential relief was prayed, the value should be according to the value of the relief sought by the plaintiff. The Amending Act inserted the proviso to the effect that in a suit coming under this paragraph in a case where the relief sought is with reference to immovable property, the valuation shall not be less than half the value of the immovable property calculated in the manner provided for by paragraph (v). There the Legislature expressly provided that the method of calculation was to be in accordance with paragraph (v) but in adding paragraph (iv-A) no such direction was given. The court-fee is to be calculated on the amount or the value of the property and to give the wording of paragraph (iv-A) its plain meaning the valuation must be the valuation based on the market value of the property at the date of the plaint. We consider that *Venkatanarasimha Raju v. Chandrayya*(1) and *Venkatasiva*

(1) (1926) 53 M.L.J. 267.

*Rao v. Satyanarayanamurti*(1) were wrongly decided and they will therefore be overruled.

It follows that the District Munsif was right in requiring the suit to be valued under section 7 (iv-A) of the Court Fees Act, but we do not agree that it necessarily follows that the stamp fee shall be based on the amount stated in the conveyance. It must be based on the value of the property at the time of the suit. It may very well be that on that date the market value was Rs. 900, the amount stated to be the consideration, but this question is not before us. All we need say is that the plaintiff will have to stamp his suit according to the market value of the property before the plaint is received.

In view of the earlier decisions we consider that there should be no order as to costs.

V.V.C.

(1) (1932) I.L.R. 56 Mad. 212.

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## INCOME-TAX REFERENCE.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice Gentle  
and Mr. Justice Somayya.*

1939,  
March 7.

THE COMMISSIONER OF INCOME-TAX, MADRAS  
(RESPONDENT IN THE ORIGINAL PETITION), APPLICANT,

v.

VOORA SREERAMULU CHETTY (PETITIONER IN THE  
ORIGINAL PETITION), RESPONDENT.\*

*Indian Income-tax Act (XI of 1922), sec. 66 (3)—Application to High Court under, on refusal of Commissioner of Income-tax to state a case on the ground that order was not prejudicial within meaning of sec. 66 (2) read with section 33 of the Act—Full Bench decision to the effect that order was a prejudicial order and order of Bench dealing with application under sec. 66 (3) requiring Commissioner to state a case—Appeal to Privy Council against—Certificate permitting—Jurisdiction of High Court to grant—Letters Patent (Madras), Cls. 39 and 40—Applicability and effect of.*

The respondent (assessee) applied to the Commissioner of Income-tax to state a case on a question arising under section 25 (3) of the Indian Income-tax Act of 1922. The Commissioner, relying upon *Venkatachalam v. Commissioner of Income-tax, Madras*(1), refused to state a case on the ground that the order was not prejudicial within the meaning of section 66 (2) read with section 33 of the Act. The respondent then applied to the High Court under section 66 (3) and the Bench before which that application came, feeling some doubt as to the correctness of the decision in *Venkatachalam's* case, *Venkatachalam v. Commissioner of Income-tax, Madras*(1), referred the question of its correctness to a Full Bench of five Judges. The Full Bench held that that case had been wrongly decided and on receipt of its answer the Bench dealing with the respondent's application directed the Commissioner of

\* Application for leave to appeal to His Majesty in Council in Original Petition No. 146 of 1938.

(1) (1934) I.L.R. 58 Mad. 367.

Income-tax to state a case on the point of law involved. The Commissioner thereupon applied for a certificate permitting an appeal to His Majesty in Council.

*Held* that the High Court had no jurisdiction to grant a certificate.

Admittedly the High Court has no jurisdiction to grant a certificate under section 66-A (2) of the Income-tax Act. *Tata Iron and Steel Company, Limited v. Chief Revenue-authority of Bombay*(1) is authority for the position that an appeal does not lie under Clause 39 of the Letters Patent from a decision of the High Court in an income-tax matter since the decision is merely advisory and is therefore not a final judgment, decree or order within the meaning of that clause. It follows that there can be no appeal, and no authority for the High Court to grant a certificate permitting an appeal, to His Majesty in Council under the provisions of Clause 40 of the Letters Patent.

APPLICATION for leave to appeal to His Majesty in Council in Original Petition No. 146 of 1938, the judgment in which is reported as *Sreeramulu v. Commissioner of Income-tax, Madras*(2).

*M. Patanjali Sastri* for Commissioner of Income-tax.

*K. Bhimasankaran* for respondent.

## JUDGMENT.

LEACH C.J.—This is an application for a certificate permitting an appeal to His Majesty in Council from an order of this Court in an income-tax matter. The respondent has taken the preliminary objection that this Court has no power to grant a certificate in this case.

The respondent applied to the Commissioner of Income-tax to state a case on a question arising under section 25 (3) of the Income-tax Act. The Commissioner, relying on the decision of this Court in *Venkatachalam v. Commissioner of Income-tax, Madras*(3),

(1) (1923) L.R. 50 I.A. 212; I.L.R. 47 Bom. 724.

(2) I.L.R. [1939] Mad. 358.

(3) (1934) I.L.R. 58 Mad. 367.

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refused to state a case on the ground that the order was not prejudicial within the meaning of section 66 (2) read with section 33. In *Venkatachalam's* case(1) an application was filed in the office of the Income-tax Officer for a refund of income-tax under the provisions of section 48 of the Act. The application was rejected and the Commissioner refused to interfere by an order under section 33. The applicant then applied to this Court under section 66 (3). As the order of the Commissioner was not one enhancing the assessment and as it was considered that it was not "prejudicial" to the petitioner, the Court held that the application by him to the Commissioner under section 66 (2) was incompetent. As some doubt was felt as to the correctness of this decision when the case out of which the present application arises came before the Court, a reference was made to a Full Bench of five Judges, and the answer given to the reference was that an order refusing to interfere with a prejudicial order was itself prejudicial. Consequently it was held that *Venkatachalam v. Commissioner of Income-tax, Madras*(1) had been wrongly decided. On receipt of the answer given by the Full Bench to the question referred, the Bench dealing with the petition directed the Commissioner of Income-tax to state a case on the point of law involved. The Commissioner of Income-tax desires to challenge the correctness of the decision of the Full Bench in an appeal to His Majesty in Council.

Section 66-A (2) provides that an appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under section 66 in a case which the High Court certifies to be a fit one for appeal. Mr. Patanjali Sastri, on

(1) (1934) I.L.R. 58 Mad. 5367.

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behalf of the Commissioner of Income-tax, concedes that the Court has no jurisdiction to grant a certificate under section 66-A (2), but says that it has power to do so under Clause 40 of the Letters Patent. Clause 40 has to be read in conjunction with Clause 39. Clause 39 gives a right of appeal to the Privy Council in a matter, not being of criminal jurisdiction, from a final judgment, decree or order made on appeal and from a final judgment, decree or order made in the exercise of original jurisdiction by Judges of the High Court or of a Division Court from which an appeal does not lie to the High Court under Clause 15 of the Letters Patent. Then follows a proviso to the same effect as the provisions of sections 109 and 110 of the Code of Civil Procedure. Clause 40 provides that the Court, at its discretion, may grant leave to appeal from a preliminary or interlocutory judgment, decree, or order, in a proceeding contemplated by Clause 39, subject to the same rules, regulations and limitations which apply to appeals from final judgments, decrees or orders.

In the case of *Tata Iron and Steel Company, Limited v. Chief Revenue-authority of Bombay*(1) the Judicial Committee held that an appeal did not lie under Clause 39 of the Letters Patent of the Bombay High Court (which corresponds to Clause 39 of the Letters Patent of this Court) from a decision of the High Court upon a case stated and referred to the Court under the Income-tax Act, 1918, since the decision was merely advisory and therefore was not a final judgment, decree, or order within the meaning of the clause. In that case it was not argued that the decision was an interlocutory judgment, order or decree within the meaning of Clause 40, but the argument is advanced here. It is said that the

(1) (1923) L.R. 50 I.A. 212; I.L.R. 47 Bom. 724.

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judgment of this Court in the Full Bench reference constitutes an interlocutory judgment within the meaning of that clause and that the order directing the Commissioner of Income-tax to state a case based on the judgment of the Full Bench is also within the clause. In my opinion these contentions cannot be maintained. If there is no appeal from a final order in an income-tax matter, apart, of course, from the appeal now given under section 66-A (2), it is difficult to understand how there can be an appeal from an interlocutory order in such a matter. I regard the direction which was given to the Commissioner of Income-tax to state a case as being an interlocutory order in a matter in which the Court was required to act in an advisory capacity and the reference to the Full Bench formed part of the interlocutory proceedings. The *Tata* case(1) is final on the question whether there is an appeal when the Court is acting merely in an advisory capacity under the Income-tax Act and it covers the present case.

The opinion which I have expressed receives support from the decisions in *E. M. Chettyar Firm v. The Commissioner of Income-tax*(2) and *Delhi Cloth and General Mills Co. v. Income-tax Commissioner, Delhi*(3) and Mr. Patanjali Sastri admits that this Court has followed the decision in *E. M. Chettyar Firm v. The Commissioner of Income-tax*(2) in an unreported case. There is a decision of the Lahore High Court, *Feroze Shah v. Commissioner of Income-tax*(4), which conflicts with the decisions I have just mentioned, but it is not necessary to discuss it because we are bound by the decisions of this Court.

(1) (1923) L.R. 50 I.A. 212; I.L.R. 47 Bom. 724.

(2) (1930) I.L.R. 8 Ran. 435.

(3) (1927) I.L.R. 9 Lah. 284; 2 I.T.C. 439.

(4) (1931) I.L.R. 12 Lah. 166 (F.B.).

For these reasons I would hold that the objection taken by the respondent is well-founded and that as the case now stands this Court has no jurisdiction to grant a certificate. The respondent is entitled to the usual costs, Rs. 100.

GENTLE J.—I agree and wish to add a few words. It is conceded that under section 66-A (2) of the Income-tax Act there is no authority for this Court to grant a certificate in this matter permitting an appeal to His Majesty in Council and the application is really based upon the provisions of Clause 40 of the Letters Patent. This clause provides an appeal from a preliminary or interlocutory decision “as aforesaid”. “As aforesaid”, it is conceded by Mr. Patanjali Sastri, refers to the proceedings contemplated by Clause 39 of the Letters Patent. In my opinion this matter is not a final judgment, decree or order within the contemplation of Clause 39. Since it has been held by their Lordships of the Judicial Committee in *Tata Iron and Steel Company, Limited v. Chief Revenue-authority of Bombay*(1) that there is no appeal under Clause 39 of the Letters Patent from a decision of the High Court in an income-tax matter, it must follow that there can be no appeal, and no authority for this Court to grant a certificate permitting an appeal, to His Majesty in Council under the provisions of Clause 40 of the Letters Patent. For these reasons I agree with the views expressed by my Lord the CHIEF JUSTICE that this application should be dismissed.

SOMAYYA J.—I agree.

A.S.V.

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## APPELLATE CIVIL.

Before Mr. Justice Pandrang Rao and Mr. Justice  
Krishnaswami Ayyangar.

1938,  
November 9.

SUNA. ANA. RAMANATHAN CHETTIAR (DEFENDANT),  
APPELLANT,

v.

MENA. PANA. PALANIAPPA CHETTIAR AND SIX OTHERS  
(PLAINTIFFS 1 TO 4, 6 AND 7 AND NIL),  
RESPONDENTS.\*

*Hindu law—Minor—Guardian—Cestui quo trust and trustee—  
Personal contract by guardian—If and when binding on  
minor—Creditor contracting with guardian, trustee or exe-  
cutor—If and when creditor has direct recourse against the  
estate or beneficiary—Contribution—Suit for, by a surety  
against principal debtor—Interest—Right of surety to claim,  
from date of payment—Rate of interest—Discretion of Court.*

*Held:* (i) A guardian can under Hindu law bind a Hindu minor's estate by a personal contract if circumstances such as those pointed out in *Hunoomanpersaud's* case (1) exist.

(ii) It is not a pre-existing liability alone that enables a guardian to enter into a contract binding on the minor, but all those facts and circumstances of necessity or benefit which ordinarily justify an alienation under Hindu law would support such a contract as well.

(iii) A guardian occupies a fiduciary position towards the ward and is a trustee for him. Ordinarily a creditor has no direct recourse against the estate or the beneficiary where he has contracted with a trustee or an executor, even though as between the latter and the beneficiary the debt might have been properly incurred. But the objection to direct recourse being had against him or his estate would not be available to a beneficiary if by his meddling with or dissipation of the estate the remedy of the trustee against him, when the beneficiary or the estate is sought to be proceeded against, is not

\* Appeal No. 438 of 1935.  
(1) (1856) 6 M.I.A. 393.

available to the trustee in fact or if the beneficiary had completely and unreservedly discharged the trustee.

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(iv) In a suit for contribution by a surety against the principal debtor the Court can allow interest from the date of payment and not merely from the date when the liability and the amount are ascertained and adjudged by Court. The Court is not bound to award the current or *nadappu* rate of interest but can fix a reasonable rate taking all the circumstances into account.

APPEAL against the decree of the Court of the Subordinate Judge of Devakottah in Original Suit No. 33 of 1927.

A. Swaminatha Ayyar and S. Tyagaraja Ayyar for appellant.

K. Rajah Ayyar and N. G. Krishna Ayyangar for respondents 1 to 4 and 6.

V. Ramaswami Ayyar and N. G. Krishna Ayyangar for seventh respondent.

*Cur. adv. vult.*

The JUDGMENT of the Court was delivered by KRISHNASWAMI AYYANGAR J.—This appeal has been preferred against the decree of the Subordinate Judge of Devakottah passed a second time in a suit for contribution. The first decree was set aside on appeal by this Court and the suit was remanded for fresh disposal on a point which was held to be the main point in the suit between the parties. That point had unfortunately not been considered at the first trial on account of the defective character of the pleadings and the wrong emphasis laid on what was found to be an untenable ground of claim.

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A short statement of the facts is necessary before we proceed to consider the contention raised by the appellant. In 1908, a loan of Rs. 20,000 was advanced by the Bank of Rangoon, Limited, to two firms, namely, the firm of M. P. belonging to the

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family of the plaintiffs and the firm of S.A. belonging to the family of the defendant on a joint and several promissory note executed by their representatives. (In this judgment the term "firm" is used not in the sense of a partnership arising by contract but in the Hindu law sense of a joint family business.) Both the firms were each separately carrying on a banking and money-lending business in Rangoon, a kind of business ordinarily carried on by members of the Nattukottai Chetti community to which the parties belong. The learned Judge has found, and we have seen no sufficient reason to dissent from his conclusion, that the S.A. firm was an ancestral business belonging to the defendant's family and founded long ago by an ancestor of his. To that business the defendant succeeded in 1906 when he was adopted, while yet a minor, by the widow of one S. A. Subramanian Chetti, the previous owner, who died in 1904. Subramanian Chetti had left a will by which he had authorised his widow to adopt. During his life he was the sole owner not only of the S.A. firm at Rangoon but also of several other businesses elsewhere. By his will he appointed two executors, of whom one, Chinnayya Chetti, alone took up the office and the management of his estate and effects inclusive of the S.A. firm at Rangoon. In February 1913 he surrendered the properties to the defendant and obtained his discharge. Whether after the adoption of the defendant Chinnayya held the character of an executor pure and simple or whether he became thereafter his testamentary guardian with those duties and privileges which appertain to such a guardian is one of the matters in controversy.

At the date of the loan the S.A. firm was in charge of one Chockalinga Chetti, an agent, who held a power of attorney from Chinnayya, while the M.P.

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firm was represented by one Palaniappa Chetti. The promissory note on which the loan of Rs. 20,000 was advanced by the bank was signed by the two agents prefixing the letters "S.A." and "M.P." respectively to their signatures, thereby indicating that they were acting in the particular transaction, not in their personal but in their representative capacity as agents of their respective principals. The money borrowed was divided, as indeed it was intended to be divided, between the two firms in equal shares, according to a practice which came into vogue by reason of the lending bank insisting for better security on the credit afforded by two signatures. Sometimes a firm would borrow for itself on the accommodation of another friendly firm in return for a similar accommodation by the former to the latter. Sometimes the two firms borrowed, as in this case, a single sum of money on one joint promissory note, dividing the money borrowed equally between themselves. Both species of transactions have not infrequently come before the Courts. It will be seen that the essence of the transaction when analysed comes to this: that in the former class, the actual borrower is the principal debtor, and the accommodating signatory, a surety; in the latter, each of the two borrowers is a principal debtor in respect of the moiety taken by him, and a surety in respect of the other moiety taken by the other signatory. The lending bank however could realise the debt indifferently from either or both of the debtors at its option. As between the debtors themselves there can be no doubt that the relationship is that which subsists in law between a principal debtor and a surety.

To come back to the narrative: default was made in the repayment of the loan to the bank and the bank was consequently obliged to institute a suit for its

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recovery in C.R. No. 55 of 1912 in the Chief Court of Lower Burma. The suit appears to have been framed following the special procedure of Order XXX, Civil Procedure Code, which permits a suit by or against a partnership or even an individual in its or his business name, if such a name is assumed for the business carried on. On 12th August 1912 a decree by consent was passed against the two firms in their firm names in terms of a compromise signed by the representatives of the firms. The decree remained unsatisfied till 19th February 1925, when the full amount of the decree with accrued interest amounting to Rs. 25,600 was collected by the bank from the plaintiffs alone, the defendant having defaulted to contribute his quota. The present suit for contribution was therefore filed on 22nd March 1927 by the plaintiffs who are members of the M.P. family against the defendant representing the S.A. family for making him bear his share of the joint liability. The claim was for Rs. 12,800 being an exact half of the amount collected. Interest was also claimed on this sum at Re. 0-13-6, the average rate, current, it was alleged, among the Nattukottai Chetties at Rangoon. The defendant contested the suit mainly on the ground that the decree of the Chief Court, Lower Burma, was a nullity, having been passed against the so-called S.A. firm at a time when that firm had ceased to exist as a legal entity and when in fact no business at all was being carried on under that style either by the defendant or any other person on his behalf. According to his written statement, the firm came to an end with the death of Subramanian Chetti in 1904; and consequently the decree passed against a firm which was no longer in existence was a nullity and could not bind him, as he could not be held to have

been a party at all to the suit. The Subordinate Judge who tried the suit in the first instance overruled this defence, holding that the S.A. firm did exist on the material dates, and that the defendant was in fact a party to the suit, though nominally it was the S.A. firm that had been impleaded. A decree was accordingly passed in terms of the prayer in the plaint.

Mention must now be made of an averment in the written statement to the effect that the "S.A. estate was in the hands of executors . . . . during the minority of this defendant, which expired with December 1912 and thereafter in February 1913, the estate was handed over to this defendant". No special notice was taken of this plea of minority, the plaintiff did not plead to it, and the Court did not raise any issue on it. But when the defendant preferred an appeal to this Court in Appeal Suit No. 400 of 1928 this neglected averment assumed serious importance. It was contended in appeal that, whatever might be the position if the defendant had been a major at the time, the decree must be held to be a nullity inasmuch as he was in fact a minor at the time and no decree could bind a minor without his being represented and his interests protected in the manner provided by Order XXXII, Civil Procedure Code. This contention prevailed, but at the same time the learned Judges were unwilling to dismiss the suit for good, as in their view it was based not merely on the invalid decree but also on the original debt. This was regarded by them as the main point for determination in the suit, though it had not been pleaded with sufficient particularity. They refused, in the interests of justice, to allow the claim to be defeated by a mere technicality, and accordingly remanded the suit for fresh disposal after allowing the plaintiff

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an opportunity to amend the plaint by supplying the necessary particulars as regards the nature and binding character of the original loan. The defendant was given liberty to plead to the amended plaint. The case then went back to the trial Court, the plaintiff carried out the necessary amendments to the plaint, the defendant put in an additional written statement and fresh issues numbered 7 to 11 were framed. At the new trial fresh evidence was adduced, and the Court below has once again come to the conclusion that the plaintiffs are entitled to a decree as prayed for and has passed a decree accordingly. It is from this second decree that the present appeal has been preferred by the defendant.

In this connection we may perhaps allude to another appeal, Appeal Suit No. 449 of 1935, which was heard along with this appeal, and disposed of by us on 20th October 1938. That appeal was preferred by the defendant, who was also the defendant in another later suit by the plaintiffs who sought to set aside the remand order of this Court in Appeal Suit No. 400 of 1928 on the ground that it had been procured by fraud. It is enough at present to say that we found there was no fraud made out, of a nature sufficient in law to set aside a judgment of Court, and hence we had to reverse the decree of the Subordinate Judge who had held that the remand order had been vitiated by fraud practised on the Court. It becomes consequently necessary for us to consider the merits of the present appeal preferred against the fresh decree passed by the lower Court.

The learned Subordinate Judge has found as a fact that Chockalinga Chetti, the then representative of the S.A. firm, did in fact receive a moiety of the loan of Rs. 20,000 borrowed from the bank, and that

he did so in the ordinary course of the S.A. business and for the purpose of carrying it on in the ordinary way. This obvious and indisputable fact, we regret, was persistently and disingenuously denied by the defendant in the lower Court till, finding it impossible satisfactorily to explain his omission to produce the account book of the firm almost conclusively traced into his possession, he finally took up the position that the loan had been borrowed by one who had no authority to borrow it on his behalf, and consequently he (the defendant) was under no obligation to recognise it. On his behalf it was urged before us that Chinnayya Chetti, who was in fact at the date of the loan and, as we have already noticed, till February 1913, in actual management of all the property and businesses of the defendant, was wholly and purely an executor under the will of his adoptive father; and that he had no right as such to continue the S.A. firm at Rangoon either in law or under the terms of the will. If, in continuing the business, Chinnayya overstepped the limits of his authority, a debt borrowed in the course of such an unauthorised business cannot of course bind the defendant. But if, on the contrary, the continuance of the business was not improper, we should be prepared to hold on the principle of the ruling in *Abdul Majid Khan v. Saraswatibai*(1) that it was within the authority of Chinnayya and his agent to borrow the money.

It is therefore necessary to ascertain the exact legal relation in which Chinnayya stood towards the defendant. It is clear from the will that he and another Chidambaram Chetty were in express terms appointed executors. Chidambaram Chetty declined

(1) (1933) 66 M.L.J. 65 (P.C.).



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to accept the office, but Chinnayya after a long and protracted contest succeeded in establishing the will and obtaining probate. There can be no doubt that Chinnayya at the outset took over the management of the business as an executor in accordance with the provisions of the will.

The will contained the following directions :

"I have appointed these two persons, namely, (i) S. R. M. Ramaswami Chetty *alias* Chinnayya Chetty, residing at Karaikudi aforesaid and (ii) A. V. P. L. Chidambaram Chetty of the said place as executors of this will for distributing and safeguarding my properties as detailed below. So the aforesaid persons shall after my death take possession of all my properties, distribute them as detailed below and manage them. As I have no male issue at present, my wife, Sivakami, shall, after my death, take any male child she may like, in adoption for the propagation of my family. Soon after the said adopted son becomes a major, the aforesaid executors shall deliver to the said adopted son all my properties—together with the accounts relating thereto. The executors shall properly safeguard and manage the above properties, maintain accounts properly in respect thereof, and conduct civil, criminal and revenue and all proceedings, improve the properties, and incur expenses for charity . . . Of the firms which are carried on for me in foreign places, firms other than those four firms, namely, Rangoon, Madras, Bengal and Singapore, should be wound up, cash realised and the same be brought to the said four firms and the transactions should be had on the Chetty firms."

Two things are clear from these provisions. The S.A. business was one of the four businesses which were not to be closed down but to be continued, managed and improved for the benefit of the son to be adopted. As an executor, bound to carry out the directions of the will, Chinnayya had accordingly a definite duty and it was certainly within his powers to carry on the business. At the same time it is equally plain that after the adoption of a son, who would from that moment become the owner, Chinnayya's executorship

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must be held to have ceased and that he thereafter became the testamentary guardian of the son adopted, namely, the defendant, who was a minor at the time. In view of the direction that the executor should deliver the properties to the adopted son soon after he attained majority, we must hold, following the ruling in *Jagannadha Rao v. Ramayamma*(1), that his position in relation to the management was that of a validly appointed testamentary guardian. It is on this footing that the question whether the loan taken from the bank could bind the defendant has to be considered, though the argument at the Bar covered a wider range.

Chinnayya was thus a testamentary guardian put in charge of an ancestral business and enjoined to preserve and improve it for the benefit of the adopted son. His powers of management are derived not only from the will but also from those principles of Hindu law recognized in *Hunoomanpersaud's* case [*Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*(2)] and in several other later cases (Mayne on Hindu Law, tenth edition, section 236). It is true that the incapacity of a minor under the Indian law to bind himself or his estate by a contract is much more complete than under the English law, especially after the pronouncement of the Privy Council in *Mohori Bibee v. Dharmodas Ghose*(3). But the Hindu law has conferred on the guardian, not of course in his interests, but in those of the minor ward, a comparatively larger power over even the immovables of the latter under his management. Though indeed it is a limited and qualified power, to be exercised only in a case of need or for the benefit of the estate, yet it is wide enough to include an authority

(1) (1920) I.L.R. 44 Mad. 189. (2) (1856) 6 M.I.A. 393.  
(3) (1903) I.L.R. 30 Cal. 539 (P.C.).

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to charge, mortgage or even to sell a sufficient portion of it, if circumstances warrant its exercise (Mayne on Hindu law, tenth edition, section 237). This was not denied, as indeed it cannot be denied at this time of day, but the old argument, based, as it has been pointed out, on an imperfect understanding of certain decisions of the Privy Council, *Waghela Rajsanji v. Shekh Mastudin*(1), *Indur Chander Singh v. Radhakishore Ghose*(2) and *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*(3), was repeated before us. It has been turned down more than once by this Court [*Ramajogayya v. Jagannadhan*(4), *Satyanarayana v. Mallayya*(5), *Ammalu Ammal v. Namagiri Ammal*(6) and *Seetharamayya Garu v. Sathiah*(7)] and it is unnecessary for us to embark upon a discussion of the soundness of the principle adopted. In view of these decisions, it has to be taken as established that a guardian can, under Hindu law, bind a Hindu minor's estate by a personal contract if circumstances such as those pointed out in *Hunoomanpersaud's case*(8) exist. We may observe that we find it difficult to appreciate an argument which denies to the guardian a power to contract a simple debt, while conceding to him in identical circumstances a power to charge or even sell the estate, in spite of the greater strictness with which the Hindu law regards transactions affecting immovable property.

It was however urged that the test laid down by the Privy Council in *Hunoomanpersaud's case*(8) is not applicable to a simple contract debt incurred by the guardian, which, according to the appellant, could be

(1) (1887) I.L.R. 11 Bom. 551 (P.C.). (2) (1892) I.L.R. 19 Cal. 507 (P.C.).  
(3) (1911) I.L.R. 39 Cal. 232 (P.C.). (4) (1918) I.L.R. 42 Mad. 185 (F.B.).  
(5) (1934) I.L.R. 58 Mad. 735 (F.B.). (6) (1917) 33 M.L.J. 631, 640.  
(7) 1938 M.W.N. 877. (8) (1856) 6 M.I.A. 393.

supported if at all not on the broad principles enunciated in that case, but only on the much more limited ground, viz., that it was incurred to pay or keep alive a binding debt already in existence. For this argument reliance was placed on a recent decision of a single Judge of this Court, VENKATARAMANA RAO J. in *Muthuswami Maniagan v. Annamalai Chettiar*(1). As we are informed that that decision is now under appeal\* it is not necessary for us to say anything more than that we are not satisfied that under Hindu law it is only in respect of a pre-existing liability that a guardian can act so as to bind the minor. With all respect to the learned Judge, we think that, once an exception based on the principles of Hindu law is recognized, there appears to be no warrant for still further narrowing it by a limitation of the kind suggested. We feel that the sounder and more reasonable view to take of the decision on the point is that, if the guardian is found to have acted in circumstances regarded as sufficient to bind the minor according to the general principles of that law, then the estate of the minor should be held bound. A pre-existing liability is only one such circumstance, but that is by no means exhaustive of the class. We feel that the observations of the Judges in the cases referred to in the judgment of the learned Judge ought not to be interpreted as enunciating a new head of necessity, or limiting the well-known ancient one, to which alone, and to none other, we must resort in every case where a transaction of the representative is questioned. The rule laid down as early as in *Hunoomanpersaud's case*(2) must therefore continue to guide the Courts,

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(1) (1936) 44 L.W. 775.

(2) (1856) 6 M.I.A. 393.

\* Since disposed of and reported as *Annamalai Chetty v. Muthuswami Maniagan* (1939) 49 L.W. 635.

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and it is not permissible to whittle down the generality of Their Lordships' language by *dicta* of Judges made with particular reference to the facts before them. We regret we are unable to agree that "the test is not a question of mere benefit, nor the mere fact that the debt was incurred for necessary purposes" as the learned Judge seems to think. It is not in our opinion a pre-existing liability alone that enables a guardian to enter into a contract binding on the minor, but all those facts and circumstances of necessity or benefit which ordinarily justify an alienation under Hindu law would support such a contract as well. We must accordingly negative the contention that Chinnayya was incapacitated from borrowing for the purposes of the business entrusted to his care. In this connexion it is well to remember that the Nattukottai Chetti community to which the parties belong have, as we have already observed, adopted money-lending and banking as their main profession or *kulachar* and such a business, which is often the mainstay of the family, has been known to descend from generation to generation in many Chetti families. The argument that it should be wound up, as apparently it has to be wound up under the English law, takes little note of the peculiar incidents of a family business in the Hindu system. It is according to that system a heritable asset of the family, affording sustenance and employment to the members of the family; and to close down such a business may often amount to the destruction of a valuable item of family property. This aspect of the matter reinforces our conclusion that, even apart from the directions contained in the will, Chinnayya was justified in continuing the business. It was not disputed that the appointment of an agent to manage the Rangoon business was anything but usual and proper in the ordinary

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course of the management of such a business. Chinnayya was only acting in the customary way in appointing Chockalinga as agent to conduct the business. We must therefore hold that the defendant is bound by the borrowing made by Chockalinga, which, as the learned Judge has found, was an act done for the legitimate purposes of the business in his charge, and which must therefore be held to have been necessary or beneficial to it.

It was next urged that, even if the loan is to be held to have been properly borrowed by Chinnayya through his agent, Chockalinga, it is not open to the creditor, or to the plaintiffs, who stand in his shoes, to enforce the claim directly against the family property in the hands of the defendant, and for this proposition reliance was placed on the cases, English and Indian, collected in *Srishchandra Nandi v. Sudhirkrishna Banerji*(1). A guardian does occupy a fiduciary position towards the ward, and is no doubt also a trustee for him. It seems to be equally clear that a lender has ordinarily no direct recourse against the estate or the beneficiary, where he has contracted with a trustee or an executor, even though as between the latter and the beneficiary, the debt might have been properly incurred(*ibid*). There are however two answers to this contention. In the first place, it is to be observed that the objection to direct recourse is based on the availability intact of the remedy against the representative at the time when the beneficiary or the estate is sought to be proceeded against. Where however the representative has been completely and unreservedly discharged by the

(1) (1931) I.L.R. 59 Cal. 216.

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beneficiary himself, it is inconceivable that the creditor should still be obliged to pursue the futile circumlocution involved in the ordinary procedure of subrogation. For, an acquittance by the ward without disputing any of the acts of the guardian during his management, is virtually tantamount to an affirmance of the propriety of those acts, and it would be hardly just to permit the ward to demur to those acts later. In the present case, it is quite clear, both from the release, Exhibit O, and from the evidence of the defendant himself in the witness-box, that he took over from Chinnayya without demur the S.A. firm along with the other properties which appertained to the estate, and his conduct, then and since, is only consistent with his having completely accepted all the liabilities to which the estate was subject at the time when he took it over. Now, and in the face of this conduct, to contend that it is Chinnayya who must be sued in the first instance is to contend for something which in all equity and good conscience the defendant should not be permitted to do. Even otherwise, an exception is recognized to the rule in question where, for instance as in this case, the debt is incurred in a trade carried on in pursuance of directions validly given by a will or other instrument; *Ammalu Ammal v. Namagiri Ammal*(1) and *Thirunavukkarasu v. Lakshmidas & Co.*(2). Lastly, we may observe that this case is free from the complication sometimes arising on account of the form of the promissory note. There is in this case no scope for the argument that the promissory note in favour of the bank bound the executant personally and was not intended to bind the defendant. It was in fact

(1) (1917) 33 M.L.J. 631, 636.

(2) A.I.R. 1935 Mad. 890.

executed by Chockalinga in the name of the *vilasam* identifying it as a transaction on behalf of the defendant, as we have already pointed out.

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Objection was next taken by the appellant's learned advocate to the grant of interest in the decree of the lower Court from the date of payment by the plaintiffs till the date of decree at thirteen annas six pies per cent per month. It is argued that in a claim for contribution no interest ought to be allowed till the liability and the amount are both ascertained and adjudged, and further, that the learned Judge erred in any event in decreeing interest at the *nadappu* rate. First, with reference to the liability for interest, the decree in this regard is sought to be supported not on section 73 of the Indian Contract Act (IX of 1872), nor under the terms of the main clause in the Interest Act (XXXII of 1839). It is on the proviso to that clause, which expressly leaves untouched the liability for interest in all cases in which at the date of the Act interest was payable by law, that reliance was placed by the respondents. The liability for interest independently of the provisions of the Act was, if we may say so with respect, most exhaustively considered by a Bench of this Court in *Nanchappa Goundan v. Ittichathara Mannadiar*(1) and the position has been much clarified by the expressions of opinion contained in that judgment. It is now plain that, though the Act speaks of interest payable by law, what is meant is that it may be payable either by common law or equity. In other words, the word "law" is used in the context in the generic and not in the technical sense, and comprehends all those principles of law and equity which Courts enforce.

(1) (1929) I.L.R. 53 Mad. 551, 553.

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It is to equitable principles accordingly that an appeal is made in this case to support the award of interest. Those principles have been enumerated in Halsbury's Laws of England, Hailsham Edition, Vol. 21, page 40, and among the instances there mentioned as giving rise to a liability for interest is the relationship of principal and surety. The claim for contribution has always been recognized as one which pre-eminently falls within the equitable jurisdiction of the Court, and on such a claim the Court of Equity appears to have always allowed interest without question. In *Hitchman v. Stewart*(1) it was held that, when one of several sureties had paid the principal debt and some of the co-sureties are insolvent, he was entitled as against the solvent sureties to be paid their numerical shares of what he had paid, *with interest from the time of payment*, although the instrument did not contain any express indemnity so as to carry interest as on a specialty. This decision was followed in two subsequent cases; *In re Swan's Estate*(2) and *Ex parte Bishop*. In *re Fox, Walker & Co.*(3); and in the latter, COTTON L.J. explained the principle as based on

"the consideration that, where there is a contract to indemnify, express or implied, the person to be indemnified ought to be put in the same position as if the act against which he is to be indemnified had been done by the person who is to indemnify him *at the time when it ought to have been done*".

The italics are ours. Interest chargeable by a surety on the amount of the contribution due to him is accordingly to run from the date or dates when his payment to the creditor becomes in excess of his share (Rowlatt on Principal and Surety, third edition, page 249). The claim for interest as from the date

(1) (1855) 3 Drewry 271; 61 E.R. 907. (2) (1869) 4 Ir. Eq. R. 209.  
(3) (1880) 15 Ch. D. 400, 422.

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when the plaintiffs paid the amount to the bank is thus well supported in equity and is therefore payable by "law" within the meaning of that word in the statute, and the objection must therefore be overruled. We may also observe that it is wrong to regard a claim for contribution as arising out of a contract enforceable at law; such a claim is independent of contract and arises out of the necessity to do equity to a person who has been damnified by the default of the person liable in failing to fulfil an obligation which was essentially his own. The award of interest as from the date of payment by the plaintiffs cannot therefore be objected to. But as regards the rate, however, the plaintiffs have no right to demand the same rate at which the interest on the original debt was payable or any particular rate. We think it is for the Court to fix a reasonable rate, taking all the circumstances into account. In the present case, we think that the learned Judge erred in awarding interest at the rate claimed by the plaintiffs, which is in our view far too excessive. The learned Subordinate Judge has not given any reasons for the course he took and we can find none ourselves for departing from the usual rule adopted by Courts in cases not covered by the contract of parties. We hold that the ends of justice would be sufficiently met in this case by awarding interest at six per cent per annum instead of at the higher rate adopted by the lower Court on the principal amount of Rs. 12,800. Subject to this modification, the decree of the lower Court will be confirmed and the appeal dismissed. The appellant will pay two-thirds of the total costs to the respondents in view of the reduced amount which the latter will recover under our judgment.

G.B.

## APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice  
Krishnaswami Ayyangar and Mr. Justice Somayya.

1939,  
March 1.

ANUMALA ANKAMMA (FIRST DEFENDANT), APPELLANT,

v.

KOMARAVOLU VENKATA SUBBAYYA AND THREE OTHERS  
(PLAINTIFF AND DEFENDANTS 2 TO 4), RESPONDENTS.\*

*Madras Estates Land Act (I of 1908), secs. 146 and 147—Retrospective, if—Transfer by ryot before Act of portion of his holding—Sale after Act of that portion for rent arrears due by ryot in respect of portion not sold and in his possession—Validity of—Notice of transfer not given by transferee to landholder—Rent paid by transferee and accepted by officials of landholder from date of transfer—Rent sale and proceedings resulting therein without notice to transferee.*

The appellant, who had in 1903 purchased the suit land, which was one of five plots comprised in the holding of a ryot, was in possession of the land from the date of his purchase and paid year by year thereafter the rent due by him in respect of the land to his landlord, the zamindar, who recognised him as being the holder of the land. The appellant did not, however, serve formal notice on his landlord in the manner prescribed by section 146 of the Madras Estates Land Act, 1908. The pattadar, who continued to be in possession of the remaining four plots comprised in the holding, failed to pay to his landlord the rent due by him in respect of those plots for the years 1919, 1920 and 1921 with the result that the landlord instituted a rent suit and obtained a decree. In execution of that decree the suit land was sold as being part of the area covered by the patta and was purchased by a third party. The appellant was not made a party to any of the proceedings and he had no notice of the suit or of the sale. In a suit to recover possession of the suit land from the appellant brought by the transferee of the same from the execution purchaser,

\* Letters Patent Appeal No. 18 of 1937.

held by the Full Bench that the appellant was not required to serve formal notice of the transfer on his landlord, that he got a good title to the suit land by the conveyance to him in 1903 and that his title was not affected by the execution sale.

Sections 146 and 147 of the Madras Estates Land Act, 1908, are not intended to have retrospective effect. Before the Act a transferee had a recognised status even without any notice being given of the transfer to the landlord. Therefore in providing that transferees should be bound to give formal notice to the landlords the Act did affect substantive rights and an Act which has this effect cannot be regarded as being retrospective unless this is so stated or this is necessarily implied. There is nothing in section 146 or in section 147 which indicates an intention on the part of the Legislature to interfere with rights acquired before the Act came into force.

*Sri Mahant Prayag Dossjee v. Sarangapani Chetty*(1) overruled.

APPEAL under Clause 15 of the Letters Patent against the decree and judgment of BURN J., dated 2nd November 1936 and passed in Second Appeal No. 299 of 1935 preferred to the High Court against the decree of the Court of the Subordinate Judge of Guntur in Appeal Suit No. 96 of 1934 preferred against the decree of the Court of the District Munsif of Ongole in Original Suit No. 356 of 1929.

The second appeal came on for hearing before LEACH C.J. and SOMAYYA J. when their Lordships made the following

## ORDER :—

In view of the decision in *Sri Mahant Prayag Dossjee v. Sarangapani Chetty*(1) we consider that the case should be heard by a Full Bench and we direct accordingly.

## ON THE REFERENCE :

*V. Govindarajachari* for appellant.—[Reference was made to *Muthukaruppa Pillai v. Annamalai Chettiar*(2), *Ekambara*

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(2) (1935) 69 M.L.J. 297, 299.

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*Ayyar v. Meenatchi Ammal*(1), *Peram Narasigadu v. Machireddi Butchireddi*(2), *Kesavasami Aiyar v. Narayana Chetty*(3) and *Sri Mahant Prayug Dossjee v. Sarangapani Chetty*(4).] Section 147 of the Madras Estates Land Act of 1908 was not the law before that Act.

[*G. Chandrasekhara Sastri* for first respondent intervening.—The effect of the decisions of this Court is that a landlord can ignore a transfer of a part of a holding but where the transfer is of the entire holding he is bound to recognise the transfer. This is also the English law.]

*V. Govindarajachari* continuing referred to Maxwell on the Interpretation of Statutes, page 196, on the question whether declaratory Acts are retrospective. *Muthukaruppa Pillai v. Annamalai Chettiar*(5) refers to the earlier decisions. In *Ekambara Ayyar v. Meenatchi Ammal*(1) the distinction between a landlord and a tenant under the English law and a shrotriendar, inamdar or zamindar and his ryots is pointed out; see page 404.

[*KRISHNASWAMI AYYANGAR J.*—There is nothing in *Ekambara Ayyar v. Meenatchi Ammal*(1) to suggest any distinction between a transfer of the whole holding and a transfer of a portion of the holding.]

No. In fact in *Peram Narasigadu v. Machireddi Butchireddi*(2) the transfer was of a portion of the holding. *Kesavasami Aiyar v. Narayana Chetty*(3) was a case of devolution of interest in respect of a portion of a holding.

*G. Chandrasekhara Sastri* for first respondent.—The plaintiff—first respondent is not trying to give any retrospective operation in the strict sense of the word to sections 146 and 147 of the Estates Land Act. If the rent sale had been before the Act and a question of its validity arose and the landlord contended that the sale was valid even though it was without notice to the transferee, the landlord would be attempting to give a retrospective effect to the said sections. The fact that rent was received from the transferee by the officials of the estate from 1903 onwards does not show that the zamindar recognised the transferee as being the holder of the land.

(1) (1903) I.L.R. 27 Mad. 401, 406. (2) (1910) 20 M.L.J. 732.  
(3) (1912) 24 M.L.J. 228. (4) (1922) 17 L.W. 361.  
(5) (1935) 69 M.L.J. 297, 299.

[THE CHIEF JUSTICE.—That fact shows that the zamindar recognised the transfer and accepted rent on that footing.]

The JUDGMENT of the Court was delivered by LEACH C.J.—The question which falls for decision in this appeal is whether section 146 and section 147 of the Madras Estates Land Act, 1908, are intended to have retrospective effect. Before considering the provisions of the Act I will state how this question arises. The appellant is a ryot in possession of a piece of land known as Survey No. 191/1. The land forms part of a holding granted by the Raja of Venkatagiri. There are five lots bearing survey numbers in this holding, the other four being in the possession of one Venkata Subbayya, the pattadar. Venkata Subbayya is the son of one Vobayya, who in 1903 sold to the appellant and two others the land described as Survey No. 191/1. The appellant's co-owners eventually gave up their interests in the land and he alone cultivated it. Venkata Subbayya failed to pay to his landlord the rent due by him for the years 1919, 1920 and 1921 in respect of Survey Nos. 246, 445, 679 and 305 which comprised the remainder of the holding. The result was the landlord instituted a rent suit before the Sub-Collector, Ongole, in 1922 and obtained a decree. In execution of that decree the land held by the appellant was sold as being part of the area covered by the patta. The purchaser was one Poluri Yellamraju, who on 28th November 1928 conveyed the land to one Komaravolu Venkata Subbayya.

The appellant was recognised by the landlord as the holder of Survey No. 191/1 after his purchase in 1903 and he continued to pay year by year the rent due by him in respect of it. It was held by the trial Court in the suit out of which this appeal arises that Venkata Subbayya had deliberately defaulted,

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knowing that a rent suit could be filed. His scheme was to induce the decree-holder to sell in execution the appellant's land as it formed part of the holding and thus give him an opportunity of buying it at the Court auction. Of course, a scheme of this nature could only be carried through with the connivance of the subordinate officials of the zamindar. The present suit was filed in the Court of the District Munsif of Ongole by Komaravolu Venkata Subbayya on 29th April 1929, six years after the Court auction had taken place, to recover possession of the property from the appellant. The District Munsif dismissed the suit, holding that the appellant's title was not affected by the sale, because he had no notice of the suit or of the sale, he was not made a party to any of the proceedings, he had been in possession of the land since 1903, and he had regularly paid his rent to the landlord, who had recognised him as his tenant. The District Munsif also held that Poluri Yellamraju and Komaravolu Venkata Subbayya were creatures of Venkata Subbayya. Poluri Yellamraju had bought the property at the Court auction on behalf of Venkata Subbayya and had transferred it to Komaravolu Venkata Subbayya, who was also his benamidar. The plaintiff appealed to the Subordinate Judge of Guntur who held that the evidence was not sufficient to justify the conclusion that the auction purchaser was a benamidar of Venkata Subbayya, although he appears to have accepted the finding that the plaintiff was. The Subordinate Judge set out the evidence on which the District Munsif had held that the auction purchaser was a benamidar and apparently did not dispute its accuracy. If true, the evidence was sufficient to support the District Munsif's finding that the auction purchaser was a benamidar. Accepting

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the evidence as true, there was no other conclusion really open. Holding that the auction purchaser was not a benamidar and relying on the decision in *Sri Mahant Prayag Dossjee v. Sarangapani Chetty*(1) where it was held that the Madras Estates Land Act had retrospective effect, the Subordinate Judge allowed the appeal and decreed the suit. The appellant then appealed to this Court, but in his memorandum of appeal he took no exception to the finding of the Subordinate Judge that the auction purchaser was not a benamidar. He challenged the correctness of his decision on legal grounds and left the facts entirely alone. It is unfortunate that he did so because it was open to him to have challenged the decision of the Subordinate Judge with regard to the position of the auction purchaser. It is, however, too late in the day now for this question to be raised, and the Court is merely concerned with the question whether the decision of BURN J., who heard the appellant's appeal which followed the decision of the Subordinate Judge, is right in law. BURN J. dismissed the appeal on the ground that he was bound by the decision in *Sri Mahant Prayag Dossjee v. Sarangapani Chetty*(1).

Before referring to what was said in that case I will set out the provisions of section 146 and section 147 of the Madras Estates Land Act. Section 146 provides that whenever a holding or any portion thereof is transferred by the act of a ryot, or in execution of a decree or order of a civil Court passed against him, or by a sale for arrears of Government revenue or for any demand recoverable as arrears, the transfer shall, subject to the provisions of section 145, be recognised by the landholder if notice in

(1) (1922) 17 L.W. 361.



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writing be communicated to him by the transferor and transferee, or a certified copy of a decree or order of a civil Court establishing a transfer is produced, or in cases in which a transfer is effected by sale under the order of any Court or public officer, the sale certificate or a certified copy is produced. On notice in writing given by the transferor and transferee or by the co-sharers, as the case may be, the landholder is required to enter into separate engagements with the holders of the sub-divisions from the revenue year next succeeding that in which the notice has been given. Therefore under this section the landlord is not bound to recognise a transfer unless he receives a notification in the manner prescribed by the section. Section 147 says that all acts and proceedings commenced or had under the Act against the transferor or the co-sharers prior to the giving of the notice under section 146 or prior to the production of such copy of the decree or order or certificate of sale under section 146 in so far as such acts and proceedings affect or purport to affect the land on which the arrear is due, the crops and the products, shall as against the transferee or co-sharer be as valid and effectual as if such acts and proceedings had been commenced or had against the transferee or co-sharer himself, and he had been the defaulter. In other words all proceedings which have been commenced before notice has been received by the landlord shall be effective against the transferee.

In *Sri Mahant Prayag Dossjee v. Sarangapani Chetty*(1) a Bench of this Court consisting of OLDFIELD and RAMESAM JJ. held that these two sections applied to cases where the transfer was before the Act. In

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other words they held that the Act had retrospective effect. Although the learned Judges seemed to have had some doubt as to what was the law before the Act came into force, it was well settled that where a pattadar transferred his holding or part of his holding to another, the transferee became the tenant and it was the duty of the landlord to find out the transferee and collect the rent from him. Proceedings for the recovery of the rent could not be commenced until notice had been given to the transferee. See *Ekambara Ayyar v. Meenatchi Ammal*(1), *Peram Narasigadu v. Machireddi Butchireddi*(2), *Kesavasami Aiyar v. Narayana Chetty*(3) and *Muthukaruppa Pillai v. Annamalai Chettiar*(4). The decision in *Peram Narasigadu v. Machireddi Butchireddi*(2) and that in *Kesavasami Ayyar v. Narayana Chetty*(3) had reference to a case where the pattadar had transferred only a portion of his holding. The decision of OLDFIELD and RAMESAM JJ. in *Sri Mahant Prayag Dossjee v. Sarangapani Chetty*(5) that the Act had retrospective effect was based on the opinion which they had formed that the Act did not determine any substantive rights, but we are unable to share this view. Before the Act a transferee had a recognised status even without any notice being given of the transfer to the landlord. Therefore in providing that transferees should be bound to give formal notice to the landlords the Act did affect substantive rights and an Act which has this effect cannot be regarded as being retrospective unless this is so stated or this is necessarily implied. That is not the position here. The wording of section 146 is in the present

(1) (1903) I.L.R. 27 Mad. 401. (2) (1910) 20 M.L.J. 732.  
(3) (1912) 24 M.L.J. 228. (4) (1935) 69 M.L.J. 297.  
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tense, and there is nothing in that section or in section 147 which indicates an intention on the part of the Legislature to interfere with rights acquired before the Act came into force.

To give retrospective effect to the Act would cause damage to the appellant. In 1903 he acquired a valid title to the land which was sold in execution of the rent decree. He was not in default and throughout had paid his rent to his landlord, the zamindar, who recognised him as being the holder of the land. The payment of the rent to the officials of the zamindar and their acceptance of it means recognition by the zamindar. The Legislature can take away rights which have become vested, but it can only do so by a measure which clearly expresses its intention. There is no indication here of any such intention on the part of the Legislature which passed the Madras Estates Land Act, and *Sri Mahant Prayag Dossjee v. Sarangapani Chetty*(1) was wrongly decided. It follows that in our opinion the appellant was not required to serve formal notice on his landlord and that he got a good title to the land by the conveyance to him in 1903.

The result is that the appeal succeeds and the suit will be dismissed with costs throughout in favour of the appellant.

A.S.V.

(1) (1922) 17 L.W. 361.

# APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Varadachariar, Mr. Justice Lakshmana Rao and Mr. Justice Gentle.*

THE DHARAPURAM JANOPAKARA NIDHI, LIMITED,  
BY ITS PRESENT SECRETARY A. ADISESHA AYYAR  
(PLAINTIFF), APPELLANT,

1939,  
February 13.

v.

K. LAKSHMINARAYANA CHETTIAR (DEFENDANT),  
RESPONDENT.\*

*Adverse possession—Interruption of—Attachment in execution of decree against owner, if amounts to—Claim by party in adverse possession to property attached—Dismissal of—Effect of—Estoppel against claimant from pleading his prior possession, if—Order dismissing claim petition—Scope and effect of—Civil Procedure Code (Act V of 1908), O. XXI, rr. 60 and 61—Suit under O. XXI, r. 63—Nature and scope of—Claimant's title to property by adverse possession perfected prior to institution of decree-holder's suit under rule 63—Declaration of decree-holder's right to attach in such a case—Propriety of.*

In 1917 the suit properties were attached in execution of a decree obtained by a third party against S the original owner thereof. A claim petition then filed by the respondent was dismissed by an order dated 9th July 1917 on the ground that the petition had been unreasonably delayed; the order was not based on any finding that the claimant was not in possession. The respondent did not file a suit within a year of the date of that order to set it aside. On the dismissal of the claim petition, the suit properties were sold in execution of the third party's decree but that sale was set aside on objections raised by the judgment-debtor and the decree of the third party was otherwise satisfied on 10th August 1918. In November 1929 the appellant who had obtained a decree for money against S (since deceased) in 1917 attached the suit properties in execution of that decree. The respondent preferred a claim and it was allowed on the ground that he had been

\* Letters Patent Appeal No. 105 of 1936.

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in possession of the suit properties in his own right since 1911; the executing Court declined to go into the question of title. In November 1931, the appellant filed a suit under Order XXI, rule 63, Civil Procedure Code, to establish his right to attach and bring the suit properties to sale in execution of his decree. The Courts below found that the respondent had been in possession of the suit properties in his own right since 1911 and had therefore acquired a title by adverse possession many years before the date of the attachment in execution of the appellant's decree. The Courts below accordingly dismissed the appellant's suit and their decision was confirmed in second appeal by a single Judge of the High Court. In a Letters Patent Appeal preferred against his decision and directed to be posted before a Bench of three Judges,

*held by the Full Bench affirming the decision in second appeal*—(i) The effect of the attachment of the suit properties by the stranger decree-holder in 1917 was not to interrupt the adverse possession of the respondent.

The possession of a stranger is not affected or disturbed by an attachment in execution of a decree. Such an attachment does not prevent the judgment-debtor and much less a third party from continuing to enjoy the property attached.

(ii) The effect of the order dated 9th July 1917 dismissing the respondent's claim petition was not to estop him from pleading his prior possession and to treat the possession as being in the judgment-debtor.

The conclusiveness of the order dated 9th July 1917 was of no avail to the appellant, because (a) it was passed not in connection with the appellant's decree or in any proceedings to which he was a party and even as regards the third party's decree then under execution, the decree was otherwise satisfied, though after the expiry of a year from the date of the claim order, making it unnecessary for the respondent to take any steps to vindicate his rights; and (b) the claim petition was dismissed on the ground of delay and not on the basis of a finding that the respondent was not in possession.

Every order dismissing a claim petition cannot be interpreted as involving an adjudication that the claimant was not in possession or that the judgment-debtor was in possession on that date. When the claim petition is dismissed on the ground of delay, it is impossible to justify any such interpretation.

Effect of the dismissal of a claim petition on a finding that the claimant was not in possession discussed.

(iii) The suit under Order XXI, rule 63, Civil Procedure Code, being in form and in substance a declaratory suit, it would be an unreasonable exercise of discretion by the Court to make a declaration in such a case of the decree-holder's right to attach if the period of limitation of twelve years had expired between the date of the attachment and the date of the institution of the suit unless the property had already been sold in time.

Case-law reviewed.

APPEAL under Clause 15 of the Letters Patent against the judgment and decree of HORWILL J., dated 2nd September 1936 in Second Appeal No. 1163 of 1934 preferred to the High Court against the decree of the Court of the Subordinate Judge (Additional) of Coimbatore in Appeal Suit No. 32 of 1934 (Appeal Suit No. 237 of 1933, District Court) preferred against the decree of the Court of the District Munsif of Dharapuram in Original Suit No. 601 of 1931.

The facts of the case are set out fully in the judgment of his Lordship VARADACHARIAR J.

*T. M. Krishnaswami Ayyar* (with him, *S. S. Ramachandra Ayyar*) for appellant.—The respondent filed a claim petition in 1917 against a stranger decree-holder who attached the suit properties in execution of a decree which he obtained against the original owner of the property. It was dismissed on 9th July 1917. No suit was filed within a year to set aside that order. So the respondent is not entitled to rely on any possession which he had prior to 9th July 1917. The decree of the third party was satisfied only on 10th August 1918. The attachment by the third party must be deemed to have subsisted till that date. When property is attached it is in the custody of the Court. The expression "*custodia legis*" should be given a wider meaning. The Court is not a person. It cannot own any property. When we say that property is in the custody of the Court, it means that it is under the authority of the Court. When

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property is attached it is an act of the Court as RANKIN C.J. put it and not an order of the Court. The word "attachment" is not defined anywhere. The effect of an attachment is not merely to prevent alienation by the judgment-debtor, but it is something more. It arrests survivorship. [*Surai Bunsu Koer v. Sheo Persad Singh*(1), *Sankaralinga Mudaliar v. Official Receiver of Tinnevely*(2) and *Anantapadmanabhaswami v. Official Receiver, Secunderabad*(3) were referred to.] Under the Criminal Procedure Code, when property is attached under section 88 or 146, the property is in the possession and control of the Court; *Sarat Chandra v. Bibhabati Debi*(4) and *Ramaswamy Ayyar v. Muthusamy Ayyar*(5)].

[VARADACHARIAR J.—The distinction between an attachment under the Criminal Procedure Code and an attachment under the Civil Procedure Code is pointed out in *Gopala Aiyar v. Krishnaswamy Iyer*(6). Under the Criminal Procedure Code, the property is taken out of the possession of the contesting parties and is put in the hands of a receiver, and possession in his hands is treated as the possession of the true owner. Not so under the Civil Procedure Code. A judgment-debtor is not prevented from enjoying the property after it is attached; much less a third party.]

[Order XXI, rule 54, and Form No. 24 of the First Schedule of the Civil Procedure Code, and section 146 and Form No. 23 of the Warrant of Attachment in Schedule V of the Code of Criminal Procedure were referred to.] When property is attached, the right, title and interest of the judgment-debtor is seized by the Court and it passes into the hands of the Court. [Reference was made to cases decided under section 52 of the Provincial Insolvency Act; *Haranchandra Chakravarti v. Jay Chand*(7), *Sivasami Odayar v. Subramania Aiyar*(8) and *Mahasukh Jhaverdas v. Valibhai Fatubhai*(9).] If the property is in the possession of the Court, the possession is subject to the control of the Court. It is a question of exercising authority and not of physical possession. To say that a party can be

- (1) (1879) L.R. 6 I.A. 88; I.L.R. 5 Cal. 148.  
(2) (1925) 49 M.L.J. 616. (3) (1933) I.L.R. 56 Mad. 405 (P.C.).  
(4) (1921) 34 C.L.J. 302. (5) (1906) I.L.R. 30 Mad. 12.  
(6) (1919) 54 I.C. 473. (7) (1929) I.L.R. 57 Cal. 122, 128.  
(8) (1931) I.L.R. 55 Mad. 316, 318.  
(9) A.I.R. 1928 Bom. 177.

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in adverse possession of property when the Court has control over it is incorrect. The Court should be treated to be in constructive possession.

The dismissal order passed on the claim petition of the respondent on 9th July 1917, in any case, estops him from putting forward the plea of his possession prior to that date. Unless he proves subsequent entry after that date and continuous possession thereafter for twelve years, the respondent is not entitled to plead adverse possession. The rejection of the claim petition, if not contested within one year, becomes conclusive against the claimant; *Velayuthan v. Lakshmana*(1) and *Arsamma v. Moidin*(2). An order dismissing a claim petition should be presumed to have been passed under Order XXI, rule 60, Civil Procedure Code, on the footing that the property is in the possession of the judgment-debtor or of some person in trust for him; *Venkata Rangacharyulu Ayyavaram Garu v. Jammi Turanga Rao*(3).

In a claim suit the material date for determining the rights of the parties is the date of the attachment; *Harishankar Jebhai v. Naran Karsan*(4), *Vasudeo Atmaram Joshi v. Eknath Balkrishna Thite*(5), *Najimunnessa Bibi v. Nacharuddin Sardar*(6), *Pandiyan Pillai v. Vellayappa Rowther*(7) and *Venkata Rangacharyulu Ayyavaram Garu v. Jammi Turanga Rao*(3). In this case the date of attachment was 8th November 1929. Since the respondent had not perfected his title by adverse possession by that date, he cannot succeed in the appeal.

The effect of the first attachment was that the property was taken into the custody of the Court. During that period possession was interrupted as attachment is an act of the Court. In the eye of the law, possession then was with the judgment-debtor.

[The following cases were referred to in the course of the argument: *Krishnama Rajah v. Narayanasamy Rajah*(8), *Narayanrav Damodar Dabholkar v. Balkrishna Mahadev*

- (1) (1885) I.L.R. 8 Mad. 506. (2) (1923) I.L.R. 47 Mad. 160.  
(3) (1938) 2 M.L.J. 430. (4) (1893) I.L.R. 18 Bom. 260.  
(5) (1910) I.L.R. 35 Bom. 79. (6) (1923) I.L.R. 51 Cal. 548.  
(7) (1917) 33 M.L.J. 316. (8) (1869) 4 M.H.C.R. 281.

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*Gadre*(1), *Seetharami Reddi v. Venku Reddi*(2), *Ranganatha Aiyar v. Srinivasa Aiyangar*(3) and *Secretary of State for India v. Krishnamoni Gupta*(4).]

*V. Govindarajachari* (with him, *V. V. Srinivasa Ayyangar*, *V. V. Ramadurai*, *T. V. Bhagavat* and *R. Muthialuswami*) for respondent.—The person who is seeking attachment is different from the person who first attached the property. Attachment under the Civil Procedure Code does not arrest possession. That is the trend of the decisions of various High Courts. The cases decided under section 52 of the Provincial Insolvency Act have no application to this case. The difference between an attachment under the Civil Procedure Code and an attachment under the Criminal Procedure Code is pointed out in *Gopala Aiyar v. Krishnaswamy Iyer*(5).

[VARADACHARIAR J : Have you got anything fresh to add to what was already discussed in the course of arguments on the other side ?]

No.

*T. M. Krishnaswami Ayyar* replied.

*Cur. adv. vult.*

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The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal arises out of a suit instituted by the appellant under Order XXI, rule 63, Civil Procedure Code, to establish his right to attach and bring the suit properties to sale in execution of a decree for money which he had obtained in 1917 against one Syed Abdul Razak Sahib (since deceased). When the suit properties were attached in execution of that decree in November 1929, the respondent preferred a claim, which was allowed on the ground that he had been in possession of these properties in his own right since 1911 ; the executing Court declined to go into the question of title. In this suit which was instituted in consequence of that order, the lower appellate Court has also found that though the properties in dispute belonged at one time to Syed Abdul

(1) (1880) I.L.R. 4 Bom. 529 (F.B.).  
(2) (1901) 11 M.L.J. 344.  
(3) (1925) 49 M.L.J. 656.  
(4) (1902) I.L.R. 29 Cal. 518 (P.C.).  
(5) (1919) 54 I.C. 473.

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Razak Sahib, he had agreed to sell them to the respondent, received the consideration and put him in possession in 1911 and that the respondent has ever since continued in possession. On this finding it would have followed that though title under the sale did not pass to the respondent, because of the absence of a registered sale deed, he had acquired a title by adverse possession many years before the date of the attachment.

To avoid the above result, the appellant relied on certain proceedings that took place in 1917, between the respondent and another decree-holder, when the latter attached these properties in execution of a decree that he had obtained against Syed Abdul Razak. A claim petition then filed by the present respondent was dismissed on 9th July 1917 ; and it has been contended that, as no suit was filed by the respondent within a year of the date of that order to set it aside, he is not entitled to rely on any possession that he might have had prior to 9th July 1917 in support of his plea of adverse possession. To complete the narrative and to assess the value of the above contention, I may add that though, on the dismissal of the claim petition in 1917, the properties were sold in execution of the third party's decree, that sale was set aside on objections raised by the judgment-debtor and the decree of the third party was otherwise satisfied on 10th August 1918, so that it became unnecessary to take any further proceedings in execution of that decree.

Both the lower Courts dismissed the appellant's suit and their decision was confirmed in second appeal by HORWILL J., who however granted the appellant leave to appeal under Clause 15 of the Letters Patent. In view of the state of the authorities bearing on some

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of the questions arising in the appeal, the case has been directed to be posted before a Bench of three Judges.

The learned Counsel for the appellant has, on the facts above stated, raised two contentions: (i) that the effect of the attachment of the suit properties by the stranger-decree-holder in 1917 was to *interrupt* the adverse possession of the respondent and that as that attachment must be deemed to have subsisted till 10th August 1918, when that decree was satisfied, the respondent could acquire a prescriptive title only by possession for twelve years subsequent to 10th August 1918, (ii) that, in any event, the effect of the order dated 9th July 1917 dismissing the respondent's claim petition was to estop him from pleading his prior possession and to treat the possession as being in the judgment-debtor and that, unless the respondent proved a subsequent entry and continuous possession after that entry for a period of twelve years, he could not claim a prescriptive title. A further difficulty arose in the appellant's way on account of the fact that this suit was instituted only in November 1931. It will be noticed that even if, in accordance with the above contentions of the appellant, the respondent should be called upon to prove twelve years' possession from 10th August 1918, that period would have expired by 11th August 1930, i.e., more than a year before the institution of this suit. The appellant had therefore to advance the further contention (No. iii) that in a claim suit, the material date with reference to which the Court has to determine the rights of the parties is the date of the attachment, which in this case was 8th November 1929.

The first contention seems to me clearly untenable and no authority has been cited in support of it. It was

held so long ago as in *Krishnama Rajah v. Na ayana-samy Rajah*(1) and *Narayanrav Damodar Dabholkar v. Balkrishna Mahadev Gadre*(2) that an attachment in execution of a decree does not dispossess the party in possession; and in *Seetharami Reddi v. Venku Reddi*(3) and *Ranganatha Aiyar v. Srinivasa Aiyangar*(4) this Court has expressly laid down that an attachment does not interrupt the adverse possession of a stranger holding adversely to the judgment-debtor. As explained in *Ranganatha Aiyar v. Srinivasa Aiyangar*(4), this proposition has not been dissented from in *Pandiyan Pillai v. Vellayappa Rowther*(5). Nor can it be maintained that *Harishankar Jebhai v. Naran Karsan*(6), *Vasudeo Atmaram Joshi v. Eknath Balkrishna Thite*(7), *Najimunnessa Bibi v. Nacharuddin Sardar*(8) and *Venkata Rangacharyulu Ayyavaram Garu v. Jammi Turanga Rao*(9), which were relied on by appellant's learned Counsel in support of his third contention, lay down any proposition corresponding to his first contention. It seems to me that in view of the provisions of the Civil Procedure Code relating to the effect of an attachment and of the form (No. 24) in Appendix E to the Code, it is not possible to hold that the possession of a stranger is affected or disturbed by an attachment. The learned Counsel relied on the familiar use of the expression "custodia legis" when speaking of the effect of an attachment; it does not seem to me right to rely on this expression as justifying the view that the property attached, even if in the possession of a stranger, passes into the possession of the Court. At best, the expression can

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- (1) (1869) 4 M.H.C.R. 281. (2) (1880) I.L.R. 4 Bom. 529 (F.B.).  
 (3) (1901) 11 M.L.J. 344. (4) (1925) 49 M.L.J. 656.  
 (5) (1917) 33 M.L.J. 316. (6) (1893) I.L.R. 18 Bom. 260.  
 (7) (1910) I.L.R. 35 Bom. 79. (8) (1923) I.L.R. 51 Cal. 548.  
 (9) (1938) 2 M.L.J. 430.

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only signify some kind of *control* of the Court over further dealings with the property by the judgment-debtor.

Reliance was placed on certain observations in *Haranchandra Chakravarti v. Jay Chand*(1), *Sivasami Odayar v. Subramania Aiyar*(2) and *Mahasukh Jhaverdas v. Valibhai Fatubhai*(3) where the Court had to determine the scope of section 52 of the Provincial Insolvency Act. I see no reason to quarrel with the view there taken that that section is not confined to "movable property". The observation in *Mahasukh Jhaverdas v. Valibhai Fatubhai*(3) is no doubt couched in terms which suit the appellant's contention; but in *Sivaswamy Odayar v. Subramania Aiyar*(2) WALLER J. emphasized the unreasonableness of treating an attachment as putting the immovable property attached in the *possession* of the Court. The question of adverse possession did not arise in any of these cases and I am not prepared to take observations contained in them out of their context and base on them a proposition which the learned Judges had no occasion to think of. In support of the argument that an attachment should not be treated as having no greater effect than preventing alienation by the judgment-debtor, reliance was placed on certain observations in *Suraj Bunsu Koer v. Sheo Persad Singh*(4), *Sankaralinga Mudaliar v. Official Receiver of Tinnevely*(5) and *Anantapadmanabhaswami v. Official Receiver, Secunderabad*(6). These at best only show that so far as the attaching creditor is concerned he may by reason of the attachment be able to defeat

(1) (1929) I.L.R. 57 Cal. 122.  
(2) (1931) I.L.R. 55 Mad. 316. (3) A.I.R. 1928 Bom. 177.  
(4) (1879) L.R. 6 I.A. 88; I.L.R. 5 Cal. 148.  
(5) (1925) 49 M.L.J. 616. (6) (1933) I.L.R. 56 Mad. 405 (P.C.).

survivorship to the extent necessary to satisfy his claim. Even the reservation made in *Anantapadmanabhaswami v. Official Receiver, Secunderabad*(1) only suggests the possibility of a charge or lien in favour of the attaching creditor and lends no support to the theory of dispossession of a stranger or interruption of his adverse possession.

The analogy of cases decided with reference to the effect of an attachment under section 146 of the Criminal Procedure Code [*Sarat Chandra v. Bibhabati Debi*(2) and *Ramaswamy Ayyar v. Muthusamy Ayyar*(3)] only helps to emphasize the distinction between an attachment under that section and an attachment in execution of a Civil Court's decree. This distinction has been clearly pointed out in *Gopala Aiyar v. Krishnaswamy Iyer*(4). A Magistrate acting under section 146 of the Criminal Procedure Code takes the property out of the possession of the disputants and the subsequent possession of the receiver is in law treated as possession on behalf of the *true owner* and not of the party previously in possession without title. But an attachment in execution does not prevent the judgment-debtor and much less a third party from continuing to enjoy the property; there is accordingly no occasion for the application of the rules relating to "constructive possession". The same consideration furnishes the ground of distinction between cases relating to *vis major* and the present. In the former case, the land has *ex hypothesi* become incapable of actual possession; and the doctrine of constructive possession can be invoked only by the true owner and

(1) (1933) I.L.R. 56 Mad. 405 (P.C.).  
(2) (1921) 34 C.L.J. 302. (3) (1906) I.L.R. 30 Mad. 12.  
(4) (1919) 54 I.C. 473.

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not by a person who has to rely on adverse possession ;  
*Secretary of State for India v. Krishnamoni Gupta*(1).

I may here refer to the indication afforded by article 137 of the Limitation Act. Read with section 3 of the Act, it implies that a person who purchases in Court auction property which at the time of the sale was not in the possession of a judgment-debtor must sue for possession within twelve years from the date when the judgment-debtor was first entitled to possession. If the appellant's argument were well-founded, the position ought to be different in cases in which there has been an attachment prior to the Court sale. If the Court were to be regarded as being in possession of the property, no suit by the purchaser would be necessary at all. It would be sufficient if he applied to the Court to hand over possession to him. Further, the period of the stranger's possession would have to be reckoned in that view only up to the date of the attachment and not up to the date of the commencement of the suit. This inconsistency might perhaps be obviated by assuming that article 137 was intended to apply only to cases in which the Court sale has taken place without an antecedent attachment, as, for instance, in execution of a mortgage decree. But I see no warrant for so limiting article 137 and I am not aware of any case in which it has been so limited.

In support of the second contention above set out, the learned Counsel for the appellant relied on *Velayuthan v. Lakshmana*(2) and *Arsamma v. Moideen*(3). In the first of these cases, which was followed in the second, it was observed that when a claim petition is dismissed and no suit questioning

(1) (1902) I.L.R. 29 Cal. 518 (P.C.). (2) (1885) I.L.R. 8 Mad. 506.  
(3) (1923) I.L.R. 47 Mad. 160.

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that order is instituted within a year, the dismissal "amounts to a summary declaration of want of title in the objector and such declaration becomes equivalent to a final adjudication against his right". Where the claimant had set up that he had been in possession, the learned Judges construed the order of dismissal to amount to "an adjudication that the land was not in the applicant's possession" and in their opinion it followed that in a suit by the Court auction-purchaser it would not be open to the claimant to assert, in direct opposition to that declaration, that he had been in possession. I may at the outset observe that this line of cases is of no avail to the appellant in the present case for two reasons. The conclusiveness of the order dismissing a claim petition can be availed of only by persons purchasing at a sale held in pursuance of the attachment in connection with which the claim was preferred. Even if it could be assumed that the adjudication would be final as between the particular decree-holder and the claimant or at least in proceedings subsequently taken to enforce that particular decree, the position in the present case is different. As already pointed out, the claim order of 9th July 1917 was passed not in connection with the appellant's decree or in any proceedings to which he was a party; and even as regards the third party's decree then under execution, the decree was otherwise satisfied, making it unnecessary for the claimant to take any steps to vindicate his rights. The fact that that decree was satisfied only after the expiry of a year from the date of the claim order cannot, in my opinion, make any difference for the purpose of the present case. If the claimant allowed one year's term to expire, he would no doubt be running a risk, in that the decree-holder



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who had originally attached the property might proceed to bring the property to sale in pursuance of his attachment. If however that decree is not for any reason executed subsequently, there is no justification for imposing a penalty on the claimant for not filing a suit within a year of the dismissal of his claim. I may add that the weight of authority is in favour of the view that the finality of the claim order cannot be invoked even by the particular decree-holder who was a party to the claim order and in respect of the very decree which was then under execution, unless he was proceeding to bring the properties to sale in pursuance of that very attachment. [See *Najimunnessa Bibi v. Nacharuddin Sardar*(1).] It also seems to me difficult to support the observations in *Velayuthan v. Laksmanna*(2) in their entirety. For one thing, it does not seem to me right to interpret every order dismissing a claim petition as involving an adjudication that the claimant was not in possession. The present case itself affords an illustration; because the order of 9th July 1917 was not based on any finding that the claimant was not in possession but only proceeded on the ground that the claim petition had been unreasonably delayed and was filed on the very day on which the sale was to take place. There is no doubt a reference to the absence of a sale deed in the claimant's favour. That statement seems to have been added only to justify the course adopted by the Court, namely, refusal to investigate the claim. Even otherwise, the reference to the absence of a sale deed cannot be construed as implying a finding against the claimant's possession. Mr. Krishnaswami Ayyar contended that an order

(1) (1923) I.L.R. 51 Cal. 548.

(2) (1885) I.L.R. 8 Mad. 506.

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dismissing a claim petition must be presumed to have been passed only under Order XXI, rule 60, of the Civil Procedure Code, i.e., on the footing that the property was in the possession of the judgment-debtor or in the possession of some other person in trust for him or as his tenant. I am not able to concur in this argument, because it ignores the proviso to rule 58, clause 1, empowering the Court to dismiss the application without investigation. Even in cases in which the Court may investigate the claim, the dismissal of the claim need not necessarily be on the ground that the judgment-debtor is in possession. If the Court found that the claimant was not in possession, it must equally dismiss the petition. In such a case it might as well be that a third party and not the judgment-debtor was in possession. The principle of *constructive* adjudication must be applied with great caution to these summary orders in execution and I see no justification for reading into a claim order anything more than is contained in it or is at least necessarily implied in it.

Even in cases in which a claim petition is dismissed on a finding that the claimant was not in possession, I find it difficult to go the length of holding that in the absence of a suit by him within one year of the order, he must be *finally* debarred from relying upon proof of prior possession when the ultimate purchaser sues for possession. The observations in *Velayuthan v. Laksmanna*(1) do not take sufficient notice of the difference between a proceeding under rule 60 or 61 of Order XXI, Civil Procedure Code, and a suit under rule 63, as regards the scope of the enquiry contemplated. To take a case in which a claim is dismissed on a finding

(1) (1885) I.L.R. 8 Ma. 1. 506.

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of absence of possession in the claimant, this finding is *ex hypothesi* capable of being displaced by a suit within one year. To that extent it is not final. But if the claimant had by that time no completed title but only a possession which was on the way to mature into a prescriptive title, what has he to gain by the institution of a suit under Order XXI, rule 63? Suppose in such a suit he satisfies the Court that the prior order as to the absence of possession in himself was wrong; if nevertheless he had not by that time perfected his prescriptive title, his suit is bound to fail. The decree-holder would still be entitled to treat the property as the property of the judgment-debtor and bring it to sale. What then is the purpose in insisting upon the claimant instituting a suit which is bound to be dismissed? These considerations incline me to think that the omission to file a suit questioning the finding as to possession will only justify that finding being treated as *prima facie* evidence of the absence of possession in the subsequent suit of the purchaser for possession. It is difficult to justify the view that the omission to file a purposeless suit should deprive the claimant of the benefit of his prior possession even if he is able to prove it conclusively.

In *Venkata Rangacharyulu Ayyavaram Garu v. Jammi Turanga Rao* (1) the learned Judges interpreted the order dismissing the claim petition as involving an adjudication that the possession if any held by the claimant was on behalf of the judgment-debtor. If the terms of the order in that particular case justified that interpretation, it would be a different matter. But if it was meant to imply that every order dismissing a claim petition involved an adjudication that the

(1) (1938) 2 M.L.J. 430.

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judgment-debtor was in possession on that date, I am with all respect unable to concur in that view. Where, as in the present case, the claim petition is dismissed on the ground of delay, it is impossible to justify any such interpretation.

In the view that the appellant fails in respect of contentions (i) and (ii) set out above, the third contention does not call for a decision in this case, because, even if the rights of parties are to be adjudicated as they stood on 8th November 1929, the respondent would have acquired a prescriptive title by that time, having been in continuous adverse possession from 1911. But as the cases bearing on this contention have been referred to before us, I think it right to make a few observations on the point. It may in a sense be right to state that the principal question for determination in a suit under Order XXI, rule 63, Civil Procedure Code, is whether or not the order on the claim petition was right and in that sense the Court is in such a suit called upon to deal with the rights of parties as they stood on the date of the attachment. But the suit under Order XXI, rule 63, is in form and in substance a declaratory suit and it seems to me that it will be an unreasonable exercise of discretion by the Court to make a declaration, in such a case, of the decree-holder's right to attach if the period of limitation of twelve years had expired between the date of the attachment and the date of the institution of the suit, unless the property had already been sold in time. The suit is often but a step to enable the decree-holder to bring the property to sale; if by reason of the extinction of the judgment-debtor's title before the sale, there would be nothing to be sold, a declaration in the decree-holder's favour in the suit under Order XXI, rule 63, will not only be futile but sometimes

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even be mischievous, as it may mislead an unwary purchaser into thinking that he was buying a subsisting interest. In this view, I am inclined to agree with *Seetharami Reddi v. Venku Reddi*(1) and *Ranganatha Aiyar v. Srinivasa Aiyangar*(2) in preference to *Vasudeo Atmaram Joshi v. Ekanath Balkrishna Thite*(3) and *Pandiyar Pillai v. Vellayappa Rowther*(4). The appeal fails and is dismissed with costs.

LAKSHMANA RAO J.—I agree.

GENTLE J.—I agree.

V.V.C.

### APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Somayya.*

A. L. MEENAKSHI ACHI AND ANOTHER (DEFENDANTS  
4 AND 5), APPELLANTS,

v.

S. T. L. R. M. alias L. R. M. RAMASWAMI CHETTIAR  
AND EIGHTEEN OTHERS (PLAINTIFF AND DEFENDANTS 1,  
2, 6 TO 20 AND LEGAL REPRESENTATIVE OF THIRD  
DEFENDANT), RESPONDENTS.\*

*Administration suit—Joint Hindu family—Deceased father in—  
Creditor of—Suit for administration of deceased's estate  
by—Maintainability of—Deceased leaving no property  
apart from his interest in family estate.*

A creditor of a deceased Hindu who was joint with his son and died leaving no property apart from his interest in

\* Letters Patent Appeal No. 67 of 1937.

(1) (1901) 11 M.L.J. 344.

(2) (1925) 49 M.L.J. 656.

(3) (1910) I.L.R. 35 Bom. 79.

(4) (1917) 33 M.L.J. 316.

the family estate has no right to maintain a suit for the administration of the estate of the deceased.

Under the Mitakshara law the father's interest in the family estate devolves by survivorship on his son or sons as the case may be. If the father dies leaving no property apart from his interest in the joint estate he dies leaving no estate. There is nothing in sections 50, 52 and 53 of the Code of Civil Procedure which justifies the conclusion that a suit for administration will lie where a Hindu father dies leaving no property of his own.

*Kavuri Anjayya v. Alapati Ankamma*(1) overruled.

*Desu Manavalla Chetty, In the matter of*(2) distinguished.

LETTERS PATENT APPEAL preferred under Clause 15 of the Letters Patent against the judgment and decree of LAKSHMANA RAO J., dated 23rd March 1937 and passed in Second Appeal No. 515 of 1935 preferred against the decree of the Court of the Subordinate Judge of Devakottai in Appeal Suit No. 58 of 1934 (Original Suit No. 397 of 1932, District Munsif's Court, Devakottai).

*V. Ramaswami Ayyar* and *N. G. Krishna Ayyangar* for appellants.

*M. Patanjali Sastri* for first respondent.

*T. M. Ramaswami Ayyar* for tenth respondent.

Other respondents were not represented.

The JUDGMENT of the Court was delivered by LEACH C.J.—The question which is raised in this appeal is whether a creditor has the right to bring a suit for the administration of the estate of a deceased Hindu who was joint with his son and died leaving no property apart from his interest in the family estate. One Arunachalam Chettiar, a member of the Nattukottai Chettiar community, died in February

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(1) (1936) 44 L.W. 836.

(2) (1909) I.L.R. 33 Mad. 93.

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1930, being survived by a widow and a son (the second respondent). The first respondent, who claims to be a creditor of the deceased, filed a suit in the Court of the District Munsif of Devakottai for the administration of his estate. The widow and the son and eighteen creditors were made defendants. The appellants who were the fourth and fifth defendants challenged the right claimed by the first respondent to bring a suit for administration. In addition to denying that the plaintiff-respondent was a creditor of the father they averred that a suit for administration would not lie because the family estate had devolved upon the son by survivorship under the Mitakshara law and consequently there was no separate estate to administer. The case of the plaintiff-respondent was that the property in the possession of the son was the self-acquired property of the father and he had ample estate. The District Munsif found that the property was the self-acquired property of the father and granted a decree for administration. The appellants appealed to the Subordinate Judge of Devakottai, who reversed the finding of the District Munsif, holding that the property was family property and that it had passed by survivorship to the son. It is not open to the plaintiff-respondent to challenge this finding. The Subordinate Judge, however, was of opinion that despite the fact that the father left no separate estate the plaintiff-respondent was entitled to maintain the suit. The appellants then appealed to this Court. The appeal was heard by LAKSHMANA RAO J. who upheld the decision of the Subordinate Judge, but gave leave to appeal under Clause 15 of the Letters Patent. The learned Judge in holding that the administration suit could be maintained relied on the provisions of sections 50, 52 and 53 of

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the Code of Civil Procedure and on the decision of HORWILL J. in *Kavuri Anjayya v. Alapati Ankamma* (1).

Section 50 of the Code of Civil Procedure allows a decree-holder to execute his decree against the legal representative of a deceased judgment-debtor, and provides that the legal representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of. Section 52 relates to the position where a decree has been obtained after the death of the judgment-debtor and has been passed against his legal representative. Where the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of his property. Section 53 says that for the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be the property of the deceased which has come to the hands of the son or other descendant as his legal representative. Section 50 was section 234 of the Code of 1882 and section 52 was section 252. Section 53 is new. It was inserted in the present Code because there was a conflict of judicial opinion in India on the question whether it was necessary for the holder of a decree against a Hindu father to bring a suit to realize his decree after the death of the judgment-debtor or whether he could proceed to execute against the family property in the hands of the son without filing a suit. There is nothing in these sections which justifies the conclusion that a suit for administration will lie where a Hindu father dies leaving no property of his own.

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Under the Mitakshara law the father's interest in the family estate devolves by survivorship on his son or sons as the case may be. If the father dies leaving no property apart from his interest in the joint estate he dies leaving no estate. If there is only one son, the son becomes entitled to the whole of the family property in his own right, subject to any lawful charges which may have been created and to the conditions imposed by his personal law. Under his personal law he has to satisfy out of the family property coming into his hands debts incurred for a family necessity. By reason of the pious obligation rule he can also be called upon to pay the debts of his father if they have not been incurred for immoral or unlawful purposes. These conditions do not, however, derogate from the nature of the son's estate on his father's death. If he is the only son the family estate becomes his entirely, subject to the conditions which I have indicated. This being the position, a suit for the administration of the father's estate cannot be maintained unless the father leaves separate property. It does not mean that a suit may not be filed. A creditor cannot be prevented from filing a suit for the administration of the father's estate and may get a preliminary decree for account, but if it appears on the taking of accounts and the making of the usual inquiries that there is no property apart from what was before the father's death the joint family estate, the proceedings cannot be carried further.

There is considerable authority in support of the view which I have just expressed. In *Gangaram v. Nagindas*(1) a joint Hindu family consisted of a

(1) (1908) I.L.R. 32 Bom. 381.

father and two sons. The father died having incurred certain debts. Later, the elder of the two sons died. A creditor of the father then filed a suit for the administration of the father's estate. It was shown that the father had left no separate estate. The Court treated the suit as a suit for the administration of the estate of a living person and therefore did not lie. The Calcutta, Allahabad, Patna, Rangoon and Lahore High Courts have all held that a surviving member of a joint Hindu family is not entitled to letters of administration in respect of the estate of a deceased member of the family when he has left no separate property; vide *Durgaprasad Barhai v. Jewdhari Singh*(1), *In the goods of Balmukund Dube*(2), *Kali Kumar v. Mt. Nunabali Kumari*(3), *T. R. Gopalaswamy Pillay v. Meenakshi Ammal*(4) and *Mt. Uttam Devi v. Dina Nath*(5). The same principle is involved here. To quote from the judgment in *T. R. Gopalaswamy Pillay v. Meenakshi Ammal*(4):

"A member of an undivided Hindu family during his life is entitled to the beneficial interest in the family estate, but on his death that interest immediately ceases and the whole beneficial interests in the estate belong to the other members of the family. There is no succession to the deceased's estate because he has left nothing to succeed to. No part of the joint family estate is therefore the deceased's estate within the meaning of section 218 of the Succession Act."

In *Kavuri Anjayya v. Alapati Ankamma*(6) HORWILL J. held that a creditor of a Hindu father dying undivided from his son is entitled to bring a suit for administration against the son. The learned Judge considered that the obligations of the son are

(1) (1935) I.L.R. 62 Cal. 733.  
(3) A.I.R. 1923 Pat. 96.  
(5) A.I.R. 1919 Lah. 235.

(2) A.I.R. 1930 All. 82.  
(4) (1929) I.L.R. 7 Ran. 39.  
(6) (1936) 44 L.W. 836.

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precisely those of an heir, for he is liable for the lawful debts of his father to the extent of the assets of the joint family property which come into his hands. He also expressed the opinion that the very reason that would make it equitable and desirable to enable a creditor to file an administration suit would make it equitable and desirable that a creditor should be allowed to bring an administration suit against an undivided son of the debtor. We must express our dissent. The son is not the father's heir so far as the family property is concerned and "equitable consideration" cannot turn his property into his father's estate. The decision in *Kavuri Anjayya v. Alapati Ankamma*(1) will therefore be overruled.

In the course of the argument our attention has been drawn to the Full Bench decision of this Court in *In the matter of Desu Manavalla Chetty*(2). In that case the family property consisted in part of shares standing in the name of the father. On the father's death these shares devolved upon the son under the rule of survivorship, but the company which had issued the shares refused to recognize the son's right to them unless he obtained letters of administration. In these circumstances he applied for letters of administration of his father's estate and the question which the Court was called upon to decide was what amount he should be called upon to pay as stamp fee. It was held that as he wanted letters of administration the letters would only be issued to him on paying the stamp fee based on the full value of the shares. The Court consisted of BENSON, MILLER and SANKARAN NAIR JJ. BENSON J. made no reference to the right of the son to apply for letters

(1) (1936) 44 L.W. 836.

(2) (1939) I L R. 38 Mad. 93.

of administration nor did SANKARAN NAIR J. They regarded the question involved as relating merely to the amount of stamp fee the applicant should pay. MILLER J. did say that the son was a person to whom letters could be issued, but in spite of this we cannot regard this case as being an authority in support of the contention of the plaintiff-respondent that the present suit can be maintained. The decision was merely concerned with the amount of stamp duty to be paid for letters of administration which were required to enable the son to get possession of the shares which were his by right.

Mr. Patanjali Sastri on behalf of the plaintiff-respondent has asked us to regard the family estate in a case of this nature as representing a fund from which a father's debts can be paid, and he says that in these circumstances the family estate should be looked upon as being his estate. This argument cannot be accepted in face of the very definite rule of the Mitakshara law that on the death of the father the son takes the father's interest in the joint estate not as his heir but by the right of survivorship.

The appeal succeeds and the suit will be dismissed with costs in favour of the appellants both here and below.

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## APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Wadsworth.*

1939,  
January 18.

A. VEERAN KUTTI (FIRST RESPONDENT), APPELLANT,

v.

P. P. KOYA KUTTI AND FOUR OTHERS (PETITIONERS  
1, 2 AND 4 TO 6), RESPONDENTS.\*

*Indian Limitation Act (IX of 1908), art. 182 (5)—Mortgage suit—Final decree in—Execution of—Starting point of limitation for—Appeal filed against preliminary decree—Final decree passed by trial Court after—Appeal against preliminary decree subsequently dismissed—Stay of proceedings not obtained pending appeal from preliminary decree—Fresh final decree after dismissal of appeal—Necessary, if.*

In a suit on a mortgage a preliminary decree was passed by the District Munsif on 21st July 1925. The mortgagor-defendant preferred an appeal but did not obtain a stay of the proceedings in the trial Court pending the appeal. On 9th November 1925 the District Munsif passed a final decree for sale. The appeal against the preliminary decree was dismissed on 16th March 1927. On 15th March 1930 the mortgagee decree-holder applied for execution of the final decree.

*Held* :—(i) Limitation for execution ran from the date of the appellate decree and the application for execution was therefore not barred by the law of limitation.

*Sriramachandra v. Venkateswara*(1) followed.

(ii) The obtaining of a fresh final decree or of an amendment of the original decree after the decision of the appeal against the preliminary decree was not a condition precedent to the mortgagee decree-holder's right to execute the final decree obtained by him on 9th November 1925.

\* Letters Patent Appeal No. 113 of 1936.  
(1) I.L.R. [1939] Mad. 252.

*Gajadhar Singh v. Kishan Jiwan Lal*(1) and *Jowad Hussain v. Gendan Singh*(2) distinguished.

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APPEAL under Clause 15 of the Letters Patent against the judgment of VENKATARAMANA RAO J., dated 26th October 1936 and passed in Appeal Against Appellate Order No. 152 of 1933, preferred to the High Court against the order of the Court of the Subordinate Judge of South Malabar at Calicut in Appeal Suit No. 205 of 1931 (Registered Execution Petition No. 442 of 1930 in Original Suit No. 273 of 1924, District Munsif's Court, Parapanangadi).

*K. Kuttikrishna Menon* for appellant.

*K. P. Krishna Menon* for respondents.

The JUDGMENT of the Court was delivered by LEACH C.J.—The appellant was the defendant in a suit on a mortgage filed in the Court of the District Munsif of Parapanangadi. A preliminary decree was passed against him on 21st July 1925 and he preferred an appeal. No stay of the proceedings in the trial Court was obtained pending the hearing of this appeal and on 9th November 1925 the District Munsif passed a final decree for sale. The appeal against the preliminary decree was dismissed on 16th March 1927. On 15th March 1930 the decree-holder-respondents applied for execution of the final decree. Objection was taken by the appellant on the ground that the application for execution was barred by the law of limitation, as it had been filed more than three years after the passing of the final decree. The District Munsif rejected this contention, but dismissed the application because the second defendant had died and his legal representatives had not been brought on the record. The appellant appealed to the Subordinate Judge against the order

(1) (1917) I.L.R. 39 All. 641 (F.B.). (2) (1926) I.L.R. 6 Pat. 24 (P.C.)

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dismissing the application and the Subordinate Judge sent the case back to the District Munsif for reconsideration. The District Munsif maintained the opinion that the application was within time, but as the legal representatives of the second defendant had still not been brought on the record he again dismissed the petition. The appellant filed an appeal against this order and the Subordinate Judge held that the application was barred by the law of limitation. The decree-holders appealed to this Court and VENKATARAMANA RAO J. allowed the appeal, agreeing with the view of the District Munsif that the application for execution was in time. A further point was taken before the learned Judge, namely, that the decree-holders were not entitled to execute the final decree obtained by them on 9th November 1925 and should have obtained a fresh final decree after the decision of the appeal against the preliminary decree. The learned Judge also decided this question against the present appellant.

When the appeal was before VENKATARAMANA RAO J. there was a conflict between a decision of this Court and a Bench decision of the Patna High Court. In *Ahammad Kutty v. Kottekkat Kutti*(1) MADHAVAN NAIR J. held that where during the pendency of an appeal from a preliminary decree in a partition suit, the trial Court passes a final decree in the suit and there is no appeal, the period of limitation for execution of the final decree runs from the date of the final decree and not from the date of the decree of the appellate Court in the appeal from the preliminary decree. In *Somar Singh v. Deonandan Prasad Singh*(2) the Patna High Court took the opposite view and VENKATARAMANA RAO J. accepted the Patna decision.

(1) (1932) I.L.R. 56 Mad. 458.

(2) (1927) I.L.R. 6 Pat. 780.

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It is not, however, necessary for us to consider whether he was right in so doing because the question has since been decided by a Bench of this Court consisting of KING and KRISHNASWAMI AYYANGAR JJ. in *Srirama-chandra v. Venkateswara*(1) where it was held that the period of limitation ran from the date of the appellate decree. In this case there was an application to set aside an *ex parte* decree but this was dismissed. Against the order of dismissal some of the defendants appealed to the High Court which allowed the appeal, extending its benefits to the defendants who had not appealed on condition that they deposited the decree amount within three months. The deposit was not made and the *ex parte* decree therefore stood as against the defendants who had not appealed. The decree-holder filed his application more than five years after the date of the *ex parte* decree. It was held that it was in time because limitation ran from the date of the appellate decree. This decision governs this case and the question must therefore be decided against the appellant.

With regard to the second contention, namely, that there can be no execution proceedings until a second final decree has been obtained, it falls to be observed that this objection was not taken in the Court of the District Munsif or in the Court of the Subordinate Judge, and, as VENKATARAMANA RAO J. has pointed out, if the objection had been taken it would have been open to the District Munsif to treat the application for execution as an application for a final decree and pass a final decree if it was necessary. Although it was not necessary in these circumstances for the learned Judge to decide the question, he did so and came to the conclusion that a fresh application for a final decree or an

(1) I.L.R. [1939] Mad. 252.



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amendment of the original decree was not necessary. With this conclusion we are in entire agreement. No authority has been quoted to the contrary. The learned Advocate for the appellant has relied on certain observations of BANERJI J. and of TUDBALL J. in *Gajadhar Singh v. Kishan Jiwan Lal*(1) approved of by their Lordships of the Privy Council in *Jowad Hussain v. Gendan Singh*(2). BANERJI J. said :

"It seems to me that this rule" i.e. the rule regulating application for final decree in mortgage actions "contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the cause."

TUDBALL J. said :

"When the Munsif passed the decree it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred, the final decree is the decree of the appellate Court of final jurisdiction. When that decree is passed, it is that decree and only that which can be made final in the cause between the parties."

The question now under consideration was not under consideration in those cases. The fact that an appeal was preferred against the preliminary decree did not prevent the Court from passing the final decree. As I have pointed out no order staying proceedings was obtained and it was the duty of the trial Court to proceed to pass the final decree. That decree remains binding and in full force until set aside. The preliminary decree was confirmed on appeal and therefore did not affect the validity of the final decree which had been passed. For the reasons indicated the appeal will be dismissed with costs.

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(1) (1917) I.L.R. 39 All. 641 (F.B.). (2) (1926) I.L.R. 6 Pat. 24 (P.C.).

## APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Somayya.

KHAJI DODDA KHAJI SAHIB AND SEVEN OTHERS  
(APPELLANTS), APPELLANTS,

1939,  
February 7.

v.

CHIGAMALLA NANJAPPA AND FIVE OTHERS  
(RESPONDENTS), RESPONDENTS.\*

*Injunction—Land owned by a community—Place of worship in  
—Erection of—Right of that community as to—Injunction  
restraining such erection—Grant of, at instance of a rival  
community—Legality of.*

The Hindus of a village filed a suit for an injunction restraining the defendants, who represented the Muhammadan community of the village, from erecting a mosque on a piece of land owned by the Muhammadan community in the Hindu quarter of the village and for a declaration of the unrestricted right of the Hindus to hold religious, social, public and private processions "attended with music" along the route on which the proposed mosque was to be built. The Courts below, while allowing the construction of the new building to proceed, issued an injunction restraining the defendants from using it as a mosque but at the same time granted a declaration that the plaintiffs were entitled to take processions along the particular street. The decision of the Courts below was confirmed by a single Judge in second appeal.

*Held* that the injunction which had been granted infringed the rights of the defendants and must therefore be dissolved.

The Muhammadans being admittedly the owners of the site in question were entitled to use it for the purpose of a mosque. That the Hindu community of the village objected to the erection of a mosque on the site and that acute feeling would be aroused if the building were used as a mosque are not grounds which the law can recognize for the granting of the injunction. The erection of a mosque on land owned by

\* Letters Patent Appeal No. 11 of 1937.

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NANJAPPA. Muhammadans cannot be regarded as constituting an injury in law to persons of another creed.

*Seshayyengar v. Seshayyengar*(1), *Parthasaradi v. Chinna-krishna*(2) and *Kasim Ali Khan v. Birj Kishore*(3) followed.

APPEAL under Clause 15 of the Letters Patent against the judgment and decree of the High Court, dated 2nd November 1936 and passed in Second Appeal No. 1194 of 1932 preferred against the decree of the District Court of Bellary in Appeal Suit No. 13 of 1931 (Original Suit No. 272 of 1929, District Munsif's Court, Hospet).

*V. S. Narasimhachar and Basheer Ahmed Sayyed* for appellants.

*K. Umamaheswaram* for respondents 1, 2, 4 and 6. Respondents 3 and 5 were not represented.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—The Muhammadan community of the village of Kunchur, Bellary District, owns a piece of land in the Hindu quarter of the village. Some years ago they proposed to erect on this land a Jumma Musjid notwithstanding that there were already two mosques in the village. The proposal was greatly resented by the Hindus of the village, and in 1929 they filed a suit in the Court of the District Munsif of Hospet for an injunction restraining the defendants, who represented the Muhammadan community, from erecting the musjid and a declaration of the unrestricted rights of the Hindus to hold religious, social, public and private processions “attended with music” along the route on which the proposed Jumma Musjid was to be built. The suit was strenuously contested. The defendants set up a contention that a mosque had been erected on

(1) (1880) I.L.R. 2 Mad. 143.

(2) (1882) I.L.R. 5 Mad. 304.

(3) (1870) 2 N.W.P.H.C. Rep. 182.

the site in 1910 but this had been demolished with a view to the construction of a new mosque. The District Munsif found that, although the Muhammadans of the village had occasionally used the site for the purpose of offering prayers, there had never been a mosque on the site and that it had never been intended that a mosque should be built thereon. In view of the feeling between the two communities he considered that it was not desirable that there should be a mosque on the site and, although he allowed the construction of the new building to proceed, he issued an injunction restraining the defendants from using it as a mosque. At the same time he granted a declaration that the plaintiffs were entitled to take processions along this particular street. The defendants appealed to the District Judge, who by a judgment, dated 7th March 1932, upheld the decision of the District Munsif. The defendants then appealed to this Court. The appeal was heard by VARADACHARIAR J., who confirmed the decrees of the lower Courts but granted a certificate under Clause 15 of the Letters Patent permitting an appeal to a Bench. The appellants do not complain of the declaration granted by the District Munsif to the respondents, but they object to the injunction restraining them from using the building as a mosque.

That the Hindu community of Kunchur objects to the erection of a mosque on the site and that acute feeling will be aroused if the building is used as a mosque are not grounds which the law can recognize for the granting of the injunction. The Muhammadans of the village are admittedly the owners of the site and they wish to utilize it for the purpose of a mosque. There is nothing unlawful in using this site for a mosque and therefore they are entitled to utilize it for the purpose. The right in the appellants to use

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this site for a mosque is so clear that authority is hardly necessary, but there is authority and authority of this Court. In *Seshayyengar v. Seshayyengar*(1) TURNER C.J. and FORBES J. held that in this country, where there is a great diversity of creeds, it would be intolerable if the members of a sect were not at liberty to erect a place of worship on their own property, because it was more or less contiguous to a place already occupied by a place of worship appertaining to another sect. The Court pointed out that the people of any sect are at liberty to erect on their own property places of worship, either public or private, and to perform worship provided that, in the performance of their worship, they do not cause material annoyance to their neighbours. A decision to the same effect was given by the learned Chief Justice and MUTTUSWAMI AYYAR J. in *Parthasaradi v. Chinnakrishna*(2). In *Kasim Ali Khan v. Birj Kishore*(3) (a case decided by the High Court, North West Provinces, when TURNER C.J. was officiating as the Chief Justice of that Court) the learned Chief Justice observed:

"The land on which the temple is erected is the property of the respondents, and they are at liberty to build what structure they please upon it. Nor can the Courts by anticipation grant a decree prohibiting them against annoying the appellants. It must be shown that some substantial annoyance, and one which the Court can recognise, has been actually committed, before the Court will interfere."

These authorities were quoted to VARADACHARIAR J., but he did not consider that he was justified in interfering with the injunction which had been granted. In the course of his judgment he referred to the maxim *sic utere tuo ut alienum non laedas*, but this maxim

(1) (1880) I.L.R. 2 Mad. 143.

(2) (1882) I.L.R. 5 Mad. 304.

(3) (1870) 2 N.W.P.H.C. Rep. 182.

can have no application here. A man must enjoy his own property in a manner which will not do injury to others, but the erection of a mosque on land owned by Muhammadans cannot be regarded as constituting an injury in law to persons of another creed. Of course, if the Muhammadan community utilizes the building in a manner which does in fact create a nuisance, then the law will interfere, but it cannot be said that the use of a building as a mosque will amount to a nuisance.

Much has been said in argument with regard to the right of the Hindu community to hold processions along the street and it is said that if a mosque is erected attempts will be made to interfere with this right. This argument is really without foundation because the respondents have already obtained a declaration in their favour. The appellants have not challenged the respondents' right to this declaration and it is binding upon them. The case has to be decided from the point of view of legal right and there can be no doubt that the injunction which has been granted does infringe the rights of the appellants. It must therefore be dissolved.

I would, however, add this. The new building which has been erected on the site has up to now been used as a school. This is the result of the injunction granted by the District Munsif. The continuance of the use of the building as a school is a matter which the Muhammadan community of Kunchur might very well consider. They have, as I have already pointed out, two mosques in the village and it has not been suggested that these two mosques are insufficient for the Muhammadan community of Kunchur. The Court can, of course, give no direction

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LEACH C.J. in the matter. It can only suggest that the matter should receive the further consideration of the appellants and in the interests of good feeling between the two communities we trust that it will.

The decree of the District Munsif will be varied by the omission of the injunction, but the declaration in favour of the respondents will stand. The appellants having succeeded with regard to the injunction are entitled to their costs in this Court and in the District Court. So far as the first Court is concerned the parties will bear their own costs.

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## APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Somayya.

KUPPAINETHU GURUVAPPA NAICKER  
(RESPONDENT), PETITIONER,

v.

M. MOUNAGURUSWAMI NAICKER  
(APPELLANT), RESPONDENT.\*

*Code of Civil Procedure (Act V of 1908), sec. 110, paragraph 2*  
—Irrigation right—Decision giving—Appeal to Privy  
Council from—Right of—Land actually involved less than  
Rs. 10,000 in value—Decision pending upon construction  
of agreement embodied in compromise decree—Property of  
far greater value than Rs. 10,000 affected by decision.

Through the lands of a village of which the petitioner and the respondent were co-owners ran two water channels A and B. In 1908 the petitioner brought under wet cultivation by means of channel B fourteen kulis in addition to the area of

\* Civil Miscellaneous Petition No. 5450 of 1938.

his lands under wet cultivation previously; whereupon the respondent sued the petitioner for an injunction restraining him from using the channel for that purpose. That suit was compromised and the agreement arrived at was embodied in a decree under which the petitioner was allowed to cultivate the fourteen kulis. Subsequently the petitioner brought under wet cultivation a further five kulis obtaining the water from stream A. Thereupon the respondent filed an application in execution proceedings to restrain him, contending that by reason of the injunction which had been granted the petitioner was not entitled to bring under wet cultivation any additional land, either by means of the water from channel A or from channel B. The petitioner contended, on the other hand, that the injunction which had been granted only referred to channel B. The High Court, on appeal, upheld the respondent's contention and allowed his application. On an application by the petitioner for a certificate permitting an appeal to His Majesty in Council against the said decision of the High Court,

held that though the value of the additional five kulis which the petitioner brought under cultivation and which resulted in the proceedings out of which the application arose was admittedly under Rs. 10,000, yet as the value of the land belonging to the petitioner which was affected by the judgment of the High Court was far more than Rs. 10,000, the petitioner was entitled to the certificate under the second clause of section 110 of the Code of Civil Procedure.

The construction of the agreement embodied in the compromise decree was what was in dispute. If the decision of the High Court stood it would mean that the petitioner would not be able to bring any further portion of his land under wet cultivation and his interest in the village was of far greater value than Rs. 10,000.

*Musst. Aliman v. Musst. Hasiba*(1) followed.

*Radhakrishna Ayyar v. Sundaraswamier*(2) relied upon.

PETITION under sections 109 and 110 and Order XLV, rule 1, of the Code of Civil Procedure praying that in the circumstances stated in the affidavit filed

(1) (1897) 1 C.W.N. LCIH (Short Notes).

(2) (1922) I.L.R. 45 Mad. 475 (P.C.).

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SWAMI.

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SWAMI.

therewith the High Court will be pleased to grant a certificate to the petitioner therein to enable him to appeal to His Majesty in Council against the order of the High Court in Appeal Against Order No. 460 of 1936 preferred against the order of the District Court of Madura dated 17th July 1936 and made in Execution Petition No. 20 of 1935 in Original Suit No. 81 of 1909.

*T. R. Venkatrama Sastri and T. M. Krishnaswami Ayyar* for petitioner.

*K. Rajah Ayyar and V. Ramaswami Ayyar* for respondent.

LEACH C.J. The ORDER of the Court was pronounced by LEACH C.J.—This is an application for a certificate permitting an appeal to His Majesty in Council. The facts as stated at the Bar are shortly these. The petitioner and the respondent are co-owners of a village in the Madura District, the petitioner owning one-third and the respondent two-thirds of the property. Through the village lands run two water channels, which have been referred to as A and B. Originally the wet cultivation of the village lands covered two hundred kulis, roughly one hundred and ten acres. Of the two hundred kulis the petitioner had fifty kulis and the respondent one hundred and fifty kulis. In 1908 the petitioner brought under wet cultivation by means of channel B an additional fourteen kulis, which resulted in a suit being filed against him by the respondent for an injunction restraining him from using the channel for this purpose. The suit was compromised and the agreement arrived at was embodied in the decree. Under the decree the petitioner was allowed to cultivate the fourteen kulis, but according to the respondent he was to be restrained from cultivating any further

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area. The petitioner subsequently brought under wet cultivation a further five kulis obtaining the water from stream A. This resulted in an application being filed by the respondent in execution proceedings to restrain him. The contention was that by reason of the injunction which had been granted the petitioner was not entitled to bring under wet cultivation any additional land, either by means of the water from channel A or from channel B. The reply was that the injunction which had been granted only referred to channel B. The District Judge of Madura dismissed the petition, being of the opinion that the petitioner was entitled to use the water from channel A, notwithstanding the decree. An appeal followed to this Court. The appeal was allowed, this Court holding that the petitioner was not entitled to draw further water from either channel. The petitioner desires to appeal to His Majesty in Council against this decision.

The application for leave is opposed on the ground that the subject-matter is not of the value of Rs. 10,000. The application came before this Court in the first instance on 9th February 1939 and a report on the value of the property was called for from the District Judge. Before the District Judge it was conceded by the respondent that the value of the land belonging to the petitioner which is affected by the judgment of this Court is far more than Rs. 10,000. The value of the additional five kulis which the petitioner brought under cultivation and which resulted in the present proceedings is admittedly under Rs. 10,000. The petitioner says that inasmuch as the property affected by the decree is of the value of Rs. 10,000, he is entitled to the certificate under the second clause of section 110 of the Code of Civil Procedure.

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We consider that this contention is well founded. In *Radhakrishna Ayyar v. Sundaraswamier*(1) the Judicial Committee observed :

"In the first place, the sum of money actually at stake may not represent the true value. The proceedings may, in many cases, such as a suit for an instalment of rent or under a contract, raise the entire question of the contract relations between the parties and that question may, settled one way or the other, affect a much greater value, and its determination may govern rights and liabilities of a value beyond the limit."

That is the position here. This is not a case of a person claiming a right in a property where the value of the property is over Rs. 10,000—and the value of the right is less than that amount. It is the construction of the agreement embodied in the compromise decree which is in dispute. If the decision of this Court stands, it will mean that the petitioner will not be able to bring any further portion of his land under wet cultivation and his interest in the village is of far greater value than Rs. 10,000. The case reported as *Musst. Aliman v. Must. Hasiba*(2) is directly in point.

The application will be allowed on the usual conditions. The costs of this application will be made costs in the appeal.

A.S.V.

(1) (1922) I.L.R. 45 Mad. 475 (P.C.).  
(2) (1897) 1 C.W.N. XCIII (Short Notes).

## APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Lakshmana Rao.

ETTI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

THE SECRETARY OF STATE FOR INDIA IN  
COUNCIL (DEFENDANT), RESPONDENT.\*

*Government of India Act, 1915, sec. 32—Suit under, against the Secretary of State for India in Council for damages for tort alleged to have been committed by its servants—Maintainability of—Conditions—Proper test of liability—Maintenance of hospital by Government—If, a proper function of Government.*

E took his infant son, two or three days old, to the Government Hospital for Women and Children, Egmore, Madras, for treatment. A few days later a nurse in charge of the children's ward at the hospital told him that the child was cured and might be taken away, but before taking the child away he was advised to buy a piece of rubber apparatus. He went away, bought the appliance, and went back to the hospital the same day to fetch the child and he was informed there by the nurse that the child had been taken away by some one else. In spite of his efforts he was unable to find the child. In a suit against the Secretary of State for India in Council by E and his wife for damages for negligence of the hospital authorities,

*held*: The Secretary of State for India in Council was not liable for the torts of the servants employed in the hospital since the Government in maintaining the hospital for the benefit of the public at the expense of the public revenues was discharging a proper function of Government in the exercise of its sovereign powers and not engaged in a business or commercial undertaking. The fact that such a hospital might be maintained by private persons as well as by Government did not make any difference.

\* City Civil Court Appeal No. 21 of 1937.

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*Peninsular and Oriental Steam Navigation Company v. The Secretary of State for India*(1) explained.

*McInerny v. Secretary of State for India*(2), *Secretary of State for India in Council v. Shreegobinda Chaudhuri*(3) and *The Secretary of State v. Cockcraft*(4) considered and followed.

APPEAL against the decree of the Additional City Civil Judge of the Court of the City Civil Judge at Madras in Original Suit No. 919 of 1935 (Pauper).

*M. Ranganatha Sastri* for *N. Yagneswara Sastri* for appellants.

*Government Pleader (B. Sitarama Rao)* for respondent.

*Cur. adv. vult.*

BURN J.—The JUDGMENT of the Court was delivered by BURN J.—This is an appeal from the decision of the learned Additional Judge of the City Civil Court in Original Suit No. 919 of 1935. The suit was filed in *forma pauperis* by a man and his wife living in Madras for Rs. 3,000 as damages against the Secretary of State for India in Council. The plaintiffs' case as set out in the plaint was that on 4th December 1933 the first plaintiff and his brother took the infant son of the plaintiffs to the Government Hospital for Women and Children, Egmore, Madras, for treatment. The child was two or three days old. About the 11th December the nurse in charge of the children's ward at the hospital is said to have told the first plaintiff and his brother that the child was cured and might be taken away, but, before taking the child away, the first plaintiff was advised to buy a piece of rubber apparatus. The first plaintiff and his brother went away, bought this appliance, went back to the hospital the same day

(1) (1861) 5 Bom. H.C. Rep. Appx. A.  
(2) (1911) I.L.R. 38 Cal. 797. (3) (1932) I.L.R. 59 Cal. 1289.  
(4) (1914) I.L.R. 39 Mad. 351.

to fetch the child away, and were then informed by the nurse that the child had been taken away by some one else. The plaintiffs sought for the child in every possible place. The first plaintiff reported the matter to the police, but the police were unable to find the child. On these facts, it was alleged that the loss of the child was due to the negligence of "the hospital authorities". It was also alleged that "the hospital authorities" had committed a breach of contract in failing to return the child to its parents or their nominees, and that they were also guilty of misfeasance, non-feasance and malfeasance in handing over the child to some unknown person. The plaintiffs estimated the damages sustained at Rs. 3,000 and filed the suit, as already stated, against the Secretary of State for India in Council.

The learned Additional Judge of the City Civil Court discussed the following issues as preliminary matters with the consent of both parties :

(i) Is there any valid and binding contract between the plaintiffs and the Secretary of State for India in Council ?

(ii) If there is no such contract, is the defendant liable in damages under section 65 or under section 70 of the Indian Contract Act ?

(iii) Is not the tort, if any, founded on contract ; and, if there is no contract between the plaintiffs and the defendant, is the defendant liable in tort ?

(iv) Is the defendant liable in tort ?

The learned Judge held that there was no valid and binding contract and that the defendant could not be said to be liable in damages under section 65 or section 70 of the Indian Contract Act. The third issue was not pressed before him on behalf of the defendant. On the fourth issue, the learned Judge

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held that the defendant was not liable in tort. The plaintiffs have filed this appeal.

The suit was filed against the Secretary of State for India in Council under section 32 of the Government of India Act, 1915. The material portions of that section are as follows :—

“(1) The Secretary of State in Council may sue and be sued by the name of the Secretary of State in Council as a body corporate.

(2) Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act, 1858, and this Act had not been passed.”

Put briefly, the case for the plaintiffs is that, in such a case as this, the East India Company would have been liable for the torts of its servants, and therefore the Secretary of State for India in Council is liable for the torts of the staff of the Government Hospital for Women and Children. The learned Counsel for the appellants has relied in this Court, as he did in the lower Court, on the leading case of the *Peninsular and Oriental Steam Navigation Company v. The Secretary of State for India*(1). That is, of course, a very well-known case. The substance of the ruling is given in the headnote as follows :

“The Secretary of State in Council for India is liable for the damages occasioned by the negligence of servants in the service of Government if the negligence is such as would render an ordinary employer liable.”

The P. & O. Company sued the Government for damages occasioned by injuries caused to a horse belonging to them. Their carriage was being driven along a public road passing between two portions of the Government dockyard at Kidderpore. Some coolies in the service of the Government were carrying a

(1) (1861) 5 Bom. H.C. Rep. Appx. A.

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piece of funnel casing from the works on one side of the road to the works on the other side of the road, and owing to their negligence, a horse drawing the plaintiffs' carriage was seriously injured. The learned First Judge of the Calcutta Court of Small Causes stated a case for the opinion of the Supreme Court on the question of the liability of the Secretary of State for India for the damages occasioned to the plaintiffs. The learned Judges, PEACOCK C.J., JACKSON and WELLS JJ., held that the Secretary of State for India in Council was liable to the plaintiffs on the facts found by the learned Judge of the Court of Small Causes. The provision of law under which the Secretary of State for India in Council was held responsible was section 65 of the Act for the better Government of India (21 and 22 Vict. C. 106). That was in the same terms as section 32 of the Government of India Act, 1915, already quoted. The learned Judges drew a distinction between acts done by the Government in the exercise of sovereign powers and acts done by the Government in the conduct of undertakings which might be carried on by private individuals to whom sovereign powers had not been delegated. PEACOCK C.J. said :

“There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them.”

The learned Chief Justice and the other Judges held that in the former case the Secretary of State for India in Council would not be liable for the torts of its servants, but that in the latter case he would be. Learned Counsel for the appellants relies entirely upon the words quoted above from the judgment of



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PEACOCK C.J. He points out that any private individual may carry on a hospital for women and children in precisely the same way that the Government Hospital for Women and Children, Egmore, is carried on by the Government. He goes further than that. He points out that the history of the institution is that it actually began as a private hospital. It was started by a number of private individuals acting jointly and was later taken over by the Government. Learned Counsel argues that the case therefore falls within the *dictum* of PEACOCK C.J. This contention however entirely fails to take into consideration the facts of the *P. & O. case*(1). The Kidderpore dockyard, as appears from the judgment in the case, was being maintained by the East India Company for the repair of their river steamers, which carried both passengers and goods for hire. This dockyard was taken over by the Government from the East India Company. This is the principal fact in the case which must not be lost sight of when considering the distinction drawn by PEACOCK C.J. between acts done in the exercise of sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals. It is quite clear that PEACOCK C.J. was considering undertakings of a business or commercial nature. There is no analogy whatever between the carrying on of a dockyard for the purpose of repairing steamers engaged in commercial traffic and the carrying on of a hospital for the purpose of curing the diseases of women and children. Learned Counsel for the appellants objects to the proposition that the Secretary of State's immunity is taken away only in cases where the Government is engaged in undertakings

(1) (1861) 5 Bom. H.C. Rep. Appx A.

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of a commercial or a business character. He wishes to rely on the letter of the *dictum* of PEACOCK C.J. This is, in our opinion, clearly unsound. The judgment of PEACOCK C.J. has been referred to in many cases subsequently, and it has, we think, always been recognized that the learned Chief Justice was there dealing with undertakings of a business or commercial character; vide *McInerny v. Secretary of State for India*(1), where FLETCHER J. held that the Government were not liable for damages sustained by the plaintiff through coming in contact with a post set up by the Government on a public road on the Calcutta Maidan. After referring to the *P. & O. case*(2), the learned Judge enquires:

"This case is a case to make the Government liable to pay compensation out of Government revenues. What for? For an act which happened to the plaintiff on the public highway. What commercial undertaking or other trading operation were the Government of India carrying on in maintaining the public path on the public highway?" (Page 801).

RANKIN C.J. explains the *P. & O. case*(2) in similar language in *Secretary of State for India in Council v. Shreegobinda Chaudhuri*(3). At page 1293 the learned Chief Justice observes with regard to the *P. & O. case*(2):

"It was an action in tort and the matter, having come before this Court, on a reference from the Small Cause Court, and it being contended that the Secretary of State for India in Council was not liable, this Court decided that there was a distinction between a business or mercantile concern carried on by the East India Company, whether for its own private or for public benefit, and acts done in connection with Governmental power or powers which could not be lawfully exercised save by the sovereign or an individual delegated by the sovereign to exercise such powers."

(1) (1911) I.L.R. 38 Cal. 797. (2) (1861) 5 Bom. H.C. Rep. Appx. A.  
(3) (1932) I.L.R. 59 Cal. 1289.

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It is impossible in our opinion to treat the *dictum* of PEACOCK C.J. as though it had been intended to cover cases of an institution such as a hospital, which may be maintained by private persons as well as by Government. The real question is, as the learned Judge of the Court below has found, whether the Government, in maintaining the Hospital for Women and Children, Egmore, is discharging a function of Government. There is no allegation that that hospital is maintained by the Government as a commercial or business undertaking. It is admittedly maintained out of public revenues. Now, by section 20 (1) of the Government of India Act, the Revenues of India can only be applied for the purposes of the Government of India. The maintenance of a hospital is a proper object for the expenditure of the public revenues; *vide* item (2) in Part II of Schedule I appended to the Devolution Rules framed under section 45-A of the Government of India Act. That section authorizes the framing of rules

"for the classification of subjects, in relation to the functions of Government, as central and provincial subjects, for the purpose of distinguishing the functions of Local Governments and Local Legislatures from the functions of the Governor-General in Council and the Indian Legislature".

In maintaining a hospital such as this for the benefit of the public at the expense of the public revenues, we are quite clear that the Government is discharging a proper function of Government, and that, under the principle enunciated in the *P. & O.* case(1) and in many subsequent cases, the Secretary of State is not liable for the torts of his servants employed in the hospital.

We have been referred to a large number of cases by the learned Counsel for the appellants, but there is

(1) (1861) 5 Bom. H.C. Rep. Appx. A.

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nothing in them which supports his contention, unless the *dictum* of PEACOCK C.J. is taken literally, without any reference to the facts of the *P. & O.* case(1). The case which is most nearly parallel to this is, we think, *The Secretary of State v. Cockcroft*(2). In that case Wallis J. expresses the view that, in maintaining a road, and more particularly in maintaining a military road, the Government were exercising a function of Government and that consequently the Secretary of State for India in Council was not liable for damages occasioned to the plaintiff by the careless stacking of gravel on road by the persons engaged to carry out the work of repairs. It is not necessary, in our opinion, to refer to the other cases which have been cited. The learned Additional Judge of the City Civil Court has dealt with all the important cases, and we have scarcely anything to add to his able and accurate exposition of the law on this point.

The learned Counsel did not seriously press before us the claim of the plaintiffs based upon contract, and quite rightly, as it is clear that none of the proper formalities necessary to bind the Secretary of State in a case of contract was observed in this case. This appeal must therefore be dismissed.

The learned Judge of the Court below did not direct the plaintiffs to pay the Government's costs, and the learned Government Pleader has not pressed before us the question of the costs in the lower Court. If he had, we should have been disposed to say, as RANKIN C.J. said in *Secretary of State for India in Council v. Shreegobinda Chaudhuri*(3), that there is no justification for making the tax-payer contribute a single penny towards the costs of the suit. The plaintiffs

(1) (1861) 5 Bom. H.C. Rep. Appx. A. (2) (1914) I.L.R. 39 Mad. 351.  
(3) (1932) I.L.R. 59 Cal. 1289.

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were very ill-advised in filing this suit against the Secretary of State for India in Council, but since the learned Judge of the Court below did not award costs against them we shall not interfere with his decree in that respect. We shall however direct that the appellants must pay the costs of the respondent in this appeal, since, whatever grounds there might have been for filing a suit, there were certainly none for preferring this appeal.

It is necessary to note that the learned Judge of the Court below proceeded on the assumption that an actionable tort had been committed by some person employed on the staff of the Hospital for Women and Children. The learned Government Pleader does not admit the soundness of that assumption; he is prepared to contend that the plaintiffs, on the facts of this case, had no cause of action in tort against anybody. We express no opinion on that question, as it was not discussed in the lower Court and a decision of it is not necessary for the purposes of this appeal. The plaintiffs must pay the court-fees.

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# APPELLATE CIVIL.

Before Mr. Justice Varadachariar and  
Mr. Justice Gentle.

DIRAVIYAM PILLAI AND ANOTHER (DEFENDANTS  
1 AND 2), APPELLANTS,

1939,  
January 10.

v.

VEERANAN AMBALAM AND THIRTEEN OTHERS (PLAINTIFFS  
2 TO 6 AND DEFENDANTS 3 AND 5 TO 13), RESPONDENTS.\*

*Hindu law—Joint family composed of brothers and their sons—  
Brothers entering into contract of sale of the properties  
of the family—Brothers adjudicated insolvents—Subsequent  
attachment of sons' interests in the property by creditor—  
Subsequent sale under orders of Insolvency Court by Official  
Receiver in favour of person with whom the contract of  
sale was entered into—Competition between him and attach-  
ing decree-holder in so far as the shares of the sons in family  
properties are concerned—Former entitled to preferential  
right on account of earlier contract of sale—Non-existence  
of distinction in such case between voluntary sale by  
brothers and sale made under orders of Court—Sons'  
coparcenary rights in the family property—If and when  
could be ignored—Proper interpretation of rule in Nanomi  
Babuasin's case(1).*

Certain properties belonged to a joint Hindu family consisting of five brothers and the sons of four of them. On 24th July 1926 some of the brothers entered into a contract with X for the sale of the properties. The brothers were adjudicated insolvents on a petition presented by a creditor in June 1927. On 15th March 1930 the interests of the sons in the joint family properties were attached by a creditor who had obtained a decree for money payable by the five brothers personally and from out of the properties of the joint family in the hands of the five brothers and their sons. Under orders of the Insolvency Court passed on an application

\* Appeal No. 101 of 1935.

(1) (1885) I.L.R. 13 Cal. 21 (P.C.).

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filed by X claiming specific performance, a sale deed was executed by the Official Receiver on 6th November 1931.

*Held.*—(i) The power of the brothers and of the Official Receiver as representing their estate to convey the interests of the sons in the joint family estate did not come to an end when the interests of the sons were attached because there was in existence, long prior to the attachment, a contract of sale entered into by the brothers at a time when the family was joint and they had the power to sell the full interest of the joint family in the suit properties. In such a case no distinction exists between a voluntary sale and one executed under orders of Court.

(ii) The proper interpretation to be given to the statement of the rule in *Nanomi Babuasin v. Modhun Mohun*(1) is that, to the extent required to satisfy the father's proper debts, the father and his creditors are entitled to ignore the sons' coparcenary rights in the family property.

Case-law reviewed and discussed.

APPEAL against the decree of the Court of the Subordinate Judge of Madura in Original Suit No. 90 of 1932.

*T. M. Krishnaswami Ayyar* and *N. Sivarama-krishna Ayyar* for appellants.

*K. Rajah Ayyar* for *V. Ramaswami Ayyar* for respondents 1 to 5.

*A. Bhujanga Rao* for respondents 13 and 14.

Other respondents were not represented.

VARADA-  
CHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal arises out of a suit instituted by the predecessor in title of respondents 1 to 5 for obtaining a declaration that he was the full owner of the suit properties and for setting aside an order passed on 14th September 1931 dismissing a claim petition that he had filed. The suit properties belonged to a joint Hindu family which consisted of five brothers and the sons of four of them.

(1) (1885) I.L.R. 13 Cal. 21 (P.C.).

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CHARIAR J.

Defendants 3, 4, 5 and 6 in the present suit are four of the brothers; another brother Sundararaja Ayyar had died before suit. Defendants 7 to 12 are the sons of four of the brothers. The appellants who were defendants 1 and 2 in the lower Court had obtained a decree for money payable by the five brothers personally and from out of the properties of the joint family in the hands of the five brothers and their sons. In execution of that decree, the appellants attached the interests of the sons in the joint family properties. This attachment which was made on 15th March 1930 was advisedly limited to the interests of the sons, because, in the meanwhile, the five brothers had been adjudicated insolvents and their interests were being administered in insolvency. The present plaintiff's claim as against the attachment made by the appellants was based upon an alleged contract for the sale of the suit property to him for Rs. 30,000; it was stated that this contract had been entered into by defendants 3 and 4 and their deceased brother on 24th July 1926. It was the plaintiff's case that in pursuance of this contract a sum of more than Rs. 28,000 had been paid to the vendors even before 12th April 1927, the date fixed for the completion of the contract, that after the expiry of the time fixed the vendors had been delaying the execution of the sale deed on account of certain domestic reasons, that in June 1927 a creditor of the vendors presented a petition to adjudicate them insolvents, that accordingly the execution of the sale deed was further delayed and that finally under orders of the Insolvency Court, passed on an application filed by the plaintiff claiming specific performance, a sale deed was executed by the Official Receiver on 6th November 1931. The plaintiff further alleged

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that, even before he became aware of the presentation of the insolvency petition, he had paid to the vendors the balance still remaining due, that he had already been put in possession of the property and had been in enjoyment thereof, that the monies received by the vendors in pursuance of the contract of sale had been utilized by them for paying off family debts binding on the sons as well and that therefore the contract of sale and the sale deed subsequently executed by the Official Receiver were operative to vest in the plaintiff the whole interest of the joint family in the suit properties.

The appellants, who were the contesting defendants, disputed the truth of the alleged contract of sale and the payment of consideration therefor and the binding character of the sale as against the sons. This question of fact was made the subject of the first issue in the case. The appellants further contended that in any event the sale deed executed by the Official Receiver on 6th November 1931 could not affect the rights of defendants 7 to 12 and that the plaintiff could not accordingly object to the appellants' right to attach the interests of these defendants in the suit properties. This contention of law was raised by the third issue in the case. Two further questions arose in the course of the discussion of the rights of the parties in the lower Court as to the exact position of defendants 7, 8 and 9 and their interests in the suit properties. Defendants 7 and 8 had been impleaded in the insolvency proceedings and the creditor sought to have them also adjudicated insolvents, but by a consent order they were exonerated on their agreeing that their interests in the properties of the family might be vested in the Official Receiver appointed in the insolvency. The

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plaintiff contended that in any event the interests of defendants 7 and 8 must be held to have passed under the sale deed executed by the Official Receiver. The ninth defendant instituted a suit for partition in 1928 but subsequently withdrew it, though the papers relating to the withdrawal are not on record. It has been contended on behalf of the appellants that, as a result of the filing of the plaint by the ninth defendant, he became separated in status from the rest of the family and that thereafter neither his father nor the Official Receiver in the insolvency had any right to convey his interest to the plaintiff. In answer to this contention, it has been urged that the admitted withdrawal of the partition suit must in the circumstances be deemed to have left the ninth defendant a member of the joint Hindu family and that accordingly his interest was effectually conveyed by the Official Receiver. The learned Subordinate Judge upheld the plaintiffs' contention on all the points above set out and passed a decree in the plaintiffs' favour. Hence this appeal by defendants 1 and 2.

The question of fact raised by the first issue may be very briefly disposed of.

[His Lordship discussed the evidence and confirmed the finding of the lower Court on the first issue and proceeded:]

The finding of the lower Court on the third issue was challenged by the learned Counsel for the appellants on the ground that, according to a long course of decisions in this Court, the power of the brothers and of the Official Receiver as representing their estate to convey the interests of the sons in the joint family estate must be deemed to have come to an end when the interests of the sons were attached

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by the present appellants in execution of their decree. In support of this contention reliance was placed upon the decisions in *Gopalakrishnayya v. Gopalan*(1), *The Official Receiver, Coimbatore v. Arunachalam Chettiar*(2), *Kanyaka Parameswaramma v. Venkataramayya*(3), *Palaniappa Chettiar v. Palani Goundan*(4) and *Official Receiver, East Godavari v. Imperial Bank of India*(5) and the observations in an unreported judgment of REILLY and ANANTAKRISHNA AYYAR JJ. which has been filed as Exhibit XXIV in this case. Reference was also made to the decisions of the Allahabad High Court in *Allahabad Bank Ltd., Bareilly v. Bhagwan Das Johari*(6), of the Bombay High Court in *Subraya v. Nagappa*(7) and of the Calcutta High Court in *Kamala Bala v. Surendra Nath*(8). Before considering the effect of these decisions and the reasoning on which they rest, we may point out that the present case differs from all of them in one important respect, namely, that there was in existence in this case, long prior to the attachment, a contract of sale entered into by the brothers at a time when the family was joint and they had the power to sell the full interest of the joint family in the suit properties. That this circumstance makes a very material distinction will appear when the authorities are examined.

The rights of a promisee under a prior contract of sale as against a subsequent attachment and the rights of a Court-auction-purchaser under that attachment have been considered in several decisions in this Court beginning as early as in *Savithri Ammal*

- (1) (1926) I.L.R. 51 Mad. 342.  
(3) (1936) 71 M.L.J. 294.  
(5) (1935) I.L.R. 59 Mad. 296.  
(7) (1903) I.L.R. 33 Bom. 264.

- (2) (1933) 66 M.L.J. 412.  
(4) (1936) 71 M.L.J. 541.  
(6) (1925) I.L.R. 48 All. 343.  
(8) A.I.R. 1937 Cal. 517.

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v. *Ramasami*(1) and going down to *Veerappa Thevar v. Venkatarama Ayyar*(2). See *Bapineedu v. Venkayya*(3), *Venkata Reddi v. Yellappa Chetti*(4), *Veera-raghavayya v. Kamala Devi*(5) and *Sunkari Sitayya v. Mudaragaddi Sanyasi*(6). See also *Karalia Nanubhai v. Mansukhram*(7), *Madan Mohan Dey v. Rebati Mohan Poddar*(8), *Deoki Nandan Singh v. Saiyed Jawad Hussain*(9) and *Lakshman v. Ramchandra*(10). It was contended by Mr. Krishnaswami Ayyar, the learned Counsel for the appellants, that the course of decisions beginning with *Savithri Ammal v. Ramasami*(1) cannot be regarded as laying down good law in view of recent pronouncements of the Judicial Committee as to the effect of the last paragraph of section 54 of the Transfer of Property Act. He also contended that if, as laid down in the Madras decisions relating to the effect of the attachment on the father's power to sell the sons' interest, the father's power was at an end, the decisions dealing with the effect of an antecedent contract to sell can have no bearing on the decision of the present case. It accordingly becomes necessary to examine at some length the two sets of authorities above referred to. Though the sale deed was executed by the Official Receiver in this case, it must be taken that he had no larger power than the insolvents themselves would have had, and if, for any reason, the insolvents had lost the power to sell their sons' interests, the conveyance executed by the Official Receiver could have no greater effect; see *Sat Narain v. Sri Kishen Das*(11).

- (1) (1898) 8 M.L.J. 266.  
(3) (1910) 21 M.L.J. 82.  
(5) (1934) 68 M.L.J. 67.  
(7) (1900) I.L.R. 24 Bom. 400.  
(9) A.I.R. 1928 Pat. 199.  
(2) (1935) I.L.R. 59 Mad. 1.  
(4) (1916) 5 L.W. 234.  
(6) (1924) 46 M.L.J. 361.  
(8) (1915) 21 C.W.N. 158.  
(10) (1931) 34 Bom. L.R. 117.  
(11) (1936) I.L.R. 17 Lah. 644 (P.C.).

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The point for consideration therefore is whether, as a result of the attachment placed by the appellants on 15th March 1930 on the interests of the sons, the power of the fathers to sell the joint family property including the sons' interests for the satisfaction of debts binding on the sons *came to an end*.

It may be conceded that in some of the Madras decisions very general language has been used which almost seems to lay down the proposition contended for by Mr. Krishnaswami Ayyar; but on examination it will be found that in all those cases the question arose between the attaching creditor and the Official Receiver and all that was intended to be laid down by the learned Judges was that the attaching creditor was entitled to proceed to bring the sons' interest to sale and that the Official Receiver could not claim the proceeds of the sons' shares for the benefit of the general body of creditors. In *Gopalakrishnayya v. Gopalan*(1), where this question was considered for the first time in this Court, the learned Judges referred to *Allahabad Bank Ltd., Bareilly v. Bhagwan Das Johari*(2) as supporting their conclusion. The Allahabad decision only dealt with the question whether the interests of the sons in the joint family properties vested in the Official Receiver on the insolvency of the father. The learned Judges did not address themselves to the question whether, apart from the vesting of the sons' interest, the power to sell which the father has under the Hindu law passed to the Official Receiver and, if so, what the effect on it is of the attachment of the sons' interest. In the later decisions of this Court, which purported to follow *Gopalakrishnayya v. Gopalan*(1) and repeated

(1) (1926) I.L.R. 51 Mad. 342.

(2) (1925) I.L.R. 48 All. 343

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the language used in that case, reference has also been made to the decision of the Bombay High Court in *Subraya v. Nagappa*(1) and we think we are justified in holding that the Madras decisions, though using general language, only intended to adopt the view laid down in *Subraya v. Nagappa*(1).

The judgment of CHANDAVARKAR J. in *Subraya v. Nagappa*(1) was based upon the effect of section 276 of the Civil Procedure Code, 1882, corresponding to section 64 of the Code of 1908. The learned Judge observed that, as the effect of the attachment was to prevent the sons from alienating their shares, it must also be held to prevent the father from alienating the sons' shares for the satisfaction of the father's debts. With all respect, we venture to think that this reasoning is not reconcilable with the basis on which the father's power to sell joint family property for the discharge of his own proper debts is supported by the decisions of the Judicial Committee. CHANDAVARKAR J. regarded the father in such cases as merely exercising the power of alienation which the sons would have exercised in the discharge of their pious duty which they owed to him. He went on to add that the father "is virtually alienating the property for them (the sons) and on their behalf" and it was on this view that he based the further proposition that, as the attachment prevented the son from alienating his (son's) interest, it must equally be held to prevent the father from alienating the son's interest. The basis of the Privy Council decisions, if we may take *Nanomi Babuasin v. Modhun Mohun*(2) as typical of them, seems to us to be somewhat different. Their Lordships observed that the recognition of the father's

(1) (1908) I.L.R. 33 Bom. 264.

(2) (1885) I.L.R. 13 Cal. 21 (P.C.).

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power to sell the sons' interest for the discharge of his own debts was destructive of the principle of independent coparcenary rights in the sons; they then proceed to state the position to be that the sons cannot set up their rights in the family property as against the father's alienation for an antecedent debt or against his creditors' remedies for their debts if not tainted with immorality. The proper interpretation of this statement of the rule seems to us to be that, to the extent required to satisfy the father's proper debts, the father and his creditors are entitled to ignore the sons' coparcenary rights in the family property. If this is the true view of the father's right, it seems to us, with all respect, open to question whether it can be said, as CHANDAVARKAR J. said in the Bombay case, that the father when he sells the family property for the discharge of his debts is merely exercising the power of sale possessed by the son himself. Except on this theory, it will be difficult to limit the father's power by reason of the statutory disability imposed by section 64 of the Code of Civil Procedure upon the son as a result of the attachment of the son's interest. We may also observe in this connection that the provision in section 53 of the Code of Civil Procedure, declaring that the property in the hands of a son which under the Hindu law is liable for the payment of the debts of the deceased father shall be deemed to be the property of the deceased which has come to the hands of the son, is more consistent with the view we have above indicated as to the basis of the decisions of the Judicial Committee relating to the father's power to sell joint family property. It is not however necessary for the purposes of this case to decide whether the view enunciated in *Subraya v.*

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*Nagappa*(1) is to be followed or not. We have therefore thought it unnecessary to refer the case to a Full Bench and we propose to deal with the case on the footing that *Subraya v. Nagappa*(1) was rightly decided.

The result of the Bombay decision as well as of the decision of the Calcutta High Court in *Kamala Bala v. Surendra Nath*(2) is only to impose on the father in a case like the present the disability imposed upon the son by section 64 of the Code of Civil Procedure. We are not aware of any other rule of law which sets a limitation either on the son's power or on the father's power in circumstances like those of the present case. All that section 64 of the Code provides is that any private transfer by the judgment-debtor of the property attached shall be void as against all claims enforceable under the attachment. It will not be accurate to read section 64 as *putting an end* to the power of sale, because as between the transferor and the transferee the alienation will undoubtedly be operative. If the attaching creditor is paid off or for any reason the attachment ceases to subsist, the alienee's title will be unassailable. The only effect of section 64 is that such transfer shall not prejudice the rights of the attaching creditor.

If the above is the true position, the question arises whether, when a sale is made in pursuance of a contract entered into prior to the attachment, such conveyance is one contrary to the terms of section 64 at all. We cannot agree with Mr. Krishnaswami Ayyar that the uniform course of decisions on this point referred to already is in any way opposed to the recent decisions of the Privy Council as to the effect of section 54 of

(1) (1908) I.L.R. 33 Bom. 264.

(2) A.I.R. 1937 Cal. 517.



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the Transfer of Property Act. The argument based on section 54 has been considered in many of the cases referred to. The question is not whether any *interest* has passed under the contract to sell. An attaching decree-holder attaches not the physical property but only the right of the judgment-debtor in the property. As explained in the decisions and recognised in section 40 of the Transfer of Property Act, the right of the judgment-debtor in the property is on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. Nor can it be said that the sale by the contracting parties executed in pursuance of a pre-existing contract to sell prejudices the attaching creditor, because the sale is merely the fulfilment of the obligation to which the judgment-debtor was already subject. The utmost that the attaching decree-holder will be entitled to, in such circumstances, is the payment of the balance of the purchase money, if anything remained due on the date of the attachment.

Mr. Krishnaswami Ayyar relied on the observations of Sir D. F. Mulla in the notes to section 40 of the Transfer of Property Act to the effect that the attaching decree-holder will not be bound by a conveyance even in pursuance of a pre-existing contract to sell; but the learned author draws a distinction between a conveyance voluntarily executed by the judgment-debtor in pursuance of a pre-existing contract and a conveyance executed by him under an order of Court in pursuance of a pre-existing contract. In the latter case, the author seems to think that the attaching creditor cannot object to the conveyance. If this

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distinction is well founded, it is sufficient to support the decision of the lower Court in this case because the sale deed was executed in this case in pursuance of an order of Court. But we are inclined to agree with Mr. Krishnaswami Ayyar that there really ought to be no distinction between the two classes of cases, because in both the cases, the conveyance is really not voluntary but is only the fulfilment of an obligation already incurred; only we would also hold that such a conveyance is not in reality contrary to the attachment within the meaning of section 64 of the Civil Procedure Code.

Reliance was placed by the learned Counsel for the appellants on some observations of CUMING J. in *Taraknath Mukherji v. Sanatkumar Mukherji*(1). In one part of the judgment, the learned Judge seems to grant that the vendee will have a right to claim specific performance as against the Court-auction-purchaser. If that be the position, it is difficult to see the justification for his differing from the other decisions referred to already including the decision of the Calcutta High Court in *Madan Mohan Dey v. Rebati Mohan Poddar*(2). With all respect, we prefer to adopt the view of PEARSON J., the other learned Judge who took part in *Taraknath Mukherji v. Sanatkumar Mukherji*(1), and that is in accordance with the weight of authority, as we have already observed. Our attention was drawn by Mr. Krishnaswami Ayyar to the decision of the Judicial Committee in *Nur Mahomed Peerbhoy v. Dinshaw Hormasji Motiwalla*(3). We do not find anything in that judgment to help the appellants. Their Lordships merely leave the question open and they have not given any

(1) (1929) I.L.R. 57 Cal. 274.

(2) (1915) 21 C.W.N. 158.

(3) (1922) 45 M.L.J. 770 (P.C.).

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indication that may be said even to throw doubt on the correctness of the decisions of the several High Courts on the point.

In the view above stated, the position when the Official Receiver executed the sale deed in favour of the plaintiffs on 6th November 1931 was that he merely carried out the contract entered into by the brothers on 24th July 1926, i.e., more than three years before the date of the attachment, and as the sale deed was executed in pursuance of an order of Court which was in effect a decree for specific performance, though passed by the insolvency Court, the weight of authority is clearly in favour of its having all the effect which a conveyance by the five brothers would have had. On the finding that the contract to sell was binding on the sons and that the consideration received for the sale had been utilised for the payment of antecedent debts, a sale by the five brothers would undoubtedly have been effective to convey the interest not merely of the brothers but also of all their sons who continued to remain joint with them.

In view of the dates of the various proceedings taken by the plaintiff a further question may arise whether the attachment placed by the appellants on 15th March 1930 could have any effect at all as against the plaintiff because though the sale deed was in fact executed on 6th November 1931, its execution was asked for by a petition dated 21st December 1928 and was ordered by the Court of first instance on 2nd December 1929 (Exhibit U). We are informed that the draft sale deed and the stamp paper for execution of the sale deed in accordance with this order were produced in Court as early as in January 1930, that in consequence of an order of stay the sale deed was not immediately executed and was executed only

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after the decision of the appellate Court on 9th February 1931. The question arises whether on these facts, the sale deed should not be treated as one executed, if not on the date of the agreement, at least on the date of the presentation of the petition or, in any event, on the date of the first Court's order. The respondents' Counsel relied in this connection on the observations in *Jahar Lal Bhutra v. Bhupendra Nath Basu*(1) and *Bhaskar v. Shankar*(2). The learned Counsel for the appellants however rightly insisted that this point had not been raised in the lower Court and involved an examination of facts which do not appear on the record itself. We do not therefore pursue this question further.

We may here refer to one other contention of Mr. Krishnaswami Ayyar. At one stage during the execution of the money decree obtained by the appellants, the Official Receiver intervened with a claim petition. He contended that the appellants were not entitled to appropriate the proceeds of the sale of the shares of defendants 6 to 12 but that he himself was entitled to deal with those shares or with the proceeds thereof. This claim was dismissed by the Subordinate Judge's Court (*see* Exhibits XXIII and XXIII-A) and that order was confirmed on appeal by this Court, Exhibit XXIV. This Court, referring to a remark of the Subordinate Judge, observed: "If the learned Subordinate Judge means only that the Official Receiver's right of sale is extinguished, it is unobjectionable." Mr. Krishnaswami Ayyar contends that this decision of this Court precludes the plaintiff from contending to the contrary because the plaintiff's title was derived under a sale deed executed by the Official Receiver

(1) (1921) I.L.R. 49 Cal. 495.

(2) (1924) 26 Bom. L.R. 418.

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only subsequent to this date. We do not think that this contention is well founded. In the proceedings above referred to, the Official Receiver cannot in any sense be said to have represented the present plaintiff. In those proceedings, he figured as representing the general body of creditors and claimed that the proceeds of the sons' shares should be made available for their benefit. The present plaintiff on the other hand claimed under a contract which, if held binding on the estate, will be binding on the Official Receiver as well and include the whole interest in the suit items. Further, when the Official Receiver executed the sale deed it is not in the capacity of the representative of the general body of creditors or even in the exercise of the power possessed by him or by the insolvents to satisfy the general body of creditors that he acted. He was merely carrying out an obligation which prior to the insolvency had been incurred by the insolvents. We see no justification for holding that the order in the claim proceedings instituted by the Official Receiver precludes the present contention of the plaintiff. The effect of an order in claim proceedings is declared by Order XXI, rule 63, Civil Procedure Code. There is no justification for giving any greater effect to such an order.

In the above view, the decision of the learned Subordinate Judge on issue 3 must be affirmed and it will not be necessary to discuss the position of defendants 7 and 8 separately. We may however add that, even if a different view should be taken as to the power of the father or of the Official Receiver under the general law, it is no longer open to defendants 7 and 8, in view of the terms of the consent order, to assert that their interests in the family property did not vest in the Official Receiver. If they are precluded, the

judgment-creditor who seeks to attach their supposed interests in the family property must be held to be equally precluded.

As regards the position of the ninth defendant, the learned Counsel for the appellants contended that the observations in paragraph 42 of the lower Court's judgment must really be understood to be in his favour and he argued that the lower Court had somehow failed to give effect to them in framing its decree. We are unable to agree with this interpretation of the lower Court's observations. It is true that the learned Subordinate Judge set out the observations of their Lordships of the Judicial Committee in *Palani Ammal v. Muthuvenkatachala Moniagar*(1); but he was evidently of opinion that, in the circumstances of this case, the effect of the institution of the suit and its ultimate withdrawal was to leave the ninth defendant as a member of the joint Hindu family. It is unfortunate that we do not have the papers relating to the withdrawal. They were apparently not filed because the fact of withdrawal was not disputed. The appellants' learned Counsel argues that the observations in *Palani Ammal v. Muthuvenkatachala Moniagar*(1) throw on the plaintiff the onus of proving that the institution of the suit did not effect a severance and that, as the plaintiff has adduced no explanation for the institution of the suit, the ninth defendant must be held to have become divided in status. This seems to us to read too much into their Lordships' observations. Referring to *Kedar Nath v. Ratan Singh*(2), their Lordships said that they saw no reason to depart from the view there laid down and only added that the plaint so presented, even if withdrawn, would, unless

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(1) (1924) I.L.R. 48 Mad. 254 (P.C.). (2) (1910) I.L.R. 32 All. 415 (P.C.).

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explained, afford evidence that an intention to separate *had been entertained*. This can hardly be read as laying down any rule of law or even a presumption. It only seems to suggest a possible inference of fact. It is not unlikely, as observed by the learned Subordinate Judge, that in this case the ninth defendant instituted the suit at a time when he thought that he would get some benefit out of it but that when he found that there would be nothing left after payment of the debt due by the family he did not think it worth while to proceed with the suit. These circumstances do not seem to us to warrant the conclusion that he became divided merely by the presentation of the plaint.

We agree with the findings of the lower Court on all the points raised and dismiss the appeal with costs of respondents 1 to 5.

G.R.

### APPELLATE CIVIL.

*Before Mr. Justice Wadsworth.*

MUNUSAMI CHETTI AND FOUR OTHERS (DEFENDANTS),  
APPELLANTS,

v.

PERIYA KUPPUSAMI CHETTI AND TWO OTHERS  
(PLAINTIFFS), RESPONDENTS.\*

*Code of Civil Procedure (Act V of 1908), sec. 91—Suit by member of public for establishing public right of way and removal of obstruction which constitutes a public nuisance—Sanction of Advocate-General—Necessity of—Special damage not proved—Maintainability of suit.*

An individual member of the public can maintain a suit for establishing a public right of way and for removal of an

\* Second Appeal No. 1158 of 1934.

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obstruction which constitutes a public nuisance without the sanction of the Advocate-General under section 91, Civil Procedure Code, and without proof of special damage.

The decision of the Privy Council in *Manzur Hasan v. Muhammad Zaman*(1) must be taken to have established that the English rule requiring proof of special damage in cases in which a member of the public prays for the removal of an obstruction to a public way does not apply to India.

*Hussain Sahib v. Narasimhappa*(2) and *Kandasami Kovundan v. Karupanna Kovundan*(3) treated as overruled by *Manzur Hasan v. Muhammad Zaman*(1).

*Appayya v. Narasimhalu*(4) dissented from.

APPEAL against the decree of the District Court of North Arcot at Vellore in Appeal Suit No. 86 of 1934 preferred against the decree of the Court of the District Munsif of Arni in Original Suit No. 480 of 1932.

*M. Patanjali Sastri* for appellants.

*N. Srinivasa Ayyangar* for *M. S. Rathnasabapathy Mudaliar* for first and second respondents.

Third respondent was not represented.

### JUDGMENT.

WADSWORTH J.—The plaintiffs sued for a declaration that there was a public path running between the house belonging to the third plaintiff and the house belonging to the defendants and for an injunction requiring the defendants to remove the wall obstructing this alleged path. The trial Court found that, though there was no proof of a public path, there was a path common to the third plaintiff and the defendants measuring three and a half feet in width and granted a declaration and injunction accordingly. The learned District Judge on an appeal by the plaintiffs

(1) (1924) I.L.R. 47 All. 151 (P.C.).  
(3) 1913 M.W.N. 1001.

(2) (1912) 23 M.L.J. 539.  
(4) 1938 M.W.N. 262.

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WADSWORTH J. frame of the suit. The defendants therefore appeal.

The main question in appeal is whether the plaintiffs can maintain the suit for establishing a public right of way and removal of an obstruction which constituted a public nuisance, without the sanction of the Advocate-General under section 91 of the Code of Civil Procedure and without proof of special damage. Undoubtedly, according to the view held by this Court in the past, such a suit would not lie. I have been referred to the rulings in *Hussain Sahib v. Narasimhappa*(1) and *Kandasami Kovundan v. Karupanna Kovundan*(2) and admittedly there are many other decisions to the same effect. These decisions, however, are prior to the decision of the Privy Council in *Manzur Hasan v. Muhammad Zaman*(3). The Privy Council were actually dealing with the case of a right to go in procession without interference, but, in discussing the right to file a suit for declaration of such a right without proof of special damage, their Lordships consider the case of *Satku Valad Kadir Sausare v. Ibrahim Aga Valad Mirza Aga*(4) where the English rule, that plaintiffs could not maintain a suit in respect of an obstruction to a highway unless they proved some damage to themselves personally in addition to the general inconvenience occasioned to the public, has been adopted. Their Lordships point out that the judgment in the Bombay case proceeds entirely on English authorities which lay down the difference between proceedings by indictment and by civil action. They point out that such a way of deciding the case was inadmissible and that the distinction between

(1) (1912) 23 M.L.J. 539.

(2) 1913 M.W.N. 1001.

(3) (1924) I.L.R. 47 All. 151 (P.C.).

(4) (1877) I.L.R. 2 Bom. 457.

indictments and actions in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied in India. Now, this decision has been considered in at least two cases of other High Courts expressly dealing with the right to sue for removal of an obstruction in a public way. One is that of the Calcutta High Court, *Mandakinee Debee v. Basantakumaree Debee*(1), where JACK J. held that an individual member of the public could sue for the removal of an obstruction of a public way if it affected him personally without proof of special damage. He also found on the facts of that case that there was special damage and MALLIK J. agreed with the finding of special damage and did not consider the effect of the Privy Council decision as to the general right of suit. Another case on the same lines is *Municipal Committee, Delhi v. Mohammad Ibrahim*(2) where the learned CHIEF JUSTICE and DIN MOHAMMAD J. observe that the principle of English law requiring proof of special damage in the case of a suit by an individual member of the public to remove an obstruction from a public way does not apply to India. The learned Judges follow the decisions in *Manzur Hasan v. Muhammad Zaman*(3) and *Mandakinee Debee v. Basantakumaree Debee*(1) above referred to. They also observe that the owners of houses abutting on the public highway in question which was obstructed have an actionable claim on the ground of the diminution of the amenities of those houses. To this extent it may be said that they put their decision both ways—both on the ground that a member of the public can bring such a suit without proof of special damage and on the view that in the special circumstances of the case there was a cause of action on the

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(1) (1933) I.L.R. 60 Cal. 1003. (2) (1934) I.L.R. 16 Lah. 517.  
(3) (1924) I.L.R. 47 All. 151 (P.C.).

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basis of damage to the property in the neighbourhood. There is no Madras case, so far as I am aware, in which the effect of the Privy Council decision in *Manzur Hasan v. Muhammad Zaman*(1) has been considered. There is one decision of a single Judge, HORWILL J., reported as *Appayya v. Narasimhalu*(2) which follows the older Madras cases and holds that special damage is necessary but the learned Judge does not refer to the Privy Council decision or cases based upon it. Two other cases have been quoted before me, *Pahlad Maharaj v. Gauri Dutt*(3) and *Ardesar Jivanji v. Aimai Kuvarji*(4), in which a right of action has been recognised on the basis of the special interests of an adjoining proprietor, without reference to the question whether in view of the Privy Council decision in *Manzur Hasan v. Muhammad Zaman*(1) it is necessary to prove special damage. Mr. Patanjali Sastri for the appellants has endeavoured to maintain that the rule laid down by the Judicial Committee refers only to procession cases, i.e., to cases in which a man is endeavouring to establish a right to use a public way without interference and not to cases in which he is endeavouring to remove an obstruction from a public way on behalf of the general public; and he points out that according to the Madras decisions even before the Privy Council decision, the former class of actions could be maintained without proof of special damage, whereas the latter class could not. As I read the judgment of the Privy Council, however, no such distinction is contemplated by their Lordships. They deal generally with the whole class of cases governing the rights of the public to use a public way. The case from the consideration of which the

(1) (1924) I.L.R. 47 All. 151 (P.C.). (2) 1938 M.W.N. 262.  
(3) A.I.R. 1937 Pat. 620. (4) (1928) I.L.R. 53 Bom. 187.

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comment arose was one of actual obstruction, though the case which the Privy Council were themselves deciding was a case of a right to use a road without interference. I find it very difficult to see any difference in principle between the two classes of cases both governed by the same rule in England and if the English rule does not apply in one class of cases, as the Privy Council has certainly held that it does not, I find it very difficult to see how it should be applied in the other class of cases. Section 91 of the Code of Civil Procedure, though it provides a remedy by getting the sanction of the Advocate-General—a remedy which in many of these cases will be financially out of reach of the parties—, expressly safeguards any other remedies which may exist. It seems to me that the decision of the Privy Council in *Manzur Hasan v. Muhammad Zaman*(1) must be taken to have established that the English rule requiring proof of special damage in cases in which a member of the public prays for the removal of an obstruction to a public way does not apply to India. It seems to me to follow, therefore, that the decision of the District Judge is correct on this point.

I do not accept the alternative contention of the respondents that special damage was proved in the present case. The District Munsif found it to have been proved on slender materials; the District Judge gives no finding at all. If this right of way is a public right of way, I do not see how the third plaintiff has been damnified any more than other members of the public merely because the way runs by the side of his house.

It is urged by the appellants that the learned District Judge was wrong in deciding that the width

(1) (1924) I.L.R. 47 All. 151 (P.C.).

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WADSWORTH J. of this path was eight feet merely on the evidence of the Union Survey of which neither party appears to have had notice. So far as I am able to gather, there is no other evidence in support of this measurement and the title deeds of the parties indicate that the proper width of the path is three and a half feet only as found by the trial Court. While, in my opinion, the record of the Union Survey (though not conducted under the Survey and Boundaries Act) was admissible in evidence, I doubt very much whether the learned District Judge was justified in treating it as practically conclusive in the face of the measurements in the sale deeds and in the face of the fact that the plaintiffs' witnesses themselves were unable to say what was the proper width of the path. We do not know on what materials this survey was made and clearly the most reliable criteria in a case of this kind are the measurements in the sale deeds.

In the result, therefore, the appeal will be allowed and the declaration and injunction given by the learned District Judge will be modified by the adoption of a width of three and a half feet in lieu of eight feet for the public path which has been established. In the circumstances, both parties will bear their own costs in the second appeal.

V.V.C.

# APPELLATE CIVIL—FULL BENCH.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice Krishnaswami Ayyangar and Mr. Justice Somayya.*

JONNALA LAKSHMIDEVAMMA (PLAINTIFF),  
APPELLANT,

v.

JONNALA VEERA REDDI AND TWO OTHERS  
(DEFENDANTS 2, 3 AND 1), RESPONDENTS.\*

*Hindu law—Maintenance—Widow of deceased member of joint Hindu family—Bona fide partition after husband's death between surviving members and allotment of his share to his son by a pre-deceased wife—Widow's right to maintenance in case of, against her step-son's share only or against entire family property.*

The appellant's husband was at the time of his death a member of a joint Hindu family consisting of himself and the respondents who were his father, his brother, and his son by a pre-deceased wife. Some years after her husband's death and while the family was still joint, the appellant made a formal demand for maintenance but subsequently and, as a result of the appellant's demand, a partition was effected by a registered deed as a result of which the appellant's step-son obtained the share in the family properties which his father would have obtained had he lived. The partition was, however, a genuine partition. The appellant then filed a suit for maintenance and for arrears of maintenance claiming a decree against all the respondents on the ground that her status as a widow gave her the right to be maintained out of the family estate as a whole and not merely out of that portion allotted to her step-son on partition.

*Held by the Full Bench.*—(i) For the amount due to the appellant for maintenance after the date of the partition her step-son's share alone was liable and in respect of that amount the appellant was entitled to a charge on her step-son's share only.

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A widow's right to maintenance merely attaches to her husband's share and on partition she has no claim against the assets forming the shares of the other members.

*Narasimham v. Venkatasubbamma*(1) and *Jayanti Subbiah v. Alamelu Mangamma*(2) approved.

*Subbarayalu Chetti v. Kamalavallithayaramma*(3) and *Rangappaya v. Shiva*(4) overruled.

(ii) For the amount representing arrears of maintenance due to the appellant before the date of the partition, however, all the respondents were liable and in respect of that amount the appellant was entitled to a charge against all the family properties.

APPEAL under Clause 15 of the Letters Patent against the decree and judgment of VENKATARAMANA RAO J., dated 27th March 1936 and passed in Second Appeal No. 1535 of 1931 preferred to the High Court against the decree of the District Court of Guntur in Appeal Suit No. 250 of 1929 preferred against the decree of the Court of the District Munsif of Tenali in Original Suit No. 547 of 1927.

*V. Govindarajachari* for appellant.—*Subbarayalu Chetti v. Kamalavallithayaramma*(3) is in favour of the appellant.

[THE CHIEF JUSTICE.—In that case was there a partition among the surviving members ?]

There was a partition after the filing of the suit for maintenance. *Narasimham v. Venkatasubbamma*(1) is against the appellant. [Reference was made to *Rangappaya v. Shiva*(4) and *Jayanti Subbiah v. Alamelu Mangamma*(2).]

[Reference was also made to Mayne's Hindu Law, tenth edition, page 828 (notes), paragraph 690, page 828, and to the *Smriti Chandrika*.]

[THE CHIEF JUSTICE.—Suppose the husband dies after selling his share or mortgaging his share up to the hilt but the family remains joint, would the right to maintenance of the widow of the deceased cease or would it remain ? If it would cease, *Narasimham v. Venkatasubbamma*(1) would be right ; if not, that case would be wrong.]

(1) (1931) I.L.R. 55 Mad. 752.  
(3) (1911) I.L.R. 35 Mad. 147.

(2) (1902) I.L.R. 27 Mad. 45.  
(4) (1933) I.L.R. 57 Mad. 250.

[Reference was made to Mayne's Hindu Law, latest edition, pages 829, 490 and 493.]

[THE CHIEF JUSTICE.—In order to succeed you must go the length of contending that the widow is entitled to be maintained out of the family property even in cases in which her husband was not entitled to a share during his lifetime by reason, say, of his having received a share and dissipated it.]

The appellant admits that she would not have been entitled to be maintained out of the joint family property if there had been a partition in her husband's lifetime and he had dissipated his share. [Reference was made to *Ekradeshwari Bahuasin v. Homeshwar Singh and others*(1) and *Pachayammal v. Paramasiva Mudaliur*(2).] If the widow had filed a suit for maintenance immediately after her husband's death she would have been entitled to a decree against all the surviving members. The right of the widow has to be decided as on the date of her husband's death. The surviving members must be viewed as a corporation which becomes entitled to the deceased's share by survivorship. [Reference was made to *Adhibai v. Cursandas Nathu*(3), *Madhavrav Keshav Tilak and others v. Gangabai*(4) and Mulla's Hindu Law, page 595.]

*P. Satyanarayana Rao* for respondents was not called upon.

*Cur. adv. vult.*

## JUDGMENT.

LEACH C.J.—This appeal raises a question with regard to a Hindu widow's right to maintenance out of the family properties after partition has taken place. The appellant was the plaintiff in the suit out of which the appeal arises. Her husband died some eight years before the suit. At the time of his death the joint family consisted of the first respondent (the appellant's father-in-law), the second respondent (her brother-in-law), and the third respondent (a son of her deceased husband by a previous wife). On

(1) (1929) I.L.R. 8 Pat. 840 (P.C.).  
(3) (1886) I.L.R. 11 Bom. 199.

(2) 1937 M.W.N. 785.  
(4) (1878) I.L.R. 2 Bom. 639.



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20th December 1925 the appellant made a formal demand for maintenance. The family was still joint, but on 17th March 1926 a partition was effected by a registered deed. The partition was no doubt the result of the appellant's demand, but it was a genuine partition. On the death of the appellant's husband his share in the family properties devolved upon the third respondent and as the result of the partition the third respondent obtained what his father would have obtained had he lived. The appellant then filed a suit in the Court of the District Munsif, Tenali, claiming that she was entitled to a decree against all the respondents on the ground that her status as a widow gave her the right to be maintained out of the family estate as a whole and not merely out of that portion allotted to her step-son on partition. The District Munsif found in the appellant's favour and granted her a decree against all the respondents. He held that she was entitled to arrears of maintenance for seven years at the rate of sixty rupees a year and to the payment of ninety rupees a year from the date of the suit. In addition he awarded a sum of twenty rupees for the purchase of utensils and directed the respondents to set aside a portion of the family house for the appellant to live in or to pay her a further sum of one hundred rupees. The decree so far as the first and second respondents were concerned was a personal decree, but so far as the third respondent was concerned it was limited to his share in the family properties. The first and second respondents appealed to the District Judge of Guntur, who confirmed the District Munsif's decree with slight modifications. He directed that the sum payable as arrears of maintenance should be calculated at sixty rupees per year for six years and at eighty-four rupees per year for

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one year and that all the amounts under the decree were to be recovered from the respondents in equal shares. The District Judge also modified the order which the District Munsif had passed with regard to costs. The first and second respondents then appealed to this Court. The appeal was heard by VENKATARAMANA RAO J. who allowed it. In holding that the third respondent was alone liable the learned Judge followed the decision in *Narasimham v. Venkatasubbamma*(1), where a Division Bench of this Court (WALLER and JACKSON JJ.) held that when the widow of a coparcener sues for maintenance after the family has become divided, her claim is enforceable only against the coparcener to whom her husband's share has been allotted. The learned Judge felt unable to accept that decision as embodying the correct statement of the law, but as it was directly in point he felt bound by it. The decision in *Narasimham v. Venkatasubbamma*(1) runs contrary to the decision of WHITE C.J. and MUNRO J. in *Subbarayalu Chetti v. Kamalavallithayaramma*(2), and the present appeal, which is an appeal from the judgment of VENKATARAMANA RAO J. under Clause 15 of the Letters Patent, has been placed before a Full Bench in order that the conflict may be decided.

The decision in *Narasimham v. Venkatasubbamma*(1) is in accordance with the statement of the law made by BHASHYAM AYYANGAR J. in *Jayanti Subbiah v. Alamelu Mangamma*(3) where he said :

"When an undivided Hindu family consists of two or more males related as father and sons or otherwise and one of them dies leaving a widow, she has a right of maintenance against the surviving coparcener or coparceners, *quoad* the share or interest of her deceased husband in the joint family

(1) (1931) I.L.R. 55 Mad. 752.

(2) (1911) I.L.R. 35 Mad. 147.

(3) (1902) I.L.R. 27 Mad. 45.

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property which has come by survivorship into the hands of the surviving coparcener or coparceners and though such right does not in itself form a charge upon her husband's share or interest in the joint family property, yet when it becomes necessary to enforce or preserve such right effectually, it could be made a specific charge on a reasonable portion of the joint family property, such portion of course not exceeding her husband's share or interest therein."

As authority for this statement BHASHYAM AYYANGAR J. gave the Full Bench decision in *Ramanandan v. Rangammal*(1). The judgment delivered in that case did not lay down expressly that a widow's right to a charge on the family property should not exceed her husband's interest therein, but it was recognised that she was entitled to a charge on the family property in the hands of her son.

I regard the statement of the law made by BHASHYAM AYYANGAR J. as being correct, and before commenting on the decision in *Subbarayalu Chetti v. Kamalavallithayaramma*(2) I will state my reasons. The Smriti Chandrika, XI, I, 34, according to the translation by the late T. Krishnaswami Ayyar (page 171), reads as follows :

"When the father-in-law and the like are qualified to maintain the widow and take themselves the property of the deceased undivided member of the family, they alone are to maintain the widow from the property so taken. Accordingly, Narada :—' Whichever wife (Patni) becomes a widow and continues virtuous, she is entitled to be provided with food and raiment by the elder brother of the deceased or by her father-in-law or by a Gotraja (a member born in the same family) or any other person.'

In order to maintain the widow, the elder brother, or any of the others above mentioned, must have taken the property of the deceased; the duty of maintaining the widow being dependent on taking the property."

(1) (1888) I.L.R. 12 Mad. 260 (F.B.). (2) (1911) I.L.R. 35 Mad. 147.

The authority of the Smriti Chandrika is accepted. There is here a clear statement that the duty of maintaining the widow devolves on the persons who take the property of the deceased undivided member of the family and it is emphasised that the duty is dependent on the taking of the property. If the obligation to maintain the widow depends on the taking of the deceased husband's share in the family estate, it follows that there can be no right in the widow to claim to be maintained out of the shares which fall to the other members. While the family remains undivided the position is different. The property is held jointly and of necessity the amount required for a widow's maintenance has to be paid out of the estate regarded as a whole, but in no circumstances can she claim an allowance greater than the income of her husband's share in the estate. An adequate allowance may be less than the income of her husband's share, but it represents the maximum available. See *Savitribai v. Luximibai and Sadasiv Ganoba*(1), *Madhavrav Keshav Tilak and others v. Gangabai*(2) and *Pachayammal v. Paramasiva Mudaliar*(3). In *Savitribai v. Luximibai and Sadasiv Ganoba*(1) WESTROPP C.J. observed :

"It would need very strong and distinct authority, in the ancient treatises of Hindu law, to convince us that the widows of such separated husbands stand, as to maintenance out of such portion of the family estate as remains in the hands of the other ex-parceners, in a better position than the husbands themselves occupy with regard to any right to resort to that residue for a further share, albeit under the name and guise of maintenance."

The ancient treatises of Hindu law do not furnish such authority. In the Smriti Chandrika there is, however, strong authority to the contrary.

(1) (1878) I.L.R. 2 Bom. 573, 586.

(2) (1878) I.L.R. 2 Bom. 639.

(3) 1937 M.W.N. 785.

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The learned Advocate for the appellant has conceded that when there has been a partition during the husband's lifetime and the husband has dissipated his share in the family properties, his widow is not entitled to be maintained out of the properties falling to the shares of the other members. If the widow is not entitled in such circumstances to be maintained out of the properties in the hands of the other members of the family, the logical deduction is that her right to maintenance merely attaches to her husband's share and on partition she has no claim against the assets forming the shares of the others.

I will now turn to examine the decision in *Subbarayalu Chetti v. Kamalavallithayaramma*(1). In that case a widow sued for maintenance against the surviving members of her deceased husband's family and after the institution of the suit the defendants arranged a partition. The Court held that the partition could not prejudicially affect the plaintiff's claim. WHITE C.J. quoted the passage which I have quoted from the judgment of BHASHYAM AYYANGAR J. in *Jayanti Subbiah v. Alamelu Mangamma*(2), but he was not prepared to hold that the words of BHASHYAM AYYANGAR J. were intended to apply to the members of the branch of the family of which the deceased was a member and not the members of the joint family generally. I am unable to place this interpretation on the words used by BHASHYAM AYYANGAR J. and I am at a loss to understand how the fact that the partition took place *after* suit could make any difference. It was not suggested that the partition was a sham or in any way unfair. The members of the family had the right to divide and their rights in the family

(1) (1911) I.L.R. 35 Mad. 147.

(2) (1902) I.L.R. 27 Mad.

properties could not be affected by the widow's suit. The decision in *Subbarayalu Chetti v. Kamalavallithayaramma*(1) was followed by KRISHNAN PANDALAI J. in *Rangappaya v. Shiva*(2) but the judgment in the latter case calls for no additional comment. In my opinion *Subbarayalu Chetti v. Kamalavallithayaramma* (1) was wrongly decided and *Narasimham v. Venkata-subbamma*(3) should be followed.

The result is the appeal in the main fails, but the decree of the District Judge requires amendment. The provision that the maintenance be paid equally by the respondents must be set aside. The amount awarded to the appellant by the District Judge from the date of the partition, namely 17th March 1926, will be paid by the third respondent out of the properties which have come into his hands and represent the share of the deceased husband in the joint family estate. The amount representing arrears of maintenance before that date will have to be paid by all the respondents, and therefore there will be a charge against all the family properties in respect of the amount payable for maintenance before 17th March 1926. In respect of the amount due for maintenance after that date the charge will be on the third respondent's share only. The first and second respondents are entitled to their costs.

KRISHNASWAMI AYYANGAR J.—I agree.

SOMAYYA J.—I agree.

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(1) (1911) I.L.R. 35 Mad. 147. (2) (1933) I.L.R. 57 Mad. 250.  
(3) (1931) I.L.R. 55 Mad. 752.

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## APPELLATE CIVIL

Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Patanjali Sastri.

KUMARASWAMI PILLAI AND ANOTHER (DEFENDANTS  
1 AND 2), PETITIONERS,

v.

THIRUVENGADATHA AYYANGAR (PLAINTIFF),  
RESPONDENT.\*

*Madras Agriculturists Relief Act (IV of 1938), sec. 20, proviso—Period of sixty days provided by, for application under sec. 19—Expiry of, during closing for summer vacation of Court in which application had to be made—Application filed on re-opening day of Court but after expiry of sixty days allowed by proviso to sec. 20—If in time—Sec. 7 of Madras Act IV of 1938—Sec. 4 of Indian Limitation Act (IX of 1908)—Sec. 11 of Madras General Clauses Act (I of 1867)—Applicability and effect of.*

The period of sixty days allowed by the proviso to section 20 of the Madras Agriculturists Relief Act, 1938, for making an application under section 19 of the Act for the scaling down of the debt expired while the Court to which the application had to be made was closed for the summer vacation with the result that the judgment-debtors were not in a position to file the application within the period allowed by the proviso to section 20. They filed it on the day that Court re-opened, that is, seventy days after the stay order had been passed.

Held that the application was filed in time.

*Chenchuramana v. Arunachalam*(1) explained and distinguished.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the Subordinate Judge of Tiruvarur, dated 12th August

\* Civil Revision Petition No. 1450 of 1938.  
(1) (1935) I.L.R. 58 Mad. 794 (F.B.).

1938, in Interlocutory Application No. 78 of 1938 and passed in Small Cause Suit No. 600 of 1935.

R. Krishnaswami Ayyangar for petitioners.

G. Jagadisa Ayyar for R. Narasimhachari for respondent.

## JUDGMENT.

LEACH C.J.—A decree having been passed against the petitioners, the decree-holder applied for execution to the Court of the District Munsif, Tiruvarur. The petitioners then applied for a stay under the provisions of section 20 of the Madras Agriculturists Relief Act, 1938, in order that they might prefer an application under section 19 to the Court of the Subordinate Judge, Tiruvarur, for the scaling down of the debt. On 11th April 1938 the District Munsif granted a stay. Section 20 contains the following proviso :

“ Provided that where within sixty days after the application for stay has been granted the judgment-debtor does not apply to the Court which passed the decree for relief under section 19 or where an application has been so made and is rejected, the decree shall be executed as it stands, notwithstanding anything contained in this Act to the contrary.”

The petitioners had therefore sixty days in which to apply to the Subordinate Judge. The Court of the Subordinate Judge closed for the summer vacation in the third week of April 1938 and did not re-open until 20th June 1938. As the result of the Court being closed the petitioners were not in a position to file the application for a period of eight weeks, but filed it on the re-opening day, that is, seventy days after the stay order had been passed. The petitioners, however, contended that they were within time and relied on section 4 of the Indian Limitation Act. The Subordinate Judge refused to accept this argument

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and formed the opinion that the filing of the application within sixty days of the stay order was a condition precedent to their right to apply to the Court for relief. He considered that the decision in *Chenchuramana v. Arunachalam*(1) applied. On this reasoning the petition was dismissed. The petitioners have applied to this Court for revision of the Subordinate Judge's order.

The scheme of the Madras Agriculturists Relief Act is to provide for the scaling down of debts due by agriculturists. Section 7 of the Act states that, notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of the Act shall be scaled down in accordance with the provisions of Chapter II. Section 19 provides for the scaling down of debts due under decrees passed before the commencement of the Act :

"Where a Court has passed a decree for the repayment of a debt it shall on the application of a judgment-debtor who is an agriculturist apply the provisions of the Act notwithstanding anything contained in the Code of Civil Procedure, and amend the decree in accordance with the Act or enter up satisfaction as the case may be."

By virtue of section 20 a Court is bound to stay execution proceedings against an agriculturist on application made by him. I have already referred to the proviso to this section, which gives him sixty days in which to make an application to the trial Court for scaling down the debt. If the proviso to section 20 can be read as fixing a period of limitation there can be no doubt that the application here was filed in time.

(1) 1935) I.L.R. 58 Mad. 794 (F.B.).

Section 29 of the Limitation Act applies *inter alia* section 4 to a special or local law unless such law expressly excludes section 4. Section 4 states that

"where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted preferred or made on the day that the Court re-opens."

For the petitioners it is said that the proviso to section 20 fixes the period of limitation for an application by an agriculturist judgment-debtor when a decree is being executed against him. It is a special provision inserted in the Act to meet the case where an agriculturist against whom a decree has been passed has not taken the steps contemplated by section 19 and he finds that the decree-holder is taking active steps against him. I consider that this is the correct interpretation of section 20. The period of limitation fixed by section 20 has no application in any other circumstance. Reading section 19 in conjunction with section 7 it would appear that the intention of the Legislature was to fix no period of limitation in ordinary circumstances. So long as a debt is enforceable a debtor has a right to apply at any time for the scaling down of the debt, except in the circumstances contemplated by section 20. In such circumstances there is a period of limitation and it is sixty days from the date on which the application for a stay is granted. If the debtor has not previously made an application under section 19, the decree-holder is at liberty to apply for execution of the decree as it stands, but the judgment-debtor is still allowed to apply for relief under the Act, provided he applies within the time fixed.

The decision in *Chenchuramana v. Arunachalam*(1) has no application here. In that case the Court held

(1) (1935) I.L.R. 58 Mad. 794

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that the period of three months fixed in section 9 (1) (c) of the Provincial Insolvency Act is not a period of limitation, but is a condition precedent to an adjudication. In other words, unless an application for adjudication is filed within three months of the act of insolvency complained of, a petition does not lie. Section 9 of the Provincial Insolvency Act bears no analogy to section 20 of the Madras Agriculturists Relief Act, and the conclusion arrived at by the Subordinate Judge was based on a false premise. The application was in time and the petitioners are entitled to the relief they seek. My learned brother agrees with me and the case will therefore be remitted to the Subordinate Judge to be dealt with in the light of this judgment. The petitioners are entitled to their costs.

PATANJALI  
SASTRI J.

PATANJALI SASTRI J.—I concur in the judgment just delivered by my Lord, the CHIEF JUSTICE, and would only add that even if the period of sixty days referred to in section 20 of the Madras Agriculturists Relief Act, 1938, be not strictly regarded as a period of limitation for an application under section 19, the result would be the same. For, apart from section 20, there is no time-limit for such an application. It is clear from section 7 that the debtor is entitled to the benefit of the scaling down of his debt in accordance with the Act so long as the debt is outstanding and enforceable. His right to apply under section 19 must therefore be taken to accrue *de die in diem*. His application would thus be a proceeding to which the Limitation Act does not apply and therefore the provisions of section 11 of the Madras General Clauses Act would be applicable. Under this section, the petitioners were clearly entitled to make their application on the re-opening day of the lower Court after the summer holidays.

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## APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and Mr. Justice  
Krishnaswami Ayyangar.*

P. E. R. M. ANNAMALAI CHETTY, JOINT FIRM, PALNI,  
THROUGH ITS PARTNER P. E. RAMA PERIYA KARUP-  
PAN CHETTIAR (FIRST RESPONDENT—PLAINTIFF),  
APPELLANT,

1939,  
February 24.

v.

SATYAVADIVEL MUTHUSWAMI MANIAGARAN AND  
TWO OTHERS (APPELLANT AND RESPONDENTS 2 AND  
3—DEFENDANTS 3, 1 AND 2), RESPONDENTS.\*

*Hindu law—Minor—Guardian—Simple contract debt—Power  
to incur, so as to bind minor's estate.*

The true test for deciding the binding character on a Hindu minor's estate of a simple contract debt incurred by his guardian is that laid down by the Privy Council in the case of *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*(1). Under the Hindu law the guardian has power to contract loans so as to bind the minor's estate for necessary purposes, the term "necessary purposes" being understood as comprising all that is necessary to meet the wants of the minor and of other members of his family who have claims either against him personally or against his estate. There is in this respect no difference in the test to be applied whether the money is obtained by pledge or sale of the property or by way of a simple loan. In a case in which the guardian borrows money for purposes binding on the minor the lender is under no obligation to see that the money is utilized for the benefit of the minor's estate.

Case-law reviewed.

APPEAL under Clause 15 of the Letters Patent against the decree of VENKATARAMANA RAO J., dated 2nd March 1936 in Second Appeal No. 492 of 1934

\* Letters Patent Appeal No. 39 of 1936.  
(1) (1856) 6 M.I.A. 393.

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preferred to the High Court against the decree of the Court of the Subordinate Judge of Dindigul in Appeal Suit No. 96 of 1932 preferred against the decree of the Court of the District Munsif of Palni in Original Suit No. 352 of 1931.

A. C. Sampath Ayyangar for appellant.

B. Sitarama Rao for respondents.

*Cur. adv. vult.*

KRISHNASWAMI  
AYYANGAR J.

The JUDGMENT of the Court was delivered by KRISHNASWAMI AYYANGAR J.—This is an appeal under the Letters Patent against the judgment of VENKATARAMANA RAO J. in Second Appeal No. 492 of 1934. By that judgment he has reversed the decree of both the lower Courts and dismissed the suit with costs throughout.

The appeal raises a question of importance involving a decision as to the limits within which a natural guardian under Hindu law can incur a simple contract debt so as to bind the minor's estate. That such a guardian has the power to borrow by charging, mortgaging or even by selling the estate or a sufficient portion of it, for purposes termed necessary or beneficial according to that law, cannot at this time of the day be questioned. It is also settled that even in the absence of a proved necessity or benefit, an honest creditor can still recover the debt from the estate if he can show that in advancing the money he acted in the *bona fide* belief after due enquiry that the guardian was acting for such a purpose in incurring the debt. These principles, which are based as much on Hindu law as on general considerations of equity, have been held to afford a test of the validity of similar transactions by other persons also who occupy an analogous position. The manager of a joint family

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governed by the Mitakshara, female owners in possession of inherited property, the head of a mutt, and the dharmakarthas of a temple are among the class of persons whose powers are so limited. Indeed, it can be truly said that what the Judicial Committee said with regard to a guardian in *Hunoomanpersaud's case*(1) has become an integral part of the branch of the law relating to the borrowing powers of all qualified owners. In the case of all such persons there exists in fact no difference in the test to be applied whether the money is obtained by pledge or sale of the property, or by way of a simple loan.

The decision of VENKATARAMANA RAO J., if we understand it aright, appears to introduce into this branch of the law a distinction between simple loans and loans borrowed on the security of property, and to lay down with respect to the former a stricter rule than that which obtains in regard to the latter. We are no doubt in this case concerned with the powers of a mother and natural guardian but it is none the less necessary to bear in mind that any interference with a rule so general in its application as that laid down in *Hunoomanpersaud's case*(1) may tend to create uncertainty in the administration of the law as regards also the other persons who belong to the same group and are governed by the same principles. We should, therefore, hesitate to sanction a departure from what appears to be a well-established principle unless we are satisfied that there is clear authority to the contrary.

The learned Judge has expressed the opinion that the law is correctly summed up in the following statement in Trevelyan on "Minors" at page 169:

"Although a guardian may under certain circumstances sell or charge the ward's property he cannot bind the ward

(1) (1856) 6 M.I.A. 393.

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personally by a simple contract debt, by a covenant, or by any promise to pay money or damages unless such promise is made merely to pay or to keep alive the debt for which the ward's property was liable."

This passage means according to VENKATARAMANA RAO J., as indeed it does seem to mean, that a guardian cannot without charging the estate contract so as to bind the minor, except it be to pay or keep alive a debt already in existence, and binding on the estate. On this view a pre-existing debt or liability could alone support a simple contract debt and not necessity or benefit. In fact he says:

"The test is not a mere question of benefit nor the mere fact that the debt was incurred for necessary purposes; the observations made in some of the cases that where the debt is incurred by the guardian for necessary purposes, the estate can be rendered liable are too broadly made."

The learned Advocate for the respondent has been unable to cite any authoritative precedent which recognizes such a distinction between the one class of debts and the other. In support of his view VENKATARAMANA RAO J. has referred to the decision of the Privy Council in *Indur Chunder Singh v. Radhakishore Ghose*(1) as authority for the proposition

"that the considerations by which the validity of a charge is judged are not the same in adjudging the binding nature of a contract or a covenant entered into by the guardian".

We can find no such proposition laid down in this decision or indeed in any other decision to which our attention was drawn except the one in *Maharana Shri Ranmalsingji v. Vadilal Vakhatchand*(2). This case, however, cannot after the Full Bench ruling in *Ramajogayya v. Jagannadhan*(3) be regarded as stating

(1) (1892) I.L.R. 19 Cal. 507 (P.C.). (2) (1894) I.L.R. 20 Bom. 61.  
(3) (1918) I.L.R. 42 Mad. 185 (F.B.).

the law correctly on the point. That ruling, as we understand it, lays down the proposition that the same test is applicable to both classes of borrowings. The majority view was that

"no decree should be passed against the minor or his estate on a contract entered into on his behalf by a guardian under which covenant no charge is created on the estate except in cases in which the minor's estate would have been liable for the obligations incurred by the guardian under the personal law to which he is subject".

A reading of the judgment makes it plain that the observations of the Privy Council in *Waghela Rajsanji v. Shekh Masludin*(1) are not to be understood literally so as to preclude the recognition of a large power in the guardian where the personal law of the minor confers it. WALLIS C.J. who delivered the dissenting judgment was inclined to accept the more limited construction of the guardian's power taken in *Maharana Shri Ranmalsingji v. Vadilal Vakhatchand*(2). He would limit it to *necessaries* supplied to the minor within section 68 of the Contract Act though in deciding what should be regarded as *necessaries*, the position of the minor and the expenses which are properly chargeable to his estate under the personal law by which he is governed may have to be taken into account. That this is his view appears from the observation that

"what are *necessaries* must depend upon the facts of each case, and in the case of a Hindu, money advanced for the expenses of a marriage which the minor has to perform or to pay off a debt binding on him may be recoverable under this head from his estate".

Apart from *necessaries*, there is also the power to acknowledge an already existing valid debt or promise to pay it, which, though denied in *Maharana Shri Ranmalsingji v. Vadilal Vakhatchand*(2), has been

(1) (1887) I.L.R. 11 Bom. 551 (P.C.). (2) (1894) I.L.R. 20 Bom. 61.



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since recognized in *Annapagauda v. Sangadigyapa*(1) which on this point overruled the earlier decision. According to the learned CHIEF JUSTICE, all the decisions are capable of being brought under one or other of these two heads of liability, which are both *independent of contract*. A direct contractual liability enforceable against the estate had been according to him definitely negatived by the Privy Council. If, as the CHIEF JUSTICE was inclined to hold, the term "necessaries" is understood in an expanded sense so as to cover all those purposes which are sufficient according to Hindu law to support an alienation, the difference virtually disappears leaving only the head of benefit about which as an independent source of authority there has been a conflict of opinion. SESHAGIRI AYYAR J., with whom AYLING J. concurred, took a more liberal view and rested the decision on what he described as the broader ground disclosed by the decisions of the Courts in the Madras and the other Presidencies. Differing from the CHIEF JUSTICE, he held that there was a power in the guardian by *contract* to bind the minor's estate according to Hindu law if the circumstances indicated a case of necessity or benefit. On an examination of the cases both before and after the Privy Council decision in *Waghela Rajsanji's case*(2) he reached the conclusion that according to all the High Courts the liability of the minor under the Hindu law is not affected by the circumstance that it was the guardian who had incurred the obligation. That result was in his opinion not opposed to the decisions of the Privy Council as their Lordships should not be held to have intended

"to lay down that under no circumstances can the guardian bind the estate of the ward, except it be by creating a charge".

(1) (1901) I.L.R. 26 Bom. 221 (F.B.). (2) (1887) I.L.R. 11 Bom. 551 (P.C.).

As we understand it, the difference in *Ramajogayya v. Jagannadhan*(1) between the CHIEF JUSTICE on the one hand and the other two learned Judges on the other consisted in the former denying a power in the guardian to bind the minor by *contract* apart from necessities, while the latter admitted such a power to reside in him subject, however, to the conditions imposed by the personal law of the minor. The passages occurring at page 195 make it sufficiently clear that no distinction is to be made between a charge and a simple loan according to this decision, and none seems to exist on principle so far as we can see.

It is perhaps unnecessary to undertake a reinvestigation of the earlier case-law which appears to have been amply considered in the Full Bench decision which we regard as furnishing a binding precedent for the decision of this appeal. In that case, money had been borrowed on a mortgage which was however ineffectual as the property was inalienable; yet the debt was declared enforceable against the estate on the ground that it had been incurred for a necessary purpose. In *Subramania Ayyar v. Arumuga Chetty*(2) the minor's estate was held liable on a promissory note executed by the mother to raise money for discharging the minor's share of a prior family debt contracted by the uncle and manager. Two Privy Council decisions, *Waghela Rajsanji v. Shekh Masludin*(3) and *Indur Chunder Singh v. Radhakishore Ghose*(4), were referred to and distinguished on the ground that in them there was no "pre-existing liability" such as there was in the case before the Court. But it is to be observed that there is really nothing in this judgment to support the theory that necessity by itself could not justify the incurring

(1) (1918) I.L.R. 42 Mad. 185 (F.B.). (2) (1902) I.L.R. 26 Mad. 330.  
(3) (1887) I.L.R. 11 Bom. 551 (P.C.). (4) (1892) I.L.R. 19 Cal. 507 (P.C.).

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of the debt. We feel no doubt that the reference to a "pre-existing liability" was only illustrative of the general doctrine of necessity on which the decision in fact proceeded. This case was followed in *Duraisami Reddi v. Muthial Reddi*(1) and *Venkitaswami Naicker v. Muthuswamy Pillai*(2), in both of which the guardian had executed simple bonds, as also in *Krishna Chettiar v. Nagamani Ammal*(3) in which the liability was sought to be charged on a promissory note. In all these cases it will be seen that it was the test laid down in *Hunoomanpersaud's* case(4) that formed the basis of the decision. The criticism that these decisions did not give full effect to the opinion of the Privy Council expressed in *Waghela Rajsanji v. Shekh Masludin*(5) and *Indur Chunder Singh v. Radhakishore Ghose*(6) led to the reference in *Ramajogayya v. Jagannadhan*(7) with the result already mentioned. The case of *Ramakrishna Reddiar v. Chidambara Swamigal*(8), though not a case of debt, is noteworthy for the way in which the learned Judges understood the effect of the Full Bench decision. WALLACE J. considered that *Krishna Chettiar v. Nagamani Ammal*(3), which had held that a promissory note executed by a guardian of a Hindu minor *for purposes binding on him* is enforceable against his estate, fell directly within the principle of the Full Bench decision. THIRUVENKATACHARIAR J. was more explicit and recognized the power of the guardian to contract loans without charging the estate for necessary purposes, the term to be understood as comprising

"all that is necessary to meet the wants of the minor and of other members of his family who have claims either against him personally or against his estate".

(1) (1908) I.L.R. 31 Mad. 458.

(3) (1915) I.L.R. 39 Mad. 915.

(5) (1887) I.L.R. 11 Bom. 551 (P.C.).

(7) (1918) I.L.R. 42 Mad. 185 (F.B.).

(2) (1917) 34 M.L.J. 177.

(4) (1856) 6 M.I.A. 393.

(6) (1892) I.L.R. 19 Cal. 507 (P.C.).

(8) (1927) 27 L.W. 322.

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In *Meenakshisundaram Chetty v. Ranga Ayyangar*(1) the Full Bench decision was again followed without question and a decree against the estate was rendered on a promissory note. The learned Judges referred with approval to the rule in the form stated by THIRUVENKATACHARIAR J. in the case last cited, observing that that learned Judge had correctly understood the effect of the Full Bench decision. More recently there has been another Full Bench decision reported as *Satyanarayana v. Mallayya*(2) in which the liability of a minor's estate on a promissory note executed by the guardian came up once again for consideration. RAMESAM J. reviewed the relevant decisions bearing upon the point; and, referring in particular to the earlier ruling in *Ramajogayya v. Jagannadhan*(3), he said that that decision had always been followed in this Court as settling the law and that nothing had happened since to justify a departure from it. He accepted the statement of the law by CURGENVEN J. in *Zamindar of Polavaram v. Maharaja of Pittapuram*(4) to the effect that any liability to which the minor would be subject under the Hindu law is not the less a liability because it was incurred by a guardian on his behalf. That he understood the earlier Full Bench decisions in the sense in which THIRUVENKATACHARIAR J. understood them is clear from his observation

"that in no transaction entered into by a guardian on behalf of a minor can the opposite party succeed, if challenged, without establishing some fact such as that the transaction was for the benefit of the minor or some such other fact".

The learned Judge had obviously in mind the rule in *Hunoomanpersaud's* case(5) as governing the question. This Full Bench decision has very recently

(1) (1931) 35 L.W. 397.

(2) (1934) I.L.R. 58 Mad. 735 (F.B.).

(3) (1918) I.L.R. 42 Mad. 185 (F.B.). (4) (1930) I.L.R. 54 Mad. 163.

(5) (1856) 6 M.I.A. 393.

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been followed in *Seetharamayya Garu v. Sathiah*(1) to which one of us was a party. In the face of such overwhelming authority which clearly binds us, only one conclusion is possible, namely, that *Hunoomanpersaud's* case(2) contains the true test for deciding the binding character even of a simple loan. We may also perhaps add that justice and equity, regarded both from the point of view of the minor and the lender, are in consonance with the view which has all along been accepted in this Court. The statement of the law in Trevelyan's book, on which VENKATARAMANA RAO J. has relied, merely purports to state the effect of the cases mentioned in the footnote, without noticing the course of decisions in this Presidency interpreting the Privy Council decisions. This is a serious omission which is sufficient in itself to deprive the statement of real value, so far at any rate as this Court is concerned. The Patna High Court also seems to take the same view of the powers of a guardian; see *Suchit Chaudhuri v. Harnandan Singh*(3). As I have said in *Ramanathan v. Palaniappa*(4):

"It is difficult to appreciate an argument which denies to a guardian a power to contract a simple debt while conceding to him in identical circumstances a power to charge or even sell the estate in spite of the greater strictness with which the Hindu law regards transactions affecting immovable properties."

To this proposition an answer was attempted. A sale or a mortgage, it was said, affects that portion only of the minor's estate which is involved in the particular transaction whereas a simple loan might endanger the entire estate by reason of the possibility of a limitless expansion by way of accumulating

(1) 1938 M.W.N. 677.

(3) (1932) I.L.R. 12 Pat. 112.

(2) (1856) 6 M.I.A. 393.

(4) I.L.R. [1929] Mad. 776.

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interest. Even if this is a sound proposition, which we doubt, there is no reason why it should not equally apply to other limited owners whose position is analogous to that of the guardian. Such is not however the case. The evil, if any, is due not to the honest creditor who lends the money, but to the irresponsible guardian who negligently omits to take prompt steps to repay it. In this connection it is not to be forgotten that the creditor has to make out a necessity not merely for the loan advanced but also for the rate of interest charged.

A trustee or an executor stands in a different position and to him the principles of the English law which prohibits him from binding the minor by a personal covenant are rightly applied; see *Srishchandra Nandi v. Sudhirkrishna Banerji*(1). To him however no less than to the guardian, the doctrine of subrogation is applicable. This doctrine is to be invoked in cases where there is no direct contractual liability enforceable against the estate. Where the trustee or the executor does not sell or charge but merely contracts or covenants, the effect of the transaction is that it binds him personally and not the estate and consequently there is no direct recourse against the estate available to the creditor. But the law goes to this extent to his help, that if the money is utilized for the benefit of the estate, he will be entitled to such rights of reimbursement as the borrower himself may have out of it.

It is necessary to sound a note of caution against the error of thinking that the promissory note evidences a contract binding on the minor by force of the instrument itself. The liability does not arise on the instrument, but on the debt evidenced by it, and is enforced against the estate, not on account of the fiction that

(1) (1931) I.L.R. 59 Cal. 216.

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the contract of the guardian is the contract of the minor, but on account of the substantive principle of the personal law of the minor which creates the liability. It is scarcely necessary to add that the liability of the estate, though *personal* in the English law sense of the word, is not personal in the sense that the person of the minor even after majority can be arrested in execution. A personal liability arising out of the contract of the guardian is a liability of the minor's estate only.

Coming to the facts of the present case the lower appellate Court has definitely found that out of the three promissory notes which formed the consideration for the note sued on, one only, namely, Exhibit A-1 which was for a sum of Rs. 1,000, had been executed by the mother of the minor—first respondent for purposes binding on the latter. That is a finding of fact which cannot be, and has not been, challenged before us, and is enough in our view of the law to sustain the decree passed by the District Munsif. It is true that that promissory note was executed by the mother and by her agent signing their names without purporting to do so on behalf of the minor. But that is not a material defect. For the circumstances proved in the case, taken along with the recital that the money was borrowed for family and pannai, etc., expenses, are sufficient to support the finding of the learned Subordinate Judge that the promissory note was executed by the mother not in her personal capacity but in her capacity as a guardian acting for the minor. The intention of the makers must have been to exclude the personal liability of the guardian and her agent, and leave the minor's estate alone liable. This intention can be properly inferred, according to *Satyanarayana*

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v. *Mallayya*(1), from a consideration of all the surrounding circumstances, which is precisely what the Subordinate Judge has done, and we can find no error of law in it. Nor is there anything in the pleadings which prevents the appellant, who is the payee under the note, from relying on the Hindu law liability of the minor. The plaint has been framed in such a way as to raise the question of the liability of the minor on the consideration, that is, the debt, which is an obligation different from, and external to, the note, though arising out of it under the personal law. There is therefore no valid objection to the appellant's claim.

There is one more argument of the respondents' Counsel which may be briefly noticed. He contended that there was no proof that the money advanced under Exhibit A-1 had been utilized for the benefit of the estate. Assuming that there is no such proof, still it is difficult to appreciate the argument. It is settled that a *bona fide* lender is under no obligation to see to the application of the money. As observed by the Judicial Committee in *Hunoomanpersaud's case*(2):

"The purposes for which a loan is wanted are often future, as regards the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived."

Proof of actual application will be necessary only if the validity of the transaction is to be tested from the point of view of *necessaries* under the Contract Act and not if it is to be decided on the rule of Hindu law. If a different rule has been enunciated in *Maharana*

(1) (1934) I.L.R. 58 Mad. 735 (F.B.). (2) (1856) 6 M.I.A. 393.

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*Shri Ranmalsingji v. Vadilal Vakhatchand*(1) or in any other case, we must express our inability to accept it as correct.

On the law to be applied to the facts found in this case the appellant is entitled to succeed. The appeal is accordingly allowed, the judgment of VENKATARAMANA RAO J. is set aside and the decree of the District Munsif restored with costs throughout. The first respondent has filed an application claiming to be an agriculturist and praying for the benefit of the Madras Agriculturists Relief Act (IV of 1938). This petition will be referred to the District Munsif of Palni for enquiry and disposal according to law.

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## APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Somayya.*

1939,  
February 22. SRI EMBERUMANAR JEER SWAMIGAL (PETITIONER),  
APPELLANT,

v.

THE BOARD OF COMMISSIONERS FOR HINDU  
RELIGIOUS ENDOWMENTS, MADRAS, AND  
NINE OTHERS (RESPONDENTS), RESPONDENTS.\*

*Certiorari—Writ of—Madras Hindu Religious Endowments Board—Order of, relating to allocation of honours in temple over which it has superintendence—Writ of certiorari in respect of—If can be issued—Madras Hindu Religious Endowments Act (II of 1927), sec. 18—Effect of.*

The Madras Hindu Religious Endowments Board has by virtue of section 18 of the Madras Hindu Religious Endowments Act power to settle questions relating to the allocation

(1) (1894) I.L.R. 20 Bom. 61

\* Letters Patent Appeal No. 98 of 1936.

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of honours in religious institutions over which it has superintendence, but in settling such questions the Board acts in its administrative capacity. An order of the Board relating to the allocation of honours in a temple over which it has superintendence does not declare anyone's legal right or deprive anyone of any legal right which he had but is merely an order dealing with the internal management of the temple, and an application to the High Court for a writ of *certiorari* with a view to the order being quashed is incompetent.

APPEAL under Clause 15 of the Letters Patent against the order of PANDRANG ROW J., dated 19th August 1936 and made in Civil Miscellaneous Petition No. 3852 of 1935 presented to the High Court for the issue of a writ of *certiorari* to the Board of Commissioners for Hindu Religious Endowments, Madras, the first respondent herein, calling for the records in Miscellaneous Application No. 4 of 1935 and the connected proceedings in Miscellaneous Application No. 9 of 1935 with the orders passed thereon by the said Board and to quash the orders passed thereon by the said Board in the said Miscellaneous Application No. 9 of 1935.

*V. Ramaswami Ayyar and N. G. Krishna Ayyangar* for appellant.

*P. V. Rajamannar, B. Sitarama Rao for A. Sri-rangachari, S. Narayana Ayyangar, S. Ramanujam, S. Rajagopalachari and K. E. Rajagopalachari* for respondents 1 to 3 and 5 to 9.

Other respondents were not represented.

The JUDGMENT of the Court was delivered by LEACH C.J.—This is an appeal from an order of PANDRANG ROW J. refusing to issue a writ of *certiorari*. The appellant is the head of a math known as the Sri Emberumanar Jeer Math, which is situate in the village of Alwarthirunagari in the Tinnevely

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district. In the math is a shrine and it is said that this shrine is a subsidiary shrine of the Sri Athinatha Alwar Temple which also lies within the village limits. The Sri Emberumanar Jeer Math is one of four maths which are particularly interested in the temple, the others being the Vanamamalai, Sri Ahobila and Thirukkurangudi Maths, the heads of which are respondents 7, 8 and 9. There has been great strife with regard to the right to receive *theertham* and other honours in the temple on festival and non-festival days. The quarrel commenced so long ago as 1905 and in that year a suit was filed in the Court of the Subordinate Judge of Tinnevely by certain persons to establish what they claimed to be their right to recite in the temple the sacred texts. The appellant and the seventh respondent were defendants. The suit was dismissed and an appeal filed against this decision met with a similar fate; *vide* the judgment in *Athan Sadagopa Chariar Swamigal v. Elayavalli Srinivasa Chariar*(1). In the course of that suit the question was raised whether the present appellant or the seventh respondent, who is the head of the Vanamamalai Math, was entitled to precedence in the distribution of *theertham* on festival days. SADASIVA AYYAR J., who delivered the main judgment on appeal, considered that the seventh respondent was entitled to precedence and said so in his judgment, which was delivered on 18th February 1913.

The question as to the right of precedence continued to be agitated and in 1927 the Madras Hindu Religious Endowments Board took action. By an order, dated 12th May 1927, the Board settled a list setting out who should receive the honours on festival

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days and who should receive them on non-festival days. By this order the appellant was given the right to receive the honours first on non-festival days. The seventh respondent was dissatisfied with the Board's order, and on 6th June 1927 filed a suit on the Original Side of this Court (Civil Suit No. 306 of 1927). The defendants were the Madras Hindu Religious Endowments Board and the trustee of the temple. The seventh respondent asked for a declaration that the order of 12th May 1927 was invalid. The suit was dismissed on 21st September 1932 on the ground that it was a suit relating merely to temple honours and involved no question of civil right. The seventh respondent appealed against this decision, but his appeal was dismissed on 7th November 1934. In 1930 respondents 2 to 6, who are said to be the disciples of the seventh respondent, filed a petition asking the Board to set aside its order of 12th May 1927. They claimed that they were entitled to the ninth place in the order of precedence on all days. On this ground they said that the Board should cancel in its entirety the order complained of and re-open the question. This petition was heard by three members of the Board, who by order dated 6th April 1935 declined to interfere with the order of 12th May 1927. Five days later respondents 2 to 6 filed another petition asking the Board to review its order of 6th April 1935, one of the grounds advanced being that the petitioners had not been given the ninth place to which they said they were entitled. This application, which was an application to review an order refusing to review a previous order, was heard by two of the three members of the Board who passed the order of 6th April 1935. This application succeeded and on 15th May 1935 the order of 12th May

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1927 was set aside. The result was that the trustees of the temple were directed to follow the observations of the Court in the appeal arising out of Original Suit No. 22 of 1905 in respect of non-festival days, but no change was made so far as festival days were concerned. The appellant then became the dissatisfied party and on 30th May 1935 filed an application asking the Board to review its order of 15th May 1935. This application was heard by one member of the Board who on 7th August 1935 held that the Board had no power to review its own order. The application was accordingly dismissed. This led to an application to this Court by the appellant for a writ of *certiorari* with a view to the order of the Board of 15th May 1935 being quashed. This was the application dealt with by PANDRANG ROW J.

We consider that the decision of the learned Judge refusing to issue the writ asked was right. It is acknowledged that a question relating to the distribution of *theertham* or other temple honours cannot be made the subject-matter of a suit as it is not a question which affects a legal right. By section 18 of the Madras Hindu Religious Endowments Act, 1927, the Board is given the power of general superintendence of all religious endowments in the Presidency, excepting those within the City of Madras. The Board may do all things which are reasonable and necessary to ensure that maths and temples are properly maintained and that all religious endowments are properly administered and duly appropriated to the purposes for which they were founded or exist. It is not disputed that the Board has by virtue of this section power to settle questions relating to the allocation of honours in religious institutions over which

it has superintendence, but in settling such questions the Board acts in its administrative capacity.

We are in entire agreement with the learned Judge when he says that it cannot be said that the Board's decision has declared any one's legal right or deprived any one of any legal right which he had and that the order of the Board complained of was merely an order dealing with the internal management of the temple. The issue of the writ of *certiorari* is a matter which lies within the discretion of the Court but in a case like the present one there is no question of discretion. It would obviously be improper to order the writ to issue.

The appeal will be dismissed with costs (one set).

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### APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Krishnaswami Ayyangar.*

PAMIDI VEDAVALLI THAYARAMMAL BY HER POWER  
OF ATTORNEY AGENT R. SINGANNA CHETTI  
(PLAINTIFF), APPELLANT,

v.

JUNUS CHETTIAR (DEFENDANT), RESPONDENT.\*

*Madras City Tenants' Protection Act (III of 1922), sec. 11—  
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sec. 11 to case of—Ejection of tenant in such a case—Notice  
by landlord prior to—Period of, necessary—Transfer of  
Property Act (IV of 1882)—Notice specified by, in case  
of monthly tenancy—Sufficiency of.*

Section 11 of the Madras City Tenants' Protection Act, 1921, is limited in its operation to the case where the tenant

\* Letters Patent Appeal No. 78 of 1936.

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is the owner of the superstructure. Where he is not such an owner, the landlord is not bound, before seeking to eject him from the land and the superstructure, to give him the three months' notice required by that section. The provisions of the Transfer of Property Act which require only a notice of fifteen days on the footing of a monthly tenancy must be held to apply to such a case.

APPEAL under Clause 15 of the Letters Patent against the judgment and decree of PANDRANG ROW J., dated 23rd April 1936 and passed in City Civil Court Appeal No. 9 of 1935 preferred to the High Court against the decree of the Court of the City Civil Judge, Madras, in Original Suit No. 220 of 1933.

*V. Ramaswami Ayyar* for appellant.

*K. Krishnaswami Ayyangar* for *A. M. Krishnaswami Ayyangar* for respondent.

#### JUDGMENT.

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KRISHNASWAMI AYYANGAR J.—The appellant in this appeal is the owner of a piece of land which was being let to tenants for running a firewood depot from about 1912. It is unnecessary to go into the earlier history of the tenancy. It will be enough to refer to Exhibit E, a registered rental agreement executed by two persons, V. Ratnavelu Mudaliar and T. Papiiah Chetty, brother of the respondent, in favour of the appellant on 30th October 1922. By that agreement the tenants took over the land, which was described as vacant land of the extent of about two manais, on lease for a period of five years from 1st February 1923 for opening and running a firewood depot "after constructing a building on the said land" with the permission of the appellant. The agreement winds up by saying that the appellant should take steps for recovering the property in case of default in the regular payment of rent without reference to the period of the lease. This agreement,

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as is clear, was one which was entered into between the parties after the Madras City Tenants' Protection Act, 1921, came into force which was on 21st February 1922. One of the questions argued on behalf of the appellant is that this tenancy agreement being in the nature of a contract entered into after the Act came into force, the provisions of the Act cannot apply to it. It is unnecessary to decide this point for there is another and a clearer ground on which we think that the appellant is entitled to succeed.

The learned Judge has found that the superstructure on the land does not belong to the respondent. He was inclined to think that that finding made no difference to his decision, though at the same time he expressed the opinion that, if it were necessary, he would have called for a finding on the question of the true ownership of the superstructure. We may at once say that we are unable to see any reason for taking this course, as both parties were content to have the dispute settled on the documentary evidence placed before the Court without caring to adduce any oral evidence. They had the opportunity, and if they did not avail themselves of it, it is their own fault. So we think that the case ought to be disposed of on the evidence on the record as it stands.

The finding being that the respondent is not the owner of the superstructure, the question is whether the appellant was bound, before seeking to eject him from the land and the superstructure, to give him the three months' notice required by section 11 of the Act. The learned Judge is of opinion that it is enough to attract the operation of this section that the respondent is a tenant, and that once it is found that he is a tenant, the three months' notice is obligatory irrespective of the question whether the



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tenant owns the superstructure or not. Section 11 is in these terms :

"No suits in ejectment or applications under section 41 of the Presidency Small Cause Courts Act, 1882, shall be instituted or presented against a tenant until the expiration of three months next after notice in writing has been given to him requiring him to surrender possession of the land and building, and offering to pay compensation for the building and trees, if any, and stating the amount thereof."

It is clear that the notice referred to in this section is one requiring the tenant to surrender possession of the land and building, and offering to pay compensation for the building and trees if any. There is nothing in the section or in the Act which enables the tenant to ask for compensation, when he does not own the building. In a case where the tenant is not the owner of the superstructure it is impossible to see how he can ask for compensation in respect of something which does not belong to him, or why the landlord should offer by his notice to pay compensation for a building which he himself owns. The entire scheme of the Act, as the preamble shows it, is to afford protection to a tenant who has constructed a building on another's land and not to throw obstacles in the way of a landlord enforcing his rights, even where there are no rights of a tenant to be protected. This is apparent from the language of the section itself, which seems to limit its operation to the case where the tenant is the owner of the superstructure. Where he is not such an owner, the provisions of the Transfer of Property Act which require only a notice of fifteen days on the footing of a monthly tenancy must be held to apply. We are unable to agree that this case is governed by section 11 of the Act.

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In this view it is unnecessary to discuss any other question for the disposal of this appeal. Differing from our learned brother, we must hold that the notice to quit which had been given by the appellant before suit was sufficient. The appeal is allowed with costs here and in the Court below.

LEACH C.J.—I agree.

A.S.V.

### APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Abdur Rahman.

NATESA PADAYACHI (PETITIONER—TWENTY-EIGHTH DEFENDANT), PETITIONER,

v.

KRISHNA PADAYACHI AND THIRTY-SIX OTHERS  
(RESPONDENTS AND LEGAL REPRESENTATIVES OF  
DECEASED SECOND RESPONDENT), RESPONDENTS.\*

*Practice—Partition suit—Reversioner—Suit by, to recover his share of estate of last male owner improperly alienated by his widow—Reversioner with equal rights as plaintiff made a defendant in, supporting plaintiff and asking for a decree for his share—Court granting a decree to plaintiff for his share—Decree in favour of defendant-reversioner for his share—Duty to grant.*

One of two reversioners sued for partition of the estate left by one K which had in the meanwhile been alienated by his widow. The other reversioner was made the twenty-eighth defendant in the suit and he filed a written statement supporting the plaintiff's case and asking that a decree might be given for his share of the property. The trial Court, though it gave a decree to the plaintiff for his share of the property, did not grant a decree in favour of the twenty-eighth defendant for his share and further dismissed an application made by him subsequently for a decree in his favour.

\* Civil Revision Petition No. 460 of 1931.

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The plaintiff asserted in his plaint that he and the twenty-eighth defendant were joint reversioners with equal rights, and though the plaintiff sued only for his share and did not specifically ask that the twenty-eighth defendant's rights should be decreed in the suit, throughout the whole of the pleadings and at the trial no distinction was drawn between the plaintiff and the twenty-eighth defendant. Further the decision in the suit was to the effect that in so far as the alienations by the widow of K were not binding on the plaintiff they were also not binding on the twenty-eighth defendant.

*Held* that the trial Court ought to have granted a decree to the twenty-eighth defendant for his half share.

There was no reason whatever why the twenty-eighth defendant should not have been given a decree equally with the plaintiff in regard to the alienations in question.

*Adhikari Vishnumurthiayya v. Authaiya*(1) distinguished.

*Appalanaidu v. Annamnaidu*(2) referred to.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam, dated 22nd August 1930 and made in Interlocutory Application No. 262 of 1930 in Original Suit No. 25 of 1927.

*P. Rajagopala Ayyangar* for petitioner.

*S. Panchapagesa Sastri* for respondents.

KING J.

The JUDGMENT of the Court was delivered by KING J.—This revision petition relates to a suit brought by one of two reversioners for partition of the estate left by one Kannu Padayachi which had in the meanwhile been alienated by his widow Sundaram to a number of alienees. The suit was decreed in part and dismissed in part. The plaintiff asserted in his plaint that he and the twenty-eighth defendant were joint reversioners with equal rights. The twenty-eighth defendant in his written statement supported

(1) (1918) 35 M.L.J. 153.

(2) A.I.R. 1928 Mad. 555.

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the plaintiff's case and asked that a decree might be given for his share of the property. There was, however, no decree granted in favour of the twenty-eighth defendant and shortly after the decree was passed he applied for a decree in his own favour. This was refused by the learned Subordinate Judge and the question whether that refusal was right or wrong is now before us in this petition.

We have been referred to two rulings which deal with a somewhat similar situation, on the earlier one of which the learned Subordinate Judge has relied in refusing the twenty-eighth defendant his request. That is reported as *Adhikari Vishnumurthiayya v. Authaiya*(1). On the other hand there is a case reported as *Appalanaidu v. Annamnaidu*(2) in which the opposite view has been taken. The main reason in our opinion for the position in *Adhikari Vishnumurthiayya v. Authaiya*(1) is given at page 156 in these words :

“When as in the present case plaintiff sues for his own share alone and not as representing co-owners, nothing regarding the latter's share is or can legitimately be decided.”

That proposition cannot possibly apply to the present case. No doubt the plaintiff did sue for his own share and did not specifically ask that the twenty-eighth defendant's rights should be decreed in the suit. But throughout the whole of the pleadings no distinction is drawn between the plaintiff and the twenty-eighth defendant and when it came to the framing of issues we find the 5th issue framed in these words :

“Whether the alienations in favour of the contesting defendants are true, valid and binding on plaintiff and twenty-eighth defendant.”

(1) (1918) 35 M.L.J. 153.

(2) A.I.R. 1928 Mad. 555.

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The respondent to this petition argues that there could be no decree in favour of the twenty-eighth defendant because he has been given no opportunity of putting forward any separate defence which he might have to urge against the twenty-eighth defendant's claim. That contention must be rejected in view of the terms of this issue. It is quite clear that the respondent was called upon to plead and prove any fact which suggested that though any particular alienation might not be binding on the plaintiff, it was yet binding on the twenty-eighth defendant. He has made no attempt, as already stated, to differentiate between the plaintiff and the twenty-eighth defendant in any manner whatever nor indeed even in the affidavit which he filed against the twenty-eighth defendant's application after the decree had been given did he make any positive assertion regarding any special pleas which he might have raised against the twenty-eighth defendant's claim. It is therefore clear that in the present suit there has been a decision that in so far as alienations are not binding on the plaintiff they are also not binding on the twenty-eighth defendant and there seems to us no reason whatever why the twenty-eighth defendant should not have been given a decree equally with the plaintiff in regard to these particular alienations. The mere fact that he is styled the twenty-eighth defendant and not the second plaintiff does not seem to us to be of any practical importance whatever. We therefore think that this revision petition ought, subject to certain conditions, to be allowed and that the decree for which the petitioner asks should be granted to him for his half share of what has been found by the learned Subordinate Judge to constitute the estate of Kannu Padayachi liable to division. The conditions

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are that the suit in the Court of first instance shall be regarded as if filed by the plaintiff and the twenty-eighth defendant for the *whole* of Kannu Padayachi's estate and that costs are payable by both of them on that valuation. In regard to mesne profits the twenty-eighth defendant's claim shall be limited to mesne profits from 1927 onwards, that is to say, from three years before he made the application which is now under discussion in this petition. The twenty-eighth defendant must also pay before this decree can be granted to him the same court-fee as the plaintiff has paid.

Each side will bear its own costs in this revision petition.

A.S.V.

### APPELLATE CIVIL.

*Before Mr. Justice Varadachariar and Mr. Justice  
Abdur Rahman.*

KOKKONDA VENKATA RAMA SURYA GOPALA  
KRISHNAMURTY AND SIX OTHERS (DEFENDANTS 2, 9,  
11, 13, 14, 21 AND 23), APPELLANTS,

v.

SURABHI SATYANARAYANA (PLAINTIFF), RESPONDENT.\*

*Mesne profits—Hindu widow—Debts contracted by—Mortgage  
—Foreclosure decree—Suit by reversioner for possession  
of property in the hands of third parties with mesne  
profits—Decree for possession conditional on his paying  
debts binding on the estate—Mesne profits for three years  
prior to suit, if can be allowed.*

In a suit by a reversioner for the recovery of possession of the properties of L from certain persons who derived

\* Appeal No. 25 of 1935.

1939,  
February 3.

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title from one who took possession of the same in execution of a foreclosure decree on a mortgage executed by L's widow. The plaintiff was held entitled to mesne profits for the three years prior to the suit. It was found that only a portion of the consideration for the mortgage was binding on the estate. It was contended in appeal that, as the reversioner was entitled to possession only after payment of the portion of the consideration binding on the estate, he should not be allowed any mesne profits till such payment was made. Alternatively, it was contended that, the alienation by a Hindu widow being only voidable, the reversioner could claim to treat the persons in possession as not being entitled to the same only from the time that he instituted a suit or gave notice repudiating the binding character of the widow's alienation and that therefore the plaintiff was not entitled to any mesne profits prior to the institution of the suit.

Held that, according to the rule laid down in *Bhagwat Dayal Singh v. Debi Dayal Sahu*(1), the plaintiff was entitled to mesne profits for the three years prior to the suit.

*Banwari Lal v. Mahesh*(2) explained.

APPEAL against the decree of the Court of the Subordinate Judge of Rajahmundry in Original Suit No. 6 of 1932.

*B. Somayya* for *K. Kameswara Rao* and *D. Narasimraju* for appellants 1 to 3, 5 to 7.

*B. Sitarama Rao* for *K. Rajah Ayyar* and *M. S. Ramachandra Rao* for respondent.

VARADA-  
CHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal arises out of a suit instituted by a reversioner for recovery of possession of the properties of one Lakshmayya who died in January 1889 leaving a widow Subbamma who died in February 1926. The first defendant is the widow of Subbamma's brother. She obtained the suit properties by a conveyance from her husband, that is Subbamma's brother, who in turn had taken possession in execution of a foreclosure decree obtained by him against his sister Subbamma in Original Suit No. 51

of 1903 on the file of the District Court, Godavari. The other defendants claim under the first defendant and their case need not be separately considered. The plaintiff contended that the document, Exhibit V, which was sought to be enforced in Original Suit No. 51 of 1903, was not binding on the reversioner, that the decree obtained in Original Suit No. 51 of 1903 was likewise not binding on him and that he was accordingly entitled to possession from the date of the widow's death. Against this claim, it was alleged that the widow Subbamma was obliged to incur debts from time to time for various purposes and that Exhibit V was executed to secure repayment of a consolidated amount representing these debts and that the same was binding on the plaintiff as also the decree obtained in Original Suit No. 51 of 1903.

The learned Subordinate Judge held that the decree in Original Suit No. 51 of 1903 was not binding on the plaintiff, that out of the consideration for Exhibit V only a sum of Rs. 656-5-0 was binding on the estate and that the same with interest due thereon from the date of the widow's death could be set off against the mesne profits to which the plaintiff was held entitled for three years before the date of the institution of the suit. He also held that, for the period during which the first defendant's husband and the first defendant had been in possession in pursuance of the foreclosure decree, they were not entitled to interest even on the amount found to be binding on the estate. On these findings, he gave the plaintiff a decree for possession and for mesne profits subsequent to the date of the institution of the suit. Against this decree some of the contesting defendants have filed this appeal. The plaintiff has

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(1) (1908) I.L.R. 35 Cal. 420 (P.C.). (2) (1918) I.L.R. 41 All. 63 (P.C.).

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purported to file something which is described as a memorandum of objections, but it is not really in the nature of a memorandum of objections. It only suggests arguments on which the decree of the lower Court can be supported even apart from the grounds taken in the lower Court's judgment. It is therefore unnecessary to deal further with the so-called memorandum of objections.

The learned Counsel for the appellants has not seriously challenged the conclusion of the lower Court that the decree in Original Suit No. 51 of 1903 was not binding upon the plaintiff. The lower Court's decree for possession must therefore stand. The arguments before us have been directed mainly to the question of the terms on which the plaintiff was entitled to recover possession. On behalf of the appellants, it has been contended that the decree for possession should be made conditional on payment with interest of the amounts due as per Exhibits II and III, two of the earlier documents executed by the widow, in addition to a sum of Rs. 360 borrowed by the widow at the time of Exhibit IV and another sum of Rs. 195-12-0 borrowed by her at the time of Exhibit V. It has also been contended that the lower Court was not justified in directing the amount that might be found payable by the plaintiff to be set off against mesne profits accrued due prior to the date of the suit, because, it was maintained, in a suit of this description, the plaintiff was not entitled to claim mesne profits prior to the date of suit.

There can be no doubt in this case that the widow Subbamma had been obliged to incur certain debts between 1890 and 1893. It is, however, by no means easy to determine how much was actually lent to her and how much of the monies so lent could be held to

be for purposes binding on the estate. The difficulty in dealing with the case is enhanced by the fact that during these years, Subbamma, who became a widow when she was barely twenty years old, was living with her father, who is said to have lent these monies and taken the various documents evidencing her loan transactions. The evidence also suggests that the father must have been looking after his daughter's affairs not merely in the matter of attending to her litigation and disbursing monies required therefor, but also in the matter of collecting the income due to her from time to time. It may not be possible at this distance of time to direct anything like an account to be taken of all the monies received by the father on her behalf or monies spent by him on her behalf. But in estimating the amount which may reasonably be regarded as having been borrowed by the daughter from the father for purposes binding on the estate, the situation in which the father stands could not be wholly ignored.

Besides the loan documents, Exhibits II, III, IV and V, there is one other document in the case which requires notice, namely, Exhibit XXIII. This purports to be a memorandum of account in the handwriting of the widow's father representing disbursements made by him between July 1890 and July 1893. This does not refer to any receipts on her account or even to expenses incurred for her maintenance; it relates mostly to expenses incurred in connection with one of her litigations. The learned Subordinate Judge has accepted this document as one written by the father though its genuineness was challenged and we see no reason to think otherwise.

[His Lordship discussed the evidence and proceeded:]

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The learned Subordinate Judge has found that in 1905 Subbamma's brother took possession of the estate in pursuance of the foreclosure decree except of a portion thereof which was outstanding with the mother-in-law under Exhibit E. This last item seems to have come into his possession only in 1916. We are of opinion that after 1905 there is no justification for calculating any interest as against the estate up to the date of the widow's death. The result will be that, on the date of the widow's death, the reversioner would have been entitled to demand possession subject to payment of Rs. 2,200 for principal and interest calculated as above.

It remains to deal with the plaintiff's right to mesne profits. The learned Counsel for the appellants contends that as the plaintiff is entitled to possession only after payment of a certain sum of money to the defendants, the plaintiff should not be allowed any mesne profits at all till such payment is made. Alternatively, he contends that, in any event, the plaintiff is not entitled to mesne profits prior to the date of the institution of the suit, because an alienation by the widow being "voidable", the plaintiff can claim to treat the defendant in possession as not being entitled to possession, only from the time that the reversioner institutes a suit or gives notice repudiating the binding character of the widow's alienation. The learned Counsel for the respondent has, however, contended that in the case of a reversioner suing for possession on the ground that an alienee from the widow has not derived a title binding on the estate, the alienee must be treated as being in possession without title from the date of the widow's death

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and the reversioner is entitled to mesne profits as from that date, though on account of the law of limitation, the Court can award mesne profits only for three years prior to the date of the institution of the suit. Even in cases in which the reversioner is directed to pay a certain sum of money as representing the portion of the consideration found binding on the estate, it has been contended that the persons in possession are only entitled to claim interest on the amount found payable and are not on that account any the less liable for mesne profits.

In support of his first contention, the learned Counsel for the appellants has relied on the decision of the Judicial Committee in *Banwari Lal v. Mchesh*(1). In support of the alternative contention that the reversioner is not in any event entitled to mesne profits prior to the date of the institution of the suit, he has relied on the decision of the Bombay High Court in *Mohanlal v. Jagjivan*(2). On behalf of the plaintiff (respondent) reliance has been placed upon *Bhagwat Dayal Singh v. Debi Dayal Sahu*(3) and it has also been pointed out that the decree of the lower Court which was confirmed by the Judicial Committee in *Deputy Commissioner of Kheri representing the Court of Wards v. Khanjan Singh*(4) recognised the reversioner's right to mesne profits. It seems to us that *Deputy Commissioner of Kheri representing the Court of Wards v. Khanjan Singh*(4) does not give us much help, because there is no reference to this question in the judgment of the Judicial Committee and it is not possible to gather from the report whether what was set off against the sum directed to be paid by the plaintiff represented mesne profits prior

(1) (1918) I.L.R. 41 All. 63 (P.C.). (2) A.I.R. 1938 Bom. 298.  
(3) (1908) I.L.R. 35 Cal. 420 (P.C.). (4) (1907) I.L.R. 29 All. 331 (P.C.).

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to the institution of the suit. There can, however, be no doubt that *Bhagwat Dayal Singh v. Debi Dayal Sahu*(1) supports the plaintiff's contention. Mr. Somayya tried to distinguish it on the ground that in that case the alienee claimed to be in possession not under a title derived from the limited owner (Jilab Koer) but from another lady (Etraj Koer) who, it was stated, was in possession adversely to the widow. We do not think the case can be distinguished on this ground. It is true the alienees did plead in the lower Court a title derived from Etraj Koer; but the sale deed in their favour had been executed not merely by Etraj Koer but also by Jilab Koer and the judgment of their Lordships proceeded on the footing that the defendants were alienees from a limited owner. Dealing with the claim to mesne profits, their Lordships observed at page 430 that "as the deeds of sale are not good as such, the claim for mesne profits is well-founded". In respect of the sums found payable by the plaintiff to the defendants, their Lordships held that the defendants were, on their side, entitled to interest at six per cent per annum. In *Banwari Lal v. Mahesh*(2) the litigation related to an alienation by a Hindu father. When it was found that the sale was not wholly for justifiable or necessary purposes, the Court held that the plaintiff was entitled to possession on payment of a certain portion of the consideration which was found binding. Dealing with that situation, their Lordships observed that, as the sales were to be set aside only upon payment of certain sums,

"the defendants must be deemed to be lawfully in possession until they are set aside and are therefore not accountable for mesne profits".

(1) (1908) I.L.R. 35 Cal. 420 (P.C.).

(2) (1918) I.L.R. 41 All. 63 (P.C.).

At the first blush, the observations in these two cases seem not easily reconcilable and indeed in one case a learned Judge of the Nagpur Court thought that they were irreconcilable; see *Maroti v. Abhiman*(1). In this Court, a Division Bench sought to get over *Banwari Lal v. Mahesh*(2) by suggesting that the case had been heard *ex parte*; see *Ponnuswami Pillai v. Subramania Pillai*(3). We do not think that either of these ways of distinguishing *Banwari Lal v. Mahesh*(2) can be regarded as satisfactory. In the course of the arguments in the present appeal our attention has been drawn to several other decisions by way of analogy. Compare *Deivachilai Aiyangar v. Venkatachari*(4), *Mallappa v. Anant*(5), *Subba Goundan v. Krishnamachari*(6), *Vadivelam v. Natesam*(7), *Bhirgu Nath Chaube v. Narsingh Tiwari*(8), *Ramasami Aiyar v. Venkatarama Ayyar*(9), *Visweswara Rao v. Surya Rao*(10), *Subraya Bhatta v. Sripathi Bhatta*(11), *Satgur Prasad v. Har Narain Das*(12) and *Nagappa Chettiar v. Brahadambal Ammani*(13). Some of these decisions proceed on the footing that, being in the nature of damages, mesne profits may be awarded according to the justice of the case without reference to any hard and fast rule. An examination of the other cases seems to us to suggest that it may not be right to place all cases of what are described as "voidable" alienations on one and the same footing for the purpose of determining the right of a successful plaintiff to mesne profits. As pointed out by the

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| (1) (1920) 61 I.C. 543.        | (2) (1918) I.L.R. 41 All. 63 (P.C.).   |
| (3) (1919) 53 I.C. 412.        | (4) (1925) 49 M.L.J. 317.              |
| (5) A.I.R. 1936 Bom. 386.      | (6) (1921) I.L.R. 45 Mad. 449.         |
| (7) (1912) I.L.R. 37 Mad. 435. | (8) (1916) I.L.R. 39 All. 61.          |
| (9) (1923) I.L.R. 46 Mad. 815. | (10) (1935) I.L.R. 59 Mad. 667.        |
| (11) 1928 M.W.N. 51.           | (12) (1932) I.L.R. 7 Luck. 64 (P.C.).  |
|                                | (13) (1935) I.L.R. 58 Mad. 350 (P.C.). |

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Judicial Committee in *Satgur Prasad v. Har Narain Das*(1), a voidable transaction does not necessarily and always imply a good title until avoided. Speaking of a widow's alienation, their Lordships explained in *Bijoy Gopal Mukerji v. Krishna Mahishi Debi*(2) the sense in which it is to be regarded as voidable. They point out that it was not absolutely void in the sense that it could not even be ratified by the reversioner; they went on to add that the reversioner might at his pleasure treat it as a nullity without the intervention of any Court and he showed his election to do the latter by commencing an action to recover possession of the property. They emphasised a principle which they thought had been lost sight of by the High Court when applying article 91 of the Limitation Act to such a transaction and they stated that in such a case there was nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. The observations in *Bhagwat Dayal Singh v. Debi Dayal Sahu*(3) have to be understood in the light of these observations. Alienations by a father in a Mitakshara joint family and by the guardian of a minor might well be placed on a different footing; and it is significant in this connection to note that while articles 44 and 126 of the Limitation Act describe the suits there dealt with as suits to set aside an alienation, the language of article 141, which applies to suits by reversioners, is very different. The article merely refers to a suit for possession and does not suggest that the reversioner has got to set aside any transaction before he becomes entitled to possession. We are accordingly of opinion that there is no necessary

(1) (1932) I.L.R. 7 Luck. 84 (P.C.). (2) (1907) I.L.R. 34 Cal. 329 (P.C.).  
(3) (1908) I.L.R. 35 Cal. 420 (P.C.).

inconsistency between *Bhagwat Dayal Singh v. Debi Dayal Sahu*(1) and *Banwari Lal v. Mahesh*(2) and that in the present case the rule applicable is that laid down in *Bhagwat Dayal Singh v. Debi Dayal Sahu*(1).

In the above view, the plaintiff will be entitled to mesne profits for three years prior to the date of the institution of the suit. The learned Subordinate Judge has assessed these profits at Rs. 359 per annum and found that for the three years prior to suit, the plaintiff was entitled to Rs. 1,077. As we are not allowing any mesne profits in the plaintiff's favour for the period of two years between the widow's death and the commencement of the three years prior to the date of the institution of the suit, no interest need be allowed in the defendants' favour either during that period. Against the sum of Rs. 1,077 interest at six per cent per annum on Rs. 2,200 will be set off and the balance deducted from the principal amount of Rs. 2,200. The balance thus ascertained will carry interest from the date of suit at six per cent per annum, but as against it, the defendants will be liable for mesne profits at the rate allowed by the lower Court for future mesne profits. The right to the amount thus found payable by the plaintiff as well as the liability for the mesne profits will be worked out as between the various sets of defendants in the proportion indicated in paragraph 30 of the lower Court's judgment.

We direct the appellants to pay one half of the costs of this appeal to be divided between the contesting defendants. In the lower Court also, the plaintiff will be entitled to one half of his costs to be apportioned in the manner indicated in its decree. So

(1) (1908) I.L.R. 35 Cal. 420 (P.C.). (2) (1918) I.L.R. 41 All. 63 (P.C.).



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far as parties who have died during the pendency of the appeal are concerned, the decree of the lower Court will stand confirmed except in cases where legal representatives have been duly brought on record.

G.R.

### APPELLATE CIVIL.

Before Mr. Justice Pandrang Row and Mr. Justice  
Abdur Rahman.

1939,  
March 13.

THE MADURA MUNICIPALITY, THROUGH ITS  
COMMISSIONER (PLAINTIFF), APPELLANT,

v.

K. ALAGIRISAMI NAIDU (DEFENDANT), RESPONDENT.\*

*Indian Contract Act (IX of 1872), ss. 65 and 70—Madras District Municipalities Act (V of 1920), ss. 68 (2) and 69 (2)—Contract with municipality entered into in contravention of sec. 68 (2)—Invalidity of—Person obtaining benefit under the contract—Liability to pay compensation under ss. 65 and 70 of the Indian Contract Act (IX of 1872)—Ratification of such contract by municipality—Unavailability of, under sec. 196 of the Indian Contract Act (IX of 1872)—Party receiving benefit incapable of returning same—Liability to pay compensation as a result of.*

A municipality sued to recover the balance of a certain amount of money due to it in respect of the right of taking rubbish, etc., within the municipality, basing its claim on a contract which was entered into by its chairman without conforming to the provisions of section 68 (2) of the Madras District Municipalities Act and also on an alleged ratification of the contract by the municipal council made more than a year after the entering into the said contract by the chairman

\* Appeal No. 312 of 1935.

and three months after the expiry of the period for which the bid was given by the defendant.

*Held*: (i) Under section 69 (2) of the Madras District Municipalities Act the contract would not bind the municipal council since the contract was entered into in contravention of the provisions of section 68 (2) of the Act and there was no valid contract between the parties.

(ii) The ratification of the contract was not of any avail because (a) a contract forbidden by law cannot be ratified under section 196 of the Indian Contract Act, and (b) the option of ratification was not exercised within a reasonable time of the making of the contract.

(iii) Compensation could be recovered under section 65 of the Indian Contract Act which provides for the devolution of an obligation on a person who has received some advantage under an agreement which has been discovered to be void or unenforceable from the beginning, or under section 70 on the supposition that the contract did not exist in the eye of the law.

(iv) Inasmuch as the defendant was not in a position to restore the rubbish, etc., which he had taken from the municipal depots, he was liable to pay compensation.

Case-law discussed.

*Municipal Board, Lucknow v. S. C. Deb*(1) not followed.

APPEAL against the decree of the Court of the Subordinate Judge (Principal) of Madura dated 8th March 1935 and made in Original Suit No. 23 of 1932.

*M. Patanjali Sastri* for appellant.

*K. Rajah Ayyar* for respondent.

*Cur. adv. vult.*

The JUDGMENT of the Court was delivered by ABDUR RAHMAN J.—This appeal arises out of a suit instituted on behalf of the Madura Municipality for the recovery of a balance of Rs. 5,220-7-1 alleged to have been due from the defendant in respect of the rights of taking rubbish and night-soil for the years 1928-29 and 1929-30 and for interest calculated at

(1) (1932) I.L.R. 8 Luck. 1 (F.B.).

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twelve per cent per annum. It was asserted in the plaint that the defendant was the highest bidder in auctions held by the Sales Committee of the Madura municipality for both these years, the defendant's bid being Rs. 53,500 for the first year and Rs. 55,500 for the second one. The defendant had, it was admitted, paid the whole of the amount for the first year leaving a balance of Rs. 146-7-0 for interest and the greater portion of the amount due for the second year leaving a balance of Rs. 4,181-7-1 for principal and Rs. 892-9-0 for interest. So far as the first year was concerned, a decree for Rs. 146-7-0 was passed in favour of the municipality and no appeal has been filed by the defendant against that portion of the decree. As for the balance of Rs. 5,074-0-1 the trial Court held that there was no valid contract between the parties as the mandatory requirements of sections 68 and 69 of the District Municipalities Act were not complied with, but that the plaintiff would be entitled to recover the amount if it was found to be due on the principles underlying sections 65 and 70 of the Indian Contract Act. The trial Court was not however satisfied on the merits that the municipality had succeeded in establishing its claim. The suit was therefore dismissed in regard to the second year. The municipality has preferred this appeal in consequence.

The first point which arises for determination relates to the validity of the agreement executed by the defendant and signed by the chairman of the municipality and some of its members on 8th April 1929 (Exhibit B) after the second auction had been held. It may not be very material in this case but it is rather interesting to find that most of the terms of the printed agreement which the defendant

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was asked to sign and signed had nothing to do with the sale of rubbish and night-soil. The municipal clerk who was entrusted with the duty of having the agreement prepared appears to have selected a wrong printed form for the purpose and got it executed by the defendant. The mistake does not seem to have been detected even when the chairman or the other members were signing. The document thus has led to some confusion but in view of the conclusions at which we have arrived, this mistake has not proved to be material.

The agreement on which reliance was primarily placed in the plaint was not sanctioned by the municipality until a few months after the expiry of the period for which the second auction was held. It has not been denied, and indeed it cannot be disputed, that the value or amount of the contract (Exhibit B) exceeds Rs. 1,000. The question then is whether the chairman or any other person could enter into this contract without the previous sanction of the municipality. An examination of the provisions contained in section 68 of the Madras District Municipalities Act would show that the municipality is authorised to delegate to the chairman or committee consisting of two or more members the power of making on its behalf any contract whereof the value or amount does not exceed Rs. 1,000, but that when the value or amount of the contract exceeds Rs. 1,000 the sanction of the municipality has to be taken for the making of the contract before the same is made. This means that no contract of the value or amount exceeding Rs. 1,000 can be entered into or made by any person before the sanction of the municipality has been obtained. It was contended by Mr. Patanjali Sastri

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on behalf of the municipality that it would be unnecessary for the municipal council to sanction every individual transaction before it is made and that it would be enough if, instead of delegating an authority generally to either the chairman or to a committee consisting of two or more members of the municipal council as permitted by section 68, sub-clause (1), it confers the power of entering into or making a contract in regard to a particular transaction. In other words, the point of distinction according to him between sub-clause 1 and sub-clause 2 of the section is that while delegation of the power under sub-clause 1 might be general in regard to contracts of less than Rs. 1,000, the power of making contracts in regard to transactions exceeding that figure must be specific, although he contends that in neither case would it be necessary for the municipal council to know the exact terms on which the contract was to be entered into. We cannot accept this contention and are of opinion that section 68 (2) could not be construed in that manner. The omission of any reference in that sub-section to the persons on whom this power could be conferred, if it could be conferred at all, is significant. Moreover the necessity to obtain the sanction of the council for the making of a contract before the same is made implies that the council must be made aware not only of the matter in regard to which the contract would be entered into but also of the terms and conditions of the contract. The sanction has to precede and not follow the making of every contract which exceeds Rs. 1,000. This could only be possible if the whole of the proceedings, which culminated in the highest bids made by the defendant, are, before the necessary sanction is obtained, considered to be in the nature of an offer which has to be placed

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before the municipality and which could mature into a contract after that has been accorded. Once the proposal is sanctioned by the municipality all that would remain to make the contract enforceable would be to express it in a manner recognised by law. The penalty for entering into a contract which contravenes the provisions of section 68 is contained in sub-clause 2 of section 69 and the result is that any contract entered into in contravention of the provisions of section 68 (2) would not bind the municipal council. It must therefore follow that this contract could not be deemed to have come into existence after the auction was finished; and the final bid given by the defendant must in the circumstances be regarded as a mere offer. This had to be accepted within a reasonable time and could not be held to have remained open even after the period for which it was made. The acceptance of the offer by the municipal council in July 1930 was in our opinion misconceived. It was argued by the learned Counsel for the appellant that the resolution passed by the municipality in July 1930 must at all events be taken to have ratified the auction held in April 1929 and must be taken to relate back to the date on which the agreement was signed by the chairman and other municipal councillors. It is hardly necessary to consider the correctness of the argument in regard to the doctrine of relation back as applied to contracts entered into by certain persons on behalf of others without their knowledge or authority, particularly when the decision in *Bolton Partners v. Lambert*(1), on which reliance was placed by Mr. Patanjali Sastri in this connection, although not disapproved by their

(1) (1889) 41 Ch. D. 295.

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Lordships of the Privy Council in *Fleming v. Bank of New Zealand*(1), was yet not approved of by them and when we find that section 68 of the District Municipalities Act imposes a disability and thus forbids any person other than the municipality from entering into or sanctioning a contract which exceeds Rs. 1,000 in value. Section 196 of the Indian Contract Act refers to contracts which have been entered into by some persons on behalf of others without their knowledge or authority but not to contracts which have been expressly forbidden either by those persons who are alleged to have ratified them later or by law. Moreover an option of ratification could be held to be capable of being exercised within a reasonable time of the act purported to be ratified as held in *Phillips v. Homfray Fothergill v. Phillips*(2) and *Dibbins v. Dibbins*(3) and not after the expiry of the period for which the option was open or, as in this case, three months after the expiry of the period for which the bid was given by the defendant. It is true that a distinction has been made at times between "executed" and "executory" contracts (see Leake on Contracts, 5th Edition, pages 415-416); but section 68 of the Madras District Municipalities Act which we have now been called upon to construe draws no such distinction and the word "contracts" used in that section must be held to cover both "executed" and "executory" contracts. We would therefore hold that there was no valid contract between the parties and the view taken by the lower Court on this point is correct.

This is however not enough to dispose of the case. The defendant had admittedly taken the rubbish

(1) [1900] A.C. 577, 587.

(2) (1871) 6 Ch. App. 770.

(3) [1898] 2 Ch. 348.

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and night-soil from the municipal depots for the whole year and has already paid, as stated above, a large portion of the amount he had agreed to pay. Should the municipality be held disentitled then to recover the balance or any other sum which may be found to be due either on the basis of *quantum valebat* or on the principle embodied in section 70 of the Indian Contract Act on the ground that the contract has been found to be unenforceable? There was a divergence of opinion on this point so far as this Court is concerned and some of the cases had gone to the length of deciding that when an agreement was found to be unenforceable for want of fulfilment of a statutory requirement, the whole suit should be dismissed; see *Raman Chetti v. The Municipal Council of Kumbakonam*(1) and *Ramaswamy Chetty v. The Municipal Council, Tanjore*(2). But a more equitable view has been taken in later cases; see *Palaniswami Goundar v. English and Scottish Co-operative Wholesale Societies, Ltd.*(3), *Arunachala Nadar v. Srivilliputtur Municipal Council*(4) and *Madura Municipality v. Raman Servai*(5). The language of section 65 of the Indian Contract Act has been held by their Lordships of the Privy Council in *Harnath Kunwar v. Indar Bahadur Singh*(6) to include agreements which are destitute of legal effect from their inception and it would therefore cover a case like the present where the agreement in pursuance of which the defendant took delivery of the rubbish and night-soil has been discovered to be of no legal effect from the beginning. There are certain cases which appear to hold that section 65 would have no application

(1) (1907) I.L.R. 30 Mad. 290.  
(3) A.I.R. 1933 Mad. 145.  
(5) (1935) 43 L.W. 39.

(2) (1906) I.L.R. 29 Mad. 360.  
(4) (1934) I.L.R. 58 Mad. 65.  
(6) (1922) I.L.R. 45 All. 179 (P.C.).

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where the void character of the agreement was known to the party; see *Ledu Coachman v. Hiralal Rose*(1) and *Nathu Khan v. Sewak Koeri*(2). But these cases were decided on the principle that the contracts being either immoral or opposed to public policy were inherently illegal and the parties being in *pari delicto* the Courts could not render any assistance in enforcing them. The same cannot be said however of cases where agreements are held to be merely unenforceable on account of a failure to comply with certain forms or for want of giving expression to them in the manner prescribed by law. The reason for this difference is obvious. It is impossible for a Court to give effect to or recognise an illegal transaction either by enforcing it or by ordering restitution to a party after it has been wholly or partially carried out. But when an agreement is discovered to be unenforceable and not illegal and when a party has not been guilty of any conduct which would disentitle him to come to Court, there appears to be no reason why the principle underlying section 65 should not be given effect to. It is hardly necessary to refer to English cases in this connection. Apparently the language employed in section 65 is much wider than that employed in the Act of Parliament which came up for construction before LINLEY L.J. in *Young & Co. v. Mayor, &c., of Royal Leamington Spa*(3), and since the statutory law of India is different from that which prevailed in England, the English decisions could not be of much value in interpreting the Indian Statute. While examining sections 65 and 70 of the Indian Contract Act a number of Indian decisions came to our notice and since most of them

(1) (1915) I.L.R. 43 Cal. 115.

(2) (1911) 15 C.W.N. 408.

(3) (1883) 8 App. Cas. 517.

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have taken the view which we ourselves take of these sections it would be supererogatory to do anything more than cite them; see *Municipal Committee, Gujranwala v. Fazal Din*(1), *Municipal Committee, Lahore v. Miran Bakhsh*(2), *Zulaing v. Yamethin District Council*(3), *Mohamed Ebrahim Molla v. Commissioners for the Port of Chittagong*(4) and *Pal-lonjee Eduljee v. The Lonavla City Municipality*(5). However a Full Bench case of the Lucknow Chief Court, *Municipal Board, Lucknow v. S. C. Deb*(6), takes a different view. Having given our careful attention to the matter and with deference to the learned Chief Judge who delivered the leading judgment in that case we have not been impressed by the reasons underlying that decision. If the English cases on which reliance was placed are not taken into account, as they cannot be for the reason which has been mentioned above, the decision if analysed will be found to have been arrived at mainly on two grounds; (i) that in the event of a divergence between a special law and the general law of the country the former has to be preferred, and (ii) that a man cannot be allowed to do by indirect means what he is forbidden by law to do directly. The propositions advanced by the learned Chief Judge may be sound but did they have any application to the facts of that case? Is the special law in any way different from what has been described to be the general law of the country? According to the learned Chief Judge there is a conflict between the general law of the country as laid down in section 65 of the Indian Contract Act and the so-called special law in section 97

(1) (1929) I.L.R. 11 Lah. 121.  
(3) (1932) I.L.R. 10 Ran. 522.  
(5) I.L.R. [1937] Bom. 782.

(2) (1932) I.L.R. 13 Lah. 561.  
(4) (1926) I.L.R. 54 Cal. 189.  
(6) (1932) I.L.R. 8 Luck. 1 (F.B.).

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of the United Provinces District Municipalities Act. We do not agree with this statement. The special law in the United Provinces District Municipalities Act is almost the same except in regard to certain minor details as contained in sections 68 and 69 of the Madras District Municipalities Act (IV of 1884) and defines how certain contracts between the municipalities and private individuals have to be made or expressed in order to be binding. Section 65 of the Contract Act on the other hand only provides for the devolution of an obligation on a person who has received some advantage under an *agreement* which has been discovered to be void or unenforceable from the very beginning. The sections of the two Acts were framed by the Legislatures with entirely different objects and one cannot be said to be in conflict with the other. Section 65 of the Indian Contract Act was meant to cover those agreements as well which are discovered to be void from their inception while sections 96 and 97 of the United Provinces District Municipalities Act or sections 68 and 69 of the Madras District Municipalities Act (IV of 1884) apply to contracts only. The distinction between an agreement and a contract must not be lost sight of. It would thus appear that the provisions of section 65 of the Indian Contract Act were only intended to come into play when an agreement was discovered to be unenforceable at law according to the rules laid down in sections 96 and 97 of the United Provinces District Municipalities Act or sections 68 and 69 of the Madras District Municipalities Act. The result is that instead of there being any conflict between the special and general laws we find that the general law would permit a party to get relief when on account of a special law the agreement

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cannot be considered to be enforceable or, in other words, characterised, as a contract.

So far as the second ground for the decision is concerned, the underlying assumption appears to be that a party in asking for restoration or compensation under section 65, Indian Contract Act, on account of the agreement having been denied the status of a contract, is none the less enforcing the same. This is not correct. In a suit on the basis of a contract a party is trying to enforce its terms while in a suit under section 65 a party merely asks for restoration or compensation as the agreement has not matured into a contract and he wants to be placed in the position in which he would have been if no agreement had been entered into. Moreover a perusal of these sections in the District Municipalities Act would show that the municipalities or their officers and members were not forbidden to enter into contracts. What they appear to lay down is that if a certain contract is entered into either by a person not mentioned in these sections or without the formalities regarded by them to be indispensable it would not be binding on the board or the municipality. First of all the rule only safeguards the interests of the municipalities and does not specifically lay down that the contracts would not be enforceable at their instance. But even if the doctrine of mutuality is held to be applicable the only inference would be that the contracts could not be enforced by either party. It cannot be legitimately contended that in asking for a relief under section 65 of the Indian Contract Act they are doing indirectly the same thing that was forbidden by the Municipalities Act. It would be extremely inequitable to find that, when a contract has not been entered into by authorized persons or is found to be unenforceable for want

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of certain formalities, the advantage gained by a party should not, when it was not intended to be gratuitous, be restored or compensated. The Courts in India are and have been administering both law and equity and there is no reason why this equitable relief, which since the passing of the Judicature Act is grantable even by the Courts in England, should not be grantable here. The relief which a person asks for under section 65, Indian Contract Act, has not been forbidden by any law and it cannot be legitimately argued that in trying to secure such a relief he is attempting to do indirectly what he had been forbidden by law to do directly. By asking for an equitable relief he cannot be said to have got round the law. Indeed he ought to be taken to have admitted that the law does not permit such agreements to be enforced and it is only then that he asks the Court to exercise its equitable jurisdiction in restoring the parties to the position in which they were before these infructuous agreements came into existence. By holding section 65, Indian Contract Act, to be applicable, we will be giving effect to both the letter and the spirit of the law.

The same conclusion would be arrived at if we hold that the contract did not exist in the eye of the law. In the absence of such a contract, section 70, Indian Contract Act, could well be applied. It cannot be said that there was anything unlawful in permitting the defendant to remove the rubbish or night-soil. The permission was not intended to be given gratuitously and the benefit was on the defendant's own showing enjoyed by him.

We must therefore hold that as the defendant is unable to restore the rubbish and the night-soil which he had taken from the municipal depots, he must

make compensation for it to the plaintiff municipality.

The next point for determination is the amount of compensation to which the plaintiff is entitled under sections 65 and 70 of the Indian Contract Act. The defendant had agreed to purchase the rubbish and night-soil for the year 1928-29 for a sum of Rs. 53,500. He offered to purchase the same for the year 1929-30 for a sum of Rs. 55,500. The increase in the offer was not apparently due to any increase in the market rates but in all probability to the fact that the municipality had invited tenders for the removal of rubbish and night-soil by motor lorries instead of by municipal carts. See Exhibits J and J-1. A remark in Exhibit Q that the depot for collections would be removed to the new site near Mathikattinam tank, Vandiyur limits, leads us to think that this was also one of the factors which had induced the defendant to make a higher bid in the auction. The contract for the removal of rubbish and night-soil by motor lorries was given after a few months and the depots were not shifted to the new site during the whole of the period in which he removed them. If the defendant had not been induced by these facts it is improbable that he would have exceeded the bid which he had given in the previous year. On account of the delay on the part of the municipality in carrying out these changes we are inclined to hold that the proper measure of compensation would be the amount which the defendant had agreed to pay for the previous year, particularly when the defendant has admitted in his statement as a witness that the prices of the rubbish and night-soil had not fallen during the year 1929-30. The defendant has not produced all the accounts which were in his possession and in the absence of the original chits

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in which the accounts were kept we are not prepared to believe that the accounts produced by him relate to all the supplies which were made to him from various depots. We must therefore hold that he was liable to pay Rs. 53,500 as compensation to the municipality. Having paid Rs. 51,318-8-11 he is liable to pay the balance Rs. 2,181-7-1. In the absence of any contract there is no liability to pay any interest and the same cannot be decreed. We would therefore pass a decree for Rs. 2,181-7-1 in favour of the municipality. As the parties have partly succeeded and partly failed the proper order in the circumstances appears to be that they should bear their own costs both here and in the Court below.

[The rest of the judgment is omitted as not necessary for this report.]

G R

## APPELLATE CIVIL.

*Before Mr. Justice Wadsworth.*

V. PONNAMBALAM CHETTI AND TWO OTHERS  
(APPELLANTS IN SECOND APPEAL No. 358 OF 1934),  
PETITIONERS,

1939,  
March 13.

v.

AMBALAM RAMAN CHETTI AND THREE OTHERS  
(RESPONDENTS IN THE ABOVE SECOND APPEAL),  
RESPONDENTS.\*

*Madras Agriculturists Relief Act (IV of 1938), sec. 4 (d)—*  
*"House property" within—Land earmarked for building*  
*purposes, but unoccupied by any buildings, if.*

"House property" in section 4 (d) of the Madras Agriculturists Relief Act (IV of 1938) does not include land earmarked for building purposes, but unoccupied by any buildings. Even if the land is suitable for building purposes and there is an intention to build houses upon it, it could not be considered to be "house property" until building operations had, at any rate, started.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to apply the provisions of the Madras Agriculturists Relief Act of 1938 and scale down the debt in favour of the petitioners herein before issuing a decree in Second Appeal No. 358 of 1934 preferred to the High Court against the decree of the District Court of Ramnad at Madura in Appeal Suit No. 361 of 1932 in Original Suit No. 288 of 1931, District Munsif's Court, Paramakudi.

*A. S. Srinivasa Ayyar* for petitioners.

*V. Ramaswami Ayyar* for respondents.

\* Civil Miscellaneous Petition No. 4070 of 1938 in Second Appeal No. 358 of 1934.



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## ORDER.

WADSWORTH J.—The question in this petition is whether defendants are entitled to the benefits of the Madras Agriculturists Relief Act. It has been found by the learned District Munsif from whom a report was obtained, that the defendants have not been assessed to property tax on an aggregate annual rental value of Rs. 600 and that therefore proviso (C) to section 3 of the Act does not apply to them.

The remaining question is whether the mortgage in respect of which the decree was passed comes within section 4 (d) of the Act, that is to say, whether it is a debt contracted on the security of house property alone in a municipality. The relevant clause of the mortgage-deed recites certain boundaries within which the one-fourth share of two items is conveyed. The first item is a vacant site (kalimanai nilam) in the south-western side, its measurements being recited, and the second item is another site with a shop building thereon in the north-western side of the area within the boundaries. The question is whether the first item, i.e., the vacant site in the south-western side of this area, can be termed "house property". If it can, then the mortgage is a debt contracted on the security of house property alone within a municipality. If it cannot, then the inclusion of this piece of unoccupied land within the mortgage takes the debt out of the exception recited in section 4 (d) and the debt as a whole comes within the mischief of the Act. It is well established that the term "house" includes the land appurtenant to the house and necessary for its enjoyment. The case law on the subject is summarized in a Calcutta ruling, *Khironde Chandra v. Saroda Prosad*(1).

(1) (1910) 7 I.C. 436.

It is contended that the term "house property" is a wider term than the term "house" and that it will include not only land appurtenant to a house which is in existence, but also land earmarked for house building purposes. I doubt very much whether this contention is in accordance with ordinary English usage. When we speak of house property, we certainly include buildings of all kinds and the sites thereof. We should probably also include the gardens, compounds and yards attached thereto. But I doubt whether the ordinary connotation of the term "house property" in every-day language would include land earmarked for building purposes, but unoccupied by any buildings. After all, it is a common experience to see agricultural land advertised for building or even sold for building, but used for agriculture until it is actually converted for the purpose for which it is destined. To my mind, one would not in ordinary English speak of agricultural land as house property merely because the owner thereof is trying to sell it or has sold it to a speculative builder. Granted that the land is suitable for building houses and that there is an intention to build houses upon it, I do not think that it would be considered to be "house property" until building operations had, at any rate, started. The alternative line of argument is that this site, item 1, is included in a larger plot with certain boundaries and is adjacent to a site upon which there was actually a building at the time when the deed was executed. It is contended that the building and its site and the vacant site adjacent to it must be deemed to be a single unit and that the whole will fall within the term "house property". Now, if in fact these two sites were a single unit, there would, I think, be some substance in this argument. But all the materials

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WADSWORTH J. available go to show that this is not the fact and that the house and its site on the north-western side were treated as a separate unit, separately recited in the mortgage deed, separately assessed in the union registers and separately numbered for the purpose of assessment. There is nothing to show that the vacant site in the south-western corner was treated as part of the property upon which the house stands. The fact seems to be that the two plots had been separately demarcated; in one of them at the time when this mortgage was executed a house had been built, the other was destined for building purposes but was still vacant. In fact a house, I am told, has been constructed since the mortgage came into force. This fact alone is an indication that the vacant site was not at the time of the mortgage a part of the compound of the existing house. If, as seems to be the case, it was a separate unit, a piece of land with no building upon it, though destined for building purposes, it would not, in my opinion, be properly described as house property and the inclusion of this site is therefore sufficient to prevent this mortgage from being immune from the operation of the Agriculturists Relief Act.

I find therefore that the petitioners (judgment-debtors) are entitled to have the decree scaled down in accordance with section 8 of the Act, the mortgage being one of 1924. The decree will therefore be amended accordingly. The petitioners will be entitled to their costs in this petition.

V.V.C.

## APPELLATE CRIMINAL.

*Before Mr. Justice Burn and Mr. Justice Stodart.*

IN RE SUBBIAH TEVAR (PRISONER), APPELLANT.\*

1939,  
April 19.

*Code of Criminal Procedure (Act V of 1898), sec. 162—  
Statements made to police by an accused person after his  
arrest admissible under sec. 27 of the Indian Evidence  
Act (I of 1872)—Inadmissible by virtue of sec. 162,  
Criminal Procedure Code, if.*

Statements made to the police by an accused person after his arrest which come within the meaning of section 27 of the Indian Evidence Act are not rendered inadmissible by virtue of section 162, Criminal Procedure Code.

The settled law under the decisions of the High Courts is that section 162, Criminal Procedure Code, does not shut out statements which are admissible under section 27 of the Evidence Act. That settled rule has not been abrogated by the decision of the Privy Council in *Pakila Narayan Swami v. The King-Emperor*(1).

Scope and effect of the decision in *Pakila Narayan Swami v. The King-Emperor*(1) explained.

TRIAL referred by the Court of Session of the Tinnevely Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 115 of the Calendar for 1938 on 10th February 1939, and appeal by the said prisoner against the said sentence.

*R. Sadasivam Pillai* for appellant.

*Public Prosecutor (V. L. Ethiraj)* for the Crown.

*Cur. adv. vult.*

\* Criminal Appeal No. 151 of 1939 and Referred Trial No. 33 of 1939.  
(1) I.L.R. [1939] Pat. 234 (P.C.).

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The JUDGMENT of the Court was delivered by STODART J.—The accused Subbiah Tevar has been convicted and sentenced to death for the murder of Sundarammal. He has filed two petitions by way of appeal. In his statement made under section 342 to the Sessions Judge he declared that the Sub-Inspector of Police, P.W. 9, concocted the case against him because he refused to give him fodder for his bulls. In one of his appeal petitions he states that the case has been concocted against him by enemies because he was the principal witness in a murder case five years ago. In the Referred Trial the question for our decision is whether the sentence of death should not be confirmed.

There is no doubt that Sundarammal, a woman of sixty, was murdered in her field on the morning of Saturday, the 30th July. She was seen in the early morning, when she set out for her field, by her daughter, P.W. 5, who lives in the opposite house and by P.W. 6, her next door neighbour, and she was seen again by P.W. 7 in her field about 8 a.m. At midday her son, P.W. 4, when he went to the field to take her her midday meal, found her lying dead near the well. Her face and the front of her head had been battered in. There was blood on the ground there. It was clear that she had been murdered there. A blood-stained stone lay near the body.

The motive for the murder was clear. The right ear-lobe was torn and lacerated. The left ear-lobe was completely cut off. Gold mudichus—a kind of ear ornament—which her daughter, P.W. 5, had lent to the deceased the previous day to wear when she went to a neighbouring village on a visit of condolence, were missing. P.W. 5 and P.W. 6 say they

saw these mudichus in the ears of the deceased on the morning of the crime.

P.W. 9, the Sub-Inspector, reached the village at 7 p.m. He held the inquest early next morning. The blood-stained stones and earth from the place where the body was lying and the blood-stained stone with which the murder might have been committed were sent by him with other things to be examined by the Chemical Examiner and Imperial Serologist and were found to be stained with human blood.

There was no clue to the murderer. The scene of crime is one and a half miles from the village: the cholam crop in the field was high: the unfortunate woman had evidently been taken unawares and killed without the knowledge of anyone who might have been in the surrounding fields.

The accused is a member of a registered Criminal Tribe who was bound to report to the authorities when he intended to leave the village. He was absent and he had not made any report. For this reason and because he suspected that the accused might have had something to do with the murder, the Sub-Inspector left instructions in the village that the whereabouts of the accused should be reported to him. On the morning of 26th August P.W. 10, a relation of the deceased, found the accused sleeping in his field and went off to the police station four miles away to tell the Sub-Inspector. The latter happened to be at Kurukkalpatti on the main road not far away and received this information at 12-30 p.m. He went to the village at once and to the place where the accused was, and arrested him. The accused then made a statement which is the principal evidence against him. He made it in the presence of the village

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munsif P.W. 11, P.W. 12 and P.W. 10. He said, according to P.W. 11 and P.W. 12 :

"I tore the ear-lobes of Sundarammal and took her mudichus. She raised an alarm. . . I have kept the mudichus in my house. I shall produce them."

P.W. 10's recollection of this statement however is simply that the accused said :

"I have kept the concerned property in my house in a hole made for a rafter in one corner, and I shall produce it."

P.W. 11 and P.W. 12 also say that the accused stated that he had killed Sundarammal with a black stone so that she might not disclose the robbery. But that part of the statement is not admissible in evidence since it did not, within the meaning of section 27 of the Indian Evidence Act, lead to the discovery of any fact. P.W. 11, the village munsif, deposes that when the accused was making this statement he took it down in writing and the record of it is Exhibit J. In Exhibit J the admissible portions are :

"On a Saturday, twenty-six days ago, in the morning my concubine Muthammal went out towards the south to gather cowdung. I followed her. Sundarammal was sitting at a place to the west of the well and to the north of the kamalai pit. I suddenly cut the two mudichus from both her ears. (Then comes the inadmissible portion.) I left her at the same place, came to my village, tied the two mudichus in a dirty white cloth with a green border and kept it in a hole in the southern wall in the south-eastern corner of the house in which I live. I shall take it and deliver it up. I should be protected."

Though the persons who heard the accused making this statement do not remember the whole of it, there is no reason to disbelieve the village munsif when he says that Exhibit J is a correct record of what the accused said.

Following on this the Sub-Inspector and the accused and the village munsif and P.W. 12, P.W. 10 and

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P.W. 13 a neighbour of the accused, went at once to the accused's house. In their presence the accused took the jewels from their hiding place and handed them over to the Sub-Inspector.

That is all the evidence against the accused. It is plain, consistent and straightforward and has been believed by the learned Sessions Judge, and learned Counsel who appears for the appellant has not attempted to show that there are any grounds on which it should be rejected. His appeal rests on a point of law. He contends that statements made to the police by an accused person after his arrest, though they may come within the meaning of section 27 of the Evidence Act, are inadmissible under section 162 of the Criminal Procedure Code. Section 162 is :

"No statement made by any person to a police officer in the course of an investigation shall be used for any purpose at any enquiry or trial in respect of any offence under investigation at the time when such statement was made."

This section is clearly wide enough to include statements made to a police officer which would be admissible under section 27 as constituting information in consequence of which some fact has been discovered. But it has been held by this High Court and by other High Courts in a long series of decisions that section 162 does not shut out statements which are admissible under section 27 of the Evidence Act. That must now be regarded as settled law. Learned Counsel contends however that this settled rule has been abrogated by a recent decision of the Judicial Committee of the Privy Council in *Pakala Narayan Swami v. The King-Emperor*(1). We have examined that decision very carefully and we do not think that it disturbs the course of decisions of this and other Courts. In

(1) I.L.R. [1939] Pat. 234 (P.C.).

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that case one of the questions at issue was the admissibility of statements made before arrest to a police officer by a person ultimately accused. The Privy Council held that such statements were shut out under section 162 of the Criminal Procedure Code. Incidentally the Privy Council when considering the scope of section 162 discussed a view which had been taken by some of the High Courts in India that section 162 referred to statements made in the course of a police investigation by witnesses only and not by accused persons. And the Privy Council differing from that view—which I *might* observe has not been the view of this High Court—proceeded to make some observations relating to the reasons on which that view had been based. The principal reason was that if section 162 of the Criminal Procedure Code applied to statements by accused persons it would amount to a repeal of section 27 of the Indian Evidence Act. On this point the Judicial Committee observed :

“The words of section 162 are plainly wide enough to exclude any confession made to a police officer in the course of investigation whether discovery is made or not. They may therefore *pro tanto* repeal the provisions of the section which would otherwise apply. If they do not, presumably, it would be on the ground that section 27 of the Evidence Act is ‘a special law’ within the meaning of section 1(2) of the Code of Criminal Procedure, and that section 162 is not a specific provision to the contrary. Their Lordships express no opinion on this topic.”

The question therefore whether section 162 of the Criminal Procedure Code has repealed section 27 of the Indian Evidence Act so far as statements made to a police officer are concerned has not been here decided by the Privy Council and we are not therefore debarred by this decision from following the rule laid down in previous decisions of this Court. We may observe that it has been recently held specifically by learned Judges

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of this Court that though section 162 of the Criminal Procedure Code applies to statements made by accused persons, nevertheless section 27 of the Indian Evidence Act is a “special law” which is not derogated from by the general rule enacted in section 162. See the dictum of RAMESAM J. in *Thimmappa v. Thimmappa*(1) and of REILLY and SUNDARAM CHETTI JJ. in *Syamo Maha Patro, In re*(2). The rule laid down in section 1(2) of the Criminal Procedure Code

“Nothing herein contained shall affect any special law now in force”  
is an application of the maxim “*Generalia specialibus non derogant*”.

The statements made by the accused in this case on 26th August being admissible in evidence we agree with the learned Sessions Judge that the charge against him is proved.

[His Lordship considered the other evidence in the case and dismissed the appeal, confirming the conviction and sentence passed by the Sessions Judge.]

V.V.C.

(1) (1928) I.L.R. 51 Mad. 987 (F.B.). (2) (1932) I.L.R. 55 Mad. 903 (F.B.).

## APPELLATE CIVIL—FULL BENCH.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice  
Krishnaswami Ayyangar and Mr. Justice Somayya.*

1939,  
March 17.

THE TRICHINOPOLY VARTHAGA SANGAM, LIMITED,  
BY ITS SECRETARY A. ARULANANDAM PILLAI,  
(PLAINTIFF), APPELLANT,

v.

T. N. SHANMUGASUNDARAM (FIFTH DEFENDANT),  
RESPONDENT.\*

*Transfer of Property Act (IV of 1882), sec. 10—Partition deed—  
Alienation by member of his share—Restraint on—Nature  
of, absolute or partial—Test—Absolute restraint—Provision  
for—Validity of.*

The clause in a deed of partition executed by C and his five sons and relating to three houses which had been used as the family residence was as follows :

“ 4 (a) The three houses shall be enjoyed in common by C and his sons as at present during the lifetime of C. (b) It shall not be competent for any one of the said sons to sell, mortgage or otherwise alienate the houses during C's lifetime. (c) After C's lifetime also the houses should be enjoyed by the sons in common without partition and should not be let, sold or otherwise disposed of to any stranger. If any of the sons does not want to live in the houses, he shall not be at liberty in any manner to let or lease, etc., his undivided share to a stranger to the family but shall do so only to any of his brothers or their heirs for a sum not exceeding Rs. 1,000 (rupees thousand). The intention of all the parties to this deed being that the houses should be enjoyed by only the members of the family and their descendants and not by strangers.”

*Held by the Full Bench.*—The restriction against alienation imposed by the deed amounted to an absolute restriction on alienation within the meaning of section 10 of the Transfer

of Property Act and therefore was void under that section. Consequently C's sons took the property as tenants in common without fetter.

In order to ascertain whether there is an absolute restraint or not, the Court has to examine the effect of all the conditions and find whether for all practical purposes alienation is prohibited. The mere fact that there may be some remote contingency in which there may be a possibility of an alienation taking place would not necessarily take the case out of the prohibition contained in section 10 of the Transfer of Property Act. In the present case the prohibition against alienation outside the family applied to the parties to the deed and their descendants. Further, though a right to sell within the family was given, there was no obligation to buy and a maximum price which was obviously below the real value was fixed.

*Muhammad Raza v. Abbas Bandi Bibi*(1) explained and distinguished.

*Gayasi Ram v. Shahabuddin*(2) relied upon.

APPEAL against the decree of the Court of the Subordinate Judge of Trichinopoly in Original Suit No. 97 of 1932.

*T. V. Muthukrishna Ayyar* (with him, *K. G. Srinivasa Ayyar* and *V. Ganapati*) for appellant.—The contentions of the appellant are : (i) The prohibition against partition in the partition deed offends against the rule against perpetuities and is invalid. (ii) The clause in the deed imposing a restraint upon alienation is a repugnant clause. It offends against the rule against perpetuities and is also repugnant to the quality of the estate taken. (iii) Even if that provision is a contract binding upon the parties themselves, it cannot bind their heirs nor will the heirs be entitled to the benefit of it. (iv) Even if the provision is a contract which all the members of the family can validly enter into, it would also be open to all of them to get rid of the restraint. The prohibition against partition for all time to come offends against the rule against perpetuities.

[KRISHNASWAMI AYYANGAR J.—Does anything turn on the restraint against partition ?]

(1) (1932) I.L.R. 7 Luck. 257 (P.C.). (2) (1935) I.L.R. 57 All. 861.

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The restraint upon alienation in the deed is an absolute restraint. The deed imposes no obligation on the other members to purchase the share intended to be sold.

[THE CHIEF JUSTICE.—Suppose there is such an obligation, the member could not bind his heirs by such an obligation.]

No. Again the member desirous of selling is under the deed not entitled to get the full price. He is only entitled to an amount not exceeding Rs. 1,000 though the real price may be more. The restraint is therefore an absolute restraint. *Muhammad Raza v. Abbas Bandi Bibi*(1) is cited against the appellant. That was a case of a contract. The restraint on alienation in it was one personal to the ladies and did not extend to their heirs. There was also no restriction as to the price. The case is therefore distinguishable.

[SOMAYYA J.—Suppose the restraint on alienation was confined to the parties to the partition deed, would you contend that it would be invalid?]

Yes, unless there was a corresponding obligation on the others to purchase and the price to be paid was the full price.

[SOMAYYA J.—If in respect of a family house the members of the family agree that in case of a sale by any one of them of his share it shall be to the other or others, I do not see why the agreement should be invalid.]

[Reference was made to *In re Rosher*. *Rosher v. Rosher*(2), *In re Elliot*, *Kelly v. Elliot*(3), *In re Cockerill*. *Mackanness v. Percival*(4), *Gayasi Ram v. Shahabuddin*(5) and *Dol Singh v. Khub Chand*(6).] Partition is a transfer for the purposes of section 10 of the Transfer of Property Act; *Rasa Goundan v. Arunachala Goundan*(7). A restraint upon partition perpetually has been held to be void.

[*S. Muthiah Mudaliar* for *Shanmugasundaraswami* for respondent intervening.—The respondent's contention is not that an absolute restraint on partition is good. It is only that a restraint on partition is valid during the lifetime of the contracting parties.]

(1) (1932) I.L.R. 7 Luck. 257 (P.C.).

(2) (1884) 28 Ch. D. 801, 805, 807, 816.

(3) [1896] 2 Ch. 353.

(4) [1929] 2 Ch. 131.

(5) (1935) I.L.R. 57 All. 861.

(6) (1921) 19 A.L.J. 848, 849.

(7) (1923) 44 M.L.J. 513.

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If it is open to parties to enter into a contract not to alienate, it is equally open to them to put an end to the contract.

*S. Muthiah Mudaliar* (with him, *D. A. Shanmugasundaraswami*) for respondent.—The restraint on alienation created by the partition deed is only a partial restraint.

[THE CHIEF JUSTICE.—The intention of the deed is made perfectly clear by the last words.]

The restraint is to operate only during the lifetime of the father and of any of the brothers. If even one of the brothers lives, none of the others can alienate. The restraint ceases to operate only after the death of all the brothers.

[THE CHIEF JUSTICE.—We accept the interpretation put upon the deed by the appellant, viz., that the intention is that the property should be tied down to the family for all generations to come.]

[THE CHIEF JUSTICE.—In the Privy Council case no price is fixed. In the present case, however, it is fixed.]

[KRISHNASWAMI AYYANGAR J.—The Privy Council case is a case of contract but in the present case there is no contract at all.]

[Reference was made to *Muthuraman Chettiar v. Ponnusamy Udayar*(1).]

[KRISHNASWAMI AYYANGAR J.—That case dealt with a defeasance subject to a condition subsequent and is not in point.]

[Reference was made to *In re Macleay*(2), *Muhammad Raza v. Abbas Bandi Bibi*(3) and *Doe v. Pearson*(4).]

As regards the price fixed, if at the time of the execution of the partition deed the price fixed was a fair price, the restraint would be good.

*Cur. adv. vult.*

## JUDGMENT.

LEACH C.J.—The appellant was the plaintiff in a suit filed in the Court of the Subordinate Judge of Trichinopoly to enforce a mortgage executed by three

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(1) (1915) 29 M.L.J. 214.

(2) (1875) L.R. 20 Eq. 186.

(3) (1932) I.L.R. 7 Luck. 257 (P.C.).

(4) (1805) 6 East 173; 102 E.R. 1253.

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brothers, Nataraja, Nilamegham and Manickavasagam Pillai, sons of one Chockalingam Pillai. Chockalingam had five sons, the other two being named Chandrasekaram and Muthuvelu respectively. The family was joint until 30th January 1919 when Chockalingam and his sons executed a deed of partition. The deed provided that three houses (which had been used as the family residence) should be held by the members of the family as tenants in common, but no member should have the right to dispose of his share to a stranger. Chockalingam and Muthuvelu died shortly after the execution of the deed. On 20th August 1925, Nataraja, Nilamegham, Chandrasekaram and Manickavasagam on behalf of themselves and their respective sons executed in favour of the appellant a mortgage of the three houses to secure a loan of Rs. 6,000. This loan was repaid in part, but on 25th October 1928 a fresh mortgage of the property was executed to secure the sum of Rs. 5,000. Chandrasekaram did not join in the later mortgage as he was away at the time. On 10th August 1932 the plaintiff instituted a suit to recover what was due to him on this mortgage. Nilamegham was then dead and his son, the sole respondent in this appeal, was made a party as his legal representative.

At the time of the institution of the suit the respondent was still a minor and his mother was appointed to act as his guardian *ad litem*. She took no steps, however, to defend the suit, and as the result an *ex parte* decree was passed against the respondent, limited, of course, to his interest in the property in suit. The suit was contested by certain of the other defendants on various grounds, but it is not necessary to state them. It is sufficient to say that the issues did not embrace the question

now before the Court and were all decided in favour of the plaintiff. A decree as prayed was passed against the other defendants, except Chandrasekaram and his sons, who were dismissed from the suit as they were not parties to the second mortgage. The respondent then filed an application for an order setting aside the *ex parte* decree. The application was granted and the respondent submitted a written statement in which he contended that his father had only a life interest in the property. At the hearing the respondent abandoned this plea, but contended that by reason of the partition deed the sons of Chockalingam had no right to effect a mortgage and therefore his interest was not charged. This contention was upheld and the respondent's interest in the property was exonerated from the mortgage. The preliminary decree was accordingly amended.

The plaintiff has appealed. The validity of the decision of the Subordinate Judge is challenged on two grounds. In the first place it is contended that the Subordinate Judge was wrong in holding that the partition deed operated to prevent the sons from mortgaging their interests in the property. It is said that the restriction on alienation amounts to an absolute restriction and therefore is void under section 10 of the Transfer of Property Act. In the second place it is said that the facts did not warrant the setting aside of the *ex parte* decree passed against the respondent. The second contention cannot be supported because the appellant has not printed the evidence on which the Subordinate Judge based his order setting aside the *ex parte* decree or even the order itself. There being no materials before us from which it can be shown that the order is wrong it must stand.

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The clause in the partition deed referring to this property is clause 4, which reads as follows :

"(a) The three houses described in Schedule G shall be enjoyed in common by T. M. Chockalingam Pillai and his said sons as at present during the lifetime of Chockalingam Pillai. (b) It shall not be competent for any one of the said sons to sell, mortgage or otherwise alienate the houses in Schedule G during Chockalingam Pillai's lifetime. (c) After Chockalingam Pillai's lifetime also the houses in Schedule G should be enjoyed by the sons in common without partition and should not be let, sold or otherwise disposed of to any stranger. If any of the sons does not want to live in the house mentioned in Schedule G, he shall not be at liberty in any manner to let or lease, etc., his undivided share to a stranger to the family but shall do so only to any of his brothers or their heirs for a sum not exceeding Rs. 1,000 (Rupees thousand). The intention of all the parties to this deed being that the houses should be enjoyed by only the members of the family and their descendants and not by strangers."

The estate here created is admittedly a tenancy in common and if the restriction on alienation amounts to an absolute restriction it cannot stand.

I consider that the contention that the restriction is absolute is well founded. The prohibition against alienation to strangers is not limited to the father's lifetime, but is intended to continue in perpetuity. The concluding words of the clause stating the intention of the parties places this beyond doubt. It is true that a right to sell within the family is given, but there is no obligation to buy and a maximum price which is obviously below the real value is fixed. The property was mortgaged in 1925 for Rs. 6,000 and it may be taken that the mortgagee required a substantial margin of security. It follows that it may safely be assumed that the property was worth considerably more than Rs. 6,000 at the time of the mortgage. There is no evidence to justify an inference that the property had increased in value between the

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date of the partition deed and the date of the mortgage and consequently the only conclusion open to the Court is that the property was worth considerably more than Rs. 6,000 at the date of the partition. Taking the value to be only Rs. 6,000, each son's share at the death of the father was worth Rs. 1,200, but in view of the amount of the first mortgage the figure of Rs. 6,000 cannot be accepted as the proper figure. On the basis of the mortgage the full value was more likely to be in the region of Rs. 9,000, which would make the share of each of the five sons worth about Rs. 1,800. At the date of the mortgage one son had died and the shares of the surviving sons had consequently increased in value. The prohibition against a co-tenant selling his share for more than Rs. 1,000 would mean a sale at a great sacrifice, even if the maximum were realized, but there is the further consideration that there is no obligation to buy even at Rs. 1,000 and this puts a member of the family wishing to sell at a further disadvantage. There is ample authority that provisions such as we have here amount to an absolute restriction on alienation and therefore are void.

In the case of *In re Rosher. Rosher v. Rosher*(1) a testator devised an estate to his son in fee subject to the proviso that if the son, his heirs or devisees, or any person claiming through or under him or them, should desire to sell the estate, or any part or parts thereof during the lifetime of the testator's wife, she should be given the option to purchase the estate at the price of £3,000 for the whole, and at a proportionate price for any part or parts thereof. The selling value of the estate at the date of the will and at the time of

(1) (1884) 26 Ch. D. 801.

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the testator's death was £15,000. It was held that the proviso compelling the son to sell at such an undervalue amounted to an absolute restraint on alienation during the lifetime of the widow and was consequently void. The same principle was applied by EVE J. in *In re Cockerill. Mackness v. Percival*(1). In that case a testator, by his will, devised land subject to the proviso that if within twenty years of his death the devisee should desire to sell the land he was to give the governors of a certain school the option of purchasing it at the price of £300 an acre. The total area was about twenty-two acres and was worth £670 an acre. It was held that the condition amounted to a restraint on alienation and was void for repugnancy. In *In re Elliot. Kelly v. Elliot*(2) a testator gave his plantations in Assam and all his other estate to the plaintiff absolutely, subject to the payment of his debts, but provided that on a sale by the plaintiff of the plantations the plaintiff should pay to the testator's brother a sum of £1,000 out of the proceeds of the sale and another sum of £500 to the testator's sister. CHITTY J. held that the testator had by the direction to pay these legacies imposed no obligation on the plaintiff to sell and that the direction was void for repugnancy. The testator had attempted to create an estate unknown to the law. The owner of property has as an incident of his ownership the right to sell and to receive the whole of the proceeds for his own benefit. By providing that the plaintiff should make the payments to his brother and sister he had created a condition which was repugnant to the estate which he had conferred. In *Attwater v. Attwater*(3) ROMILLY M.R. held that

(1) [1929] 2 Ch. 131.

(2) [1896] 2 Ch. 353.

(3) (1853) 18 Beav. 330; 52 E.R. 131.

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where a testator left an estate to the eldest son of his niece with an injunction never to sell it out of the family, but, if it had to be sold at all, it was to be sold to one of his brothers, the restriction amounted to a total restraint on alienation and was void.

In *Gayasi Ram v. Shahabuddin*(1) SULAIMAN C.J. pointed out that in order to ascertain whether there is an absolute restraint or not, the Court has to examine the effect of all the conditions and find whether for all practical purposes alienation is prohibited. The mere fact that there may be some remote contingency in which there may be a possibility of an alienation taking place would not necessarily take the case out of the prohibition contained in section 10 of the Transfer of Property Act. In that case a house had been sold for a sum of Rs. 150 with a condition that the vendee was not to transfer, mortgage, give or sell it to any one but the vendor or his heirs. In the event of a breach of this condition the vendor (or his heirs) was to have the right to a re-conveyance of the property on payment of Rs. 175. Sixteen years after the conveyance the purchaser sold the property for Rs. 1,000 and the transferee later disposed of it for Rs. 800. The sons of the original vendor sued to recover possession of the property from the ultimate purchaser on payment to him of Rs. 175. It was held that there was an absolute restraint on alienation and therefore the provision for re-conveyance was void.

In the case before us the respondent's Advocate has placed great reliance on the decision of the Judicial Committee in *Muhammad Raza v. Abbas Bandi Bibi*(2), but when that decision is examined it cannot be

(1) (1935) I.L.R. 57 All. 861.

(2) (1932) I.L.R. 7 Luck. 257 (P.C.).

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regarded as an authority in support of the plea that the provisions of the partition deed in this case with regard to the family house are valid in law. The facts there were these. One Sughra Bibi brought a suit against her cousin, Afzal Hussain, claiming a half-share in certain immovable properties in Oudh. The litigation ended in a compromise which was embodied in a decree of the Court. Under the terms of the compromise decree the defendant, who already had a wife, was to marry the plaintiff and the properties were to be held by the two wives in equal shares, but neither was to have power to transfer her moiety to a stranger. After her marriage to the defendant the plaintiff, in breach of the terms of the compromise decree, alienated her half-share to strangers. After her death the respondent in the appeal to the Privy Council, as a legal representative of Sughra Bibi, filed a suit for the recovery of two-thirds of her share from the appellants on the ground that the deceased had no right to alienate her moiety. The appellants' answer was that the restriction on alienation was bad and Sughra Bibi was therefore free to dispose of her moiety as she pleased. The Privy Council held that the condition that the deceased was not to alienate outside the family constituted only a partial restriction on alienation and therefore did not offend against section 10 of the Transfer of Property Act. The Board was only considering the effect of the prohibition so far as the deceased herself was concerned and the observations in the judgment went no further. In the course of the judgment reference was made to *In re Macleay*(1) and *Deo v. Pearson*(2). In the former of these cases there was a devise of an estate

(1) (1875) L.R. 20 Eq. 186. (2) (1805) 6 East 173; 102 E.R. 1253.

to a brother on condition that he should never sell it out of the family. JESSEL M.R. held that this only amounted to a partial restriction and made the following observations :

" You may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way. Then, again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. It is not, therefore, limited in the sense of there being only one person to buy; the will shows that there were a great many members of the family when she made her will; a great many are named in it; therefore you have a class which probably was large, and was certainly not small. Then it is not, strictly speaking, limited as to time except in this way, that it is limited to the life of the first tenant in tail; of course, if unlimited as to time, it would be void for remoteness under another rule. So that this is strictly a limited restraint on alienation."

In the case before us the restriction against alienation outside the family applies to the parties to the deed and their descendants and there is the further restriction with regard to price without any obligation to buy. In the course of his judgment JESSEL M.R. discussed at length the decision in *Attwater v. Attwater*(1). It is evident that he was inclined to think that the decision in *Attwater v. Attwater*(1) went too far, but came to the conclusion that ROMILLY M.R. did not intend to place a different interpretation on

(1) (1853) 18 Beav. 330; 52 E.R. 131.

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VARTHAGA  
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the law from that given by Lord ELLENBOROUGH in *Doe v. Pearson*(1). There property was left to two sisters to be held by them as tenants in common, subject to the condition that if they had no issue they should have no power of alienation except to their sisters or their sisters' children. Lord ELLENBOROUGH held this condition was good. The restriction on alienation disappeared with issue and therefore was only a partial restriction.

The facts in *Muhammad Raza v. Abbas Bandi Bibi*(2) and the cases cited therein were very different from the facts in the present case and those authorities have no application here. I hold that the restriction imposed by the deed now under consideration amounts to an absolute restriction on alienation within the meaning of section 10 of the Transfer of Property Act and therefore must be disregarded. Consequently the sons took the property as tenants in common without fetter, and the three brothers who executed the mortgage to the appellant acted within their powers.

The appeal will be allowed and the suit will be decreed against the respondent also, with costs in favour of the appellant here and below. The period allowed for redemption will be six months.

KRISHNASWAMI AYYANGAR J.—I agree.

SOMAYYA J.—I agree.

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(1) (1895) 6 East 173; 102 E.R. 1253.  
(2) (1932) I.L.R. 7 Luck. 257 (P.C.).

# APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Patanjali Sastri.*

HIS HOLINESS PERIA KOIL KELVI APPAN TIRUVEN-  
GADA RAMANUJA PEDDA JIYANGARLU VARLU  
(SECOND APPELLANT IN APPEAL SUIT NO. 466 OF 1925  
AND FOURTEENTH RESPONDENT IN APPEAL NO. 119 OF  
1926 ON THE FILE OF THE HIGH COURT), PETITIONER,

1939,  
April 19.

v.

PRATHIVADI BAYANKARAM VENKATACHARLU AND  
EIGHTEEN OTHERS (RESPONDENTS IN APPEAL NO. 466  
OF 1925 AND RESPONDENTS AND APPELLANTS IN APPEAL  
NO. 119 OF 1926), RESPONDENTS.\*

*Code of Civil Procedure (Act V of 1908), sec. 109 (c)—Temple of  
national importance—Religious rights and ceremonies at  
—Case relating to, and questions in issue being of great  
public and private importance—Falls within sec. 109 (c),  
if.*

The plaintiff, who was a Vaishnavite of the Thengalai sect and had as the head of a mutt the right of conducting public worship at the Tirupathi temple, sued to establish his right to conduct public worship at the said temple according to the Thengalai ritual, his case being that only the Thengalai mantras should be sung at the worship in the temple. The case of the contesting defendants was that the Vadagalai sect had the right of singing its own mantras at the same time as the Thengalai mantras were being sung. The High Court on appeal held, differing from the trial Court, that the Vadagalais had the same rights as the Thengalais both before and after the recitation of the scriptures. The legal representative of the plaintiff, who had died during the pendency of the appeal to the High Court, applied for leave to appeal to His Majesty in Council against the judgment of the High Court, resting his case on the provisions of section 109 (c) of the Code of Civil Procedure.

\* Civil Miscellaneous Petition No. 2237 of 1938.

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Held that, as the case related to religious rights and ceremonies at a temple of national importance and the questions in issue were in themselves of great public and private importance, the case fell within section 109 (c).

*Rubhakrishna Ayyar v. Swaminatha Ayyar*(1) followed.

*Venkata Varatha Thatha Chariar v. Anantha Chariar*(2) distinguished.

PETITION under section 109, clause (c), and section 110 and Order XLV, rules 2 and 3, of the Code of Civil Procedure praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to grant leave to the petitioner therein to appeal to His Majesty in Council against the judgment of the High Court in Appeals Nos. 466 of 1925 and 119 of 1926 preferred against the decree of the Court of the Subordinate Judge of Chittoor in Original Suit No. 23 of 1919.

*T. M. Krishnaswami Ayyar* and *V. N. Venkata-varadachari* for petitioner.

*D. Ramaswami Ayyangar* for *C. S. Venkatachari* and *C. Narasimhachari* for respondents.

LEACH C.J. The ORDER of the Court was pronounced by LEACH C.J.—This is an application for a certificate permitting an appeal to His Majesty in Council. The petitioner is the legal representative of the plaintiff who died during the pendency of the appeal. The plaintiff was the head of an important mutt and as such had the right of conducting public worship at the Tirupathi temple in the Chittoor District. Both sides are agreed that the Tirupathi temple is the most important Vaishnavite temple in the whole of India and pilgrims in large numbers visit it every year in order to worship there. The Vaishnavite community

(1) (1920) I.L.R. 44 Mad. 293 (P.C.). (2) (1893) I.L.R. 16 Mad. 299 (P.C.).

is divided into two sects, the Thengalais (Southerners) and Vadagalais (Northerners). It is also common ground that the adherents of each sect are counted by millions. The suit was filed by the plaintiff in order to establish his right to conduct public worship at the temple according to the Thengalai ritual. Before the recitation of the Tamil scriptures (Prabandham), mantras are sung. The mantras sung by the Thengalais are different from those sung by the Vadagalais. After the recitation of the scriptures, mantras are again sung. Here also the mantras sung by the Thengalais differ from the mantras sung by the Vadagalais. There are other points of difference in the worship, but it is unnecessary to pause to state them. The plaintiff's case was that the Thengalai mantras should only be sung at the worship in this temple. The contesting respondents say that the Vadagalai sect has the right of singing its own mantras at the same time as the Thengalai mantras are being sung. The trial Judge held that the plaintiff was right in his contention that only the Thengalai mantras should be sung before the recitation of the scriptures, but he considered that after the recitation of the scriptures the Vadagalais on certain occasions had the right of singing their mantras at the same time as the Thengalais sang theirs. On appeal to this Court it was held that the trial Court was wrong in holding that the Thengalai sect had the right to have their mantras sung at the commencement of the service. The Vadagalais had the same rights as the Thengalais both before and after the recitation of the scriptures.

The plaintiff valued the relief claimed in the plaint at Rs. 10,500 and in the appeal to this Court the relief was valued at a like amount. It is, however, obvious that no monetary value can be attached to the

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relief and the petitioner rests his case on the provisions of section 109 (c) of the Code of Civil Procedure. It is said that the questions involved in the appeal are questions of great public and private importance, but the contesting respondents deny this, and maintain that on a previous occasion this Court refused leave and the Privy Council refused special leave to appeal. The case referred to by the learned Advocate for the contesting respondents is *Venkata Varatha Thatha Chariar v. Anantha Chariar*(1). An examination of the judgment there shows that the question in issue was entirely different. The question was whether the Thengalais or the Vadagalais were entitled to an office in a certain temple. The decision therefore does not help the contesting respondents in any way. There can be no doubt that the form of ritual at the Tirupathi temple is a matter of both public and private importance and consequently we are of opinion that the case does fall within section 109 (c). If there were any doubt, the doubt would be removed by the decision of the Privy Council in *Radhakrishna Ayyar v. Swaminatha Ayyar*(2) where Lord BUCKMASTER in delivering the judgment of the Board said :

" . . . It is plain that there may be certain cases in which it is impossible to define in money value the exact character of the dispute ; there are questions, as for example, those relating to religious rights and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money. Sub-section (c) of section 109 of the Civil Procedure Code contemplates that such a state of things exists, and rule 3 of Order XLV regulates the procedure."

(1) (1898) I.L.R. 16 Mad. 299 (P.C.). (2) (1920) I.L.R. 44 Mad. 293 (P.C.).

As this case relates to religious rights and ceremonies at a temple of national importance and the questions in issue are in themselves of great public and private importance, the application will be granted on the usual conditions. Costs of the applicant will be made costs in the appeal.

A.S.V.

### APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Somayya.*

ALASYAM RAMAPPA (FIRST DEFENDANT), APPELLANT,

v.

PANYAM THIRUMALAPPA AND FOURTEEN OTHERS  
(PLAINTIFF AND DEFENDANTS 2 TO 8 AND 10 TO 16),  
RESPONDENTS.\*

*Indian Registration Act (XVI of 1908), ss. 17 and 49—  
Partnership—Dissolution—Immovable properties purchased  
out of partnership assets—Partners' rights after dissolution  
in—Document declaring—What amounts to—Registration  
of—Necessity—Deed not registered—Admissibility in  
evidence of.*

On the dissolution of a partnership it was agreed that immovable properties which had been purchased by the firm out of the partnership assets should not be divided among the three partners of the firm, but should be held by them as joint tenants with equal rights. The terms of the dissolution were set out in full in the firm's day book and the statement (Exhibit A) was signed by all the partners. Exhibit A provided, in so far as it related to the said properties, that "P, A and V, these three individuals," (the three partners) "have rights for equal shares to the lands" (the said properties). On the

\* Letters Patent Appeal No. 81 of 1937.

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PEDDA  
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CHARLU.

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March 14.

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death of one of the partners the said immovable properties came into the possession of his son, the appellant. The first respondent, the son of another partner who had also died, filed a suit for partition of the said properties and delivery to him of the one-third share which he claimed therein.

*Held* that Exhibit A was an instrument which declared the rights in the properties from the date of dissolution of the partnership within the meaning of section 17 of the Indian Registration Act and therefore should have been registered and that as it was not registered it could not be given in evidence by reason of the provisions of section 49 of that Act and no claim could be made under it.

Exhibit A was drawn up and signed in order that the post-dissolution rights should be declared and placed beyond dispute.

**APPEAL** under Clause 15 of the Letters Patent against the judgment of VARADACHARIAR J. in Second Appeal No. 722 of 1933 preferred to the High Court against the decree of the District Court of Anantapur in Appeal Suit No. 28 of 1930 preferred against the decree of the Court of the District Munsif of Gooty in Original Suit No. 353 of 1928.

*K. Someswara Rao* for *Kasturi Seshagiri Rao* for appellant.

*Ch. Raghava Rao* for first respondent.

Other respondents were not represented.

The **JUDGMENT** of the Court was delivered by LEACH C.J.—The appellant's father, one Nattekalappa, the first respondent's brother Yeriakalappa, and the second respondent carried on business in partnership from 1892 until 3rd May 1904 when a dissolution took place. During the existence of the partnership certain immovable properties were purchased out of the profits of the business. One lot comprising four items was purchased in the name of the appellant's father and another lot comprising three items was

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purchased in the names of the appellant's father and the first respondent's brother. On the dissolution it was agreed that the immovable properties should not be divided among the partners, but should be held by them as joint tenants with equal rights. The terms of the dissolution were set out in full in the firm's day book and the statement (Exhibit A) was signed by all the partners. The appellant's father died in 1921 and the first respondent's brother in 1918. The immovable properties eventually came into the possession of the appellant. In 1928 the first respondent filed a suit in the Court of the District Munsif of Gooty for partition of the properties and delivery to him of the one-third share which he claimed therein. The appellant resisted the claim. He contended that the properties did not belong to the partnership, but to his father; that the suit was barred by the provisions of article 106 of the Limitation Act, not having been brought within three years of the dissolution of the partnership; and that Exhibit A could not be admitted in evidence by reason of non-registration, which precluded any claim being made under it. The District Munsif rejected the appellant's contentions and decreed the suit. On appeal the District Judge of Anantapur held that the properties in suit were not partnership properties, but properties which belonged exclusively to the appellant's father. He also held that the suit was barred by limitation and that Exhibit A required registration. The appeal was therefore allowed and the suit dismissed. The first respondent then filed a second appeal which was heard by VARADACHARIAR J. The learned Judge restored the decree of the District Munsif. He held that the District Judge had entirely failed to appreciate the evidence which showed

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LEACH C.J. conclusively that the properties belonged to the partnership, that the suit did not fall within article 106 of the Limitation Act and that the law did not require Exhibit A to be registered. The learned Judge having granted a certificate under Clause 15 of the Letters Patent, the appellant has filed the present appeal.

It is not necessary to decide whether VARADACHARIAR J. was justified in reversing the decision of the District Judge on the question of the ownership of the properties because we consider that the appellant is entitled to succeed on his contention that Exhibit A required to be registered.

Exhibit A, after describing the immovable properties purchased by the firm out of the partnership assets, proceeds :

"Panyam Yerakalanna, Alasyam Nettakalappa and Voruganto Basappa, these three individuals, have rights for equal shares in the amount of Rs. 1,106-3-1 mentioned in the balance sheet from Nos. 1 to 9, and to the lands mentioned in pages 232-233.

Particulars of the amount of debts to the extent of Rs. 2,597-8-9 mentioned in pages 10 to 13 which have to be paid by us three, mentioned in numbers 14 to 16—particulars thereof :

|                               | RS.   | A. | P. |                        |
|-------------------------------|-------|----|----|------------------------|
| No. 14, Panyam Yerakalanna..  | 700   | 11 | 9  | with interest thereon. |
| No. 15, Voruganti Nagappa ..  | 649   | 10 | 5  | ..                     |
| No. 16, Alasyam Nettakalappa. | 1,247 | 2  | 7  | ..                     |

We the three aforesaid individuals have agreed thereto and settled the accounts."

There is here a declaration, made on the dissolution of the partnership, that the three persons who had constituted the partnership had equal rights in the properties which had been purchased out of the profits. The fact that the agreement embodying the terms of the dissolution was entered in the day book and not drawn up separately makes no difference.

The words written in the book constitute an agreement in writing. VARADACHARIAR J. held that Exhibit A did not require registration because it did not operate to transfer property from the partnership to its members. He referred to the provisions of section 253 of the Contract Act which states that partners are joint owners of the properties purchased out of partnership funds, and to the decision in *Samuvier v. Ramasubbier*(1) which deals with this section. The learned Judge treated Exhibit A as being merely a statement of existing facts.

Section 17 of the Registration Act requires non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, any right, title, or interest, in immovable property to be registered. In our opinion Exhibit A is an instrument which declares the rights in the properties from the date of dissolution of the partnership and therefore should have been registered. As it is not registered it cannot be given in evidence by reason of the provisions of section 49 of the Act. In *Bageshwari Charan Singh v. Jagannath Kuari*(2) the Privy Council accepted the interpretation of the word "declare" given by WEST J. in *Sakharam Krishnaji and another v. Madan Krishnaji and others*(3) where he said that the word implies a declaration of will and not a mere statement of fact. Lord DUNEDIN who delivered the judgment of the Board pointed out that the distinction is between a mere recital of a fact and something which itself creates a title. We regard Exhibit A as being within the latter category.

As I have already indicated, part of the properties were purchased in the name of the appellant's father

(1) (1931) I.L.R. 55 Mad. 72.

(2) (1931) I.L.R. 11 Pat. 272 (P.C.).

(3) (1931) I.L.R. 5 Bom. 232.



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and part in the names of the first respondent's brother and the appellant's father. Up to the time of the dissolution the partners must be regarded as joint owners of the properties within the meaning of section 253, but they were not entitled to specific shares and the rights they possessed were subject to the liabilities of the partnership on dissolution. Until an account had been taken and provision had been made for the discharge of the liabilities, no partner could claim to be entitled to have a definite share in a particular asset. In allotting on a dissolution what remains after making provision for the firm's debts, and the remaining assets include immovable properties, it does not follow that the partners will take the immovable properties in equal shares, even if they had equal rights in the partnership. What each partner receives will depend on the circumstances and the nature of the assets which remain for division. A partner, for instance, may have overdrawn his account and disentitled himself to equal division. It so happened in this case that it was possible to arrange that the immovable properties should be held by the persons who had formed the partnership as joint tenants with equal rights, but it might have been otherwise. Exhibit A was drawn up and signed in order that the post-dissolution rights should be declared and placed beyond dispute. In our opinion the declaration clearly falls within section 17 of the Registration Act, which means that the document cannot now be admitted in evidence. This being the case, the Court can only regard the properties as being partnership assets and the suit is consequently hopelessly time-barred. The appeal will therefore be allowed with costs throughout.

A.S.V.

## APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Patanjali Sastri.*

SRIMATH KACHI CHINNA NALLAPPA KALAKKA  
THOLA UDAYAR AVARGAL, ZAMINDAR OF  
UDAYARPALAYAM (COUNTER-PETITIONER), PETITIONER,

1939,  
March 28.

v.

SUDAI UDAYAN AND TEN OTHERS (PETITIONERS),  
RESPONDENTS.\*

*Madras Estates Land Act (I of 1908), sec. 40 as amended in  
1934—Right to apply under—Ryot paying rent at rates  
varying with the crop—Rent paid in cash—Case of.*

A ryot who pays rent at rates varying with the crop is entitled to apply under section 40 (as amended) of the Madras Estates Land Act of 1908 for an order commuting the rent to a definite money rent whether he pays the rent in cash or in kind. The words "whether in cash or in kind" in the section ought not to be read as meaning sometimes in cash and sometimes in kind.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Collector of Trichinopoly, dated 24th June 1937 and made in Miscellaneous Petition No. 2 of 1936 preferred against the order of the Court of the Revenue Divisional Officer, Ariyalur, dated 14th November 1936 and made in Miscellaneous Petition No. 1 of 1936.

B. Sitarama Rao for A. Srirangachari for petitioner.

K. Bhashyam and T. R. Srinivasan for respondents 1 to 7, 9 and 11.

Other respondents were not represented.

\* Civil Revision Petition No. 1193 of 1937.

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UDAYAR-  
PALAYAM  
v.  
SUDAI  
UDAYAN.  
LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The petitioner is the proprietor of the Udayarpalayam zamindari. The respondents are the ryots of the village of Kaduvatankurichi which forms part of the zamindari. They applied under section 40 of the Madras Estates Land Act, 1908, to the Deputy Collector, Ariyalur, for an order commuting the rent payable to the petitioner to a definite money rent. The respondents have for many years paid rent in cash but the amount has varied according to the nature of the crops raised. The petitioner contended that the application did not lie as section 40 only had in view cases where rents were paid partly in kind. The Deputy Collector held that the application did not come within the section and accordingly dismissed it. An appeal followed to the Collector, who disagreed with the Deputy Collector and reversed his decision. The petitioner has now applied to this Court to reinstate the order of the Deputy Collector under the powers of revision conferred upon it by section 115 of the Code of Civil Procedure.

Section 40 (1) of the Madras Estates Land Act reads as follows :

"Where for any land in his holding a ryot pays rent in kind or on the estimated value of a portion of the crop, or at rates varying with the crop, whether in cash or in kind, or partly in one of these ways and partly in another, or partly in one or more of these ways and partly in cash, either the ryot or the landholder may apply to the Collector to have the rent on the holding commuted to a definite money rent."

There are here five different categories, namely, (i) where a ryot pays rent in kind ; (ii) where he pays rent on the estimated value of a portion of the crop ; (iii) where he pays rent at rates varying with the crop, whether in cash or in kind ; (iv) where he pays rent partly in one of these ways and partly in another ;

and (v) where he pays partly in one or more of these ways and partly in cash. If the case falls within any of these categories the ryot may apply to the Collector for an order commuting the rent to a definite money rent.

In reversing the order of the Deputy Collector and in allowing the respondents' petition the Collector was of the opinion that the case fell within the third category. It is said that he was wrong because the words "whether in cash or in kind" should be read as meaning sometimes in cash and sometimes in kind. To do so would clearly be reading into the section words which are not there and words which would alter the effect of the section. The section clearly says that a ryot who pays rent at rates varying with the crop shall have the right of applying for an order whether he pays the rent in cash or in kind. Instead of the amount varying from year to year or from crop to crop the rent should be fixed at a definite sum per annum.

On behalf of the petitioner Mr. Sitarama Rao has drawn our attention to the section as it stood before its amendment in 1934. Before the amendment the section was construed in the way he would have it construed now, but the amended section is differently worded and we can only construe it in accordance with the words used. It may not have been the intention of the Legislature to permit ryots in the position of the respondents to apply under this section. The marginal note reads : "Commutation by suit of rent payable in kind." The marginal note lends some support to Mr. Sitarama Rao's argument, but the argument cannot be accepted. The intention of the Legislature can, so far as the Court is concerned, be gathered only from the words used in the section when the words are free from ambiguity. They are

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free from ambiguity in this case and we consider that the Collector read them correctly.

The petition consequently fails and will be dismissed with costs. We fix the Advocate's fee at Rs. 100.

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### APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Patanjali Sastri.*

A. P. M. SYED IBRAHIM SAHIB AND BROTHER  
(APPELLANT), APPELLANT,

v.

V. S. GURULINGA AIYAR (RESPONDENT),  
RESPONDENT.\*

*Indian Partnership Act (IX of 1932), ss. 69 (2) and 74—  
Former section, if prevails over latter. Suit by firm to  
enforce rights which accrued before commencement of Act—  
Maintainability—Firm not registered.*

Section 69 (2) of the Indian Partnership Act of 1932, which requires a firm to be registered before instituting a suit to enforce rights, does not prevail over section 74 of that Act, which saves rights and remedies which existed before the Act came into force. Therefore a suit filed by a firm to enforce rights which accrued before the commencement of the Act can be maintained in spite of the non-registration of the firm.

The majority decision in *Girdharilal Son & Co. v. Kappini Gowder*(1) followed.

APPEAL under Clause 15 of the Letters Patent against the judgment of STODART J., dated 1st March 1937 and passed in Second Appeal No. 138 of 1936 preferred.

\* Letters Patent Appeal No. 74 of 1937.  
(1) (1938) 45 L.W. 81.

to the High Court against the decree of the Court of the Subordinate Judge of Vellore in Appeal Suit No. 97 of 1935 (Original Suit No. 716 of 1933, District Munsif's Court, Vellore).

*S. Ramachandra Ayyar* for appellant.

*K. Bhashyam* for *V. C. Veeraraghavan* for respondent.

The JUDGMENT of the Court was delivered by LEACH C.J.—The question which arises in this appeal is whether section 74 of the Indian Partnership Act, 1932, which saves rights and remedies which existed before the Act came into force, should be read as being subordinate to section 69 (2), which requires a firm to be registered before instituting a suit to enforce rights, or whether section 74 should prevail. The facts are simple. The appellant firm filed a suit in the Court of the District Munsif of Vellore claiming from the respondent a sum of Rs. 846-13-2 with interest. The respondent was in the employ of the appellant firm and was given charge of a branch office. It was said that he had overdrawn his account to the extent of the amount claimed. The defence was that the respondent was entitled to a share in the profits of the firm and that if the profits were taken into account there was no indebtedness. The firm had not been registered under the provisions of section 58 of the Partnership Act when the suit was filed, but during its pendency registration was effected. When the respondent discovered that the appellant firm had not been registered before the institution of the suit he applied for leave to amend his written statement and include a plea that the suit could not be maintained by reason of the non-compliance with the Act. The amendment was allowed and an additional issue was framed. The District

LEACH C.J.

IBRAHIM SAHIB  
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ISRAHIM SAHIB  
& BROTHERS  
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Munsif found that the respondent was indebted to the appellant firm in the amount claimed, but refused to grant a decree on the ground that the firm had not been registered before the plaint was filed. The suit was accordingly dismissed. The appellant firm appealed to the Subordinate Judge of Vellore, who concurred in the decision of the District Munsif. The appellant firm then appealed to this Court. The appeal was heard by STODART J., who also accepted the contention of the respondent that the suit was bad on account of the failure to register the firm before the suit was launched. The learned Judge, however, granted a certificate under Clause 15 of the Letters Patent and the question now comes before this Court for decision.

Section 69 (2) of the Partnership Act states that no suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against a third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm. Section 74, however, states that nothing in the Act or any repeal effected thereby shall affect or be deemed to affect, *inter alia*,

"(a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or (b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability or anything done or suffered before the commencement of this Act".

The question now under discussion arose in the case of *Girdharilal Son & Co. v. Kappini Gowder*(1) which came in the first instance before PANDRANG ROW and VENKATARAMANA RAO JJ. PANDRANG ROW J., having in mind the fundamental principle that existing rights

(1) (1938) 48 L.W. 81.

are not to be taken away except by an express enactment or by an enactment which clearly expresses this intention, held that section 69 (2) does not prevail over section 74 and that a suit filed by a firm to enforce rights which had accrued before the commencement of the Act could be maintained in spite of the non-registration of the firm. On the other hand VENKATARAMANA RAO J. considered that section 69 (2) must prevail and was apparently of the opinion that section 74 was merely inserted in order to save a suit which was pending at the time the Act came into force. As the result of the disagreement the case was re-argued before VARADACHARIAR J. who agreed with PANDRANG ROW J.

The opinion of PANDRANG ROW and VARADACHARIAR JJ. is supported by the decision of SULAIMAN C.J. in *Danmal Parshotamdas v. Baburam Chhotelal*(1), the decision of the Bombay High Court in *Revappa Nandappa v. Babu Sidappa*(2) and the decision of the Rangoon High Court in *In re Sooniram Ramniranjandas v. Junjilal*(3). In his judgment in *Revappa Nandappa v. Babu Sidappa*(2), BEAUMONT C.J. referred to *Girdharilal Son & Co. v. Kappini Gowder*(4) and concurred in the judgment of SULAIMAN C.J. in the Allahabad case. In the last-mentioned case BENNET J. was not in agreement with SULAIMAN C.J. He preferred the decision of the Calcutta High Court in *Surendranath De v. Manohar De*(5) where it was held that section 69 (2) would apply to suits for enforcement of claims which accrued before the commencement of the Act, if such suits were started after section 69 (2) had come into operation. The Calcutta High Court laid great stress on

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(1) (1935) I.L.R. 58 All. 495.

(2) I.L.R. [1939] Bom. 104.

(3) I.L.R. [1938] Ran. 371 (F.B.).

(4) (1938) 48 L.W. 81.

(5) (1934) I.L.R. 62 Cal. 213.

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the provision in the Act that section 69 (2) should not come into operation until twelve months after the rest of the Act had come into force. The Calcutta decision has been followed by the Patna High Court in *Shazad Khan v. Darbar Babu Kuchhi*(1) and by the Lahore High Court in *Krishnan Lal-Ram Lal v. Abdul Ghafur Khan*(2), but the judgments in those cases do not carry the matter any further. The majority decision of this Court in *Girdharilal Son & Co. v. Kappini Gowder*(3) is binding on us and the matter could be left there, but, as it has been suggested that we should refer the question to a Full Bench, I will set out our reasons for agreeing with it.

There is no ambiguity in the wording of section 74. It says definitely that nothing in the Act shall affect or be deemed to affect any right, title, interest, obligation or liability acquired or accrued before the commencement of the Act and that the Act shall not affect any legal proceeding in respect of any such right, title, interest, obligation or liability or anything done or suffered before the commencement of the Act. Therefore the rights and remedies which accrued before the commencement of the Act are left entirely untouched. Before the Act came into force there was no register and a firm therefore had the right to file a suit without any formalities other than those required by the Code of Civil Procedure and the Stamp Act. In the Calcutta case, *Surendranath De v. Manohar De*(4), it was suggested that the words "before the commencement of this Act" should be read in conjunction with the words "any legal proceeding or remedy", but, in our opinion, to do this would be doing violence

(1) (1936) I.L.R. 15 Pat. 810.

(3) (1938) 48 L.W. 81.

(2) (1935) I.L.R. 17 Lah. 375.

(4) (1934) I.L.R. 62 Cal. 213.

to the wording of the section. The section is a saving section and, if effect is to be given to the words used, section 69 (2) cannot apply in a case like the one before us.

After we had indicated our opinion on the question of law, the learned Advocate for the respondent suggested that we should send the case back to the Subordinate Judge for his finding on the issue as to the amount due to the appellant firm. This suggestion cannot be accepted. The District Munsif's findings of fact were not challenged before the Subordinate Judge. The appeal was confined to the question of law, and the respondent must therefore be deemed to have accepted the findings of the District Munsif. The Subordinate Judge has stated in his judgment that the respondent did not seem to have any real case on the merits and had not attacked the findings of the District Munsif. It is now too late to do so. The District Munsif has found that the appellant firm was entitled to a sum of Rs. 846-13-2 with interest at nine per cent per annum from 7th March 1934. Therefore there will be a decree in favour of the appellant firm for this amount with interest at the agreed rate from the date just mentioned to the date of the judgment of the District Munsif, namely 27th March 1935, with further interest at the Court rate on the decretal amount from that date until payment or realization. The appellant firm will also be entitled to costs throughout on the principal amount.

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## APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Patanjali Sastri.*

1939,  
March 15.

K. SUNDARESA IYER (PLAINTIFF), APPELLANT,

v.

THE SARVAJANA SOWKIARI VIRDHI NIDHI,  
LTD., BY SECRETARY P. S. MANIKKAM CHETTIAR,  
(DEFENDANT), RESPONDENT.\*

*Specific Relief Act (I of 1877), sec. 42 proviso Applicability—  
Property in custodia legis Declaration of title to Suit for  
—Consequential relief Prayer for Necessity.*

S obtained possession of certain jewels from their owner, the appellant (who was desirous of selling them), on the representation that he knew of a prospective purchaser to whom he desired to show the jewels. Having obtained possession of the jewels S pledged them with the respondent company. The appellant complained to the police and as the result S was charged with and convicted of criminal breach of trust by the Magistrate who directed the jewels to be returned to the respondent company on security being furnished. That order of the Magistrate was set aside on appeal by the Sessions Judge who directed the jewels to be delivered to the appellant unconditionally. In accordance with the order of the Sessions Judge the appellant obtained possession of the jewels on 21st December 1932. The order of the Sessions Judge was, however, set aside in revision by the High Court which directed that the jewels should be delivered to the respondent company. The appellant did not obey the order and on an application made by the respondent company the Magistrate issued a summons to the appellant calling upon him to produce and surrender the jewels. This he did on 11th June 1934, but on the same day he filed a suit in the Court of the District Munsif for a declaration that he was the absolute owner of the jewels, and obtained an interim order from the District Munsif directing the Magistrate to deposit the jewels

\* Letters Patent Appeal No. 80 of 1937.

in the District Munsif's Court pending the decision of the suit. The Magistrate complied with that order and the jewels subsequently remained in the District Munsif's Court.

*Held*, reversing the Courts below which had dismissed the suit on the ground that, as no consequential relief had been asked for, it could not be maintained in view of the proviso to section 42 of the Specific Relief Act, that it was not necessary for the appellant to ask for anything more than a mere declaration and that the suit as framed was maintainable.

At the time of the institution of the suit the jewels were in the possession of the Magistrate and therefore *in custodia legis* and have remained *in custodia legis*. The Court must deliver them to the person who shows a title.

*Sunder Singh-Mallah Singh Sanatan Dharam High School Trust, Indaura v. The Managing Committee, Sunder Singh-Mallah Singh Rajput High School, Indaura*(1), *Vedanayaga Mudaliar v. Vedammal*(2) and *Makiyya Pillai v. Perumal Pillai*(3) followed.

*Natesa Ayyar v. Mangalathummal*(4) disapproved.

APPEAL preferred under Clause 15 of the Letters Patent against the judgment and decree of HORWILL J. dated 10th September 1937 and passed in Second Appeal No. 1144 of 1936 preferred against the decree of the Court of the Subordinate Judge of Coimbatore in Appeal Suit No. 128 of 1936 (Original Suit No. 507 of 1934, District Munsif's Court, Coimbatore).

*K. Rajah Ayyar and C. S. Krishnamurti Ayyar* for appellant.

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

The JUDGMENT of the Court was delivered by LEACH C.J.—The appellant filed a suit in the Court of the District Munsif of Coimbatore for a declaration that he was the absolute owner of certain jewels. At the time of the suit the jewels were in the possession

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(1) I.L.R. [1938] Lah. 63 (P.C.).  
(3) (1911) I.L.R. 36 Mad. 62.

(2) (1904) I.L.R. 27 Mad. 591.  
(4) (1933) 38 L.W. 194.

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of the Court of the Sub-Divisional First Class Magistrate of Coimbatore. No consequential relief was asked for, and the question which we are called upon to decide is whether the suit could be maintained in view of the proviso to section 42 of the Specific Relief Act, which says that no Court shall make a declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. In 1932 the appellant was desirous of selling the jewels and he was approached by one Subba Rao, who represented that he knew of a prospective purchaser. On the representation that he desired to show the jewels to the prospective purchaser the appellant handed them over to him. This was on 3rd July 1932. Having obtained possession of the jewels Subba Rao pledged them for a total sum of Rs. 1,000 with the respondent company, which carries on a banking business in Coimbatore. When the appellant came to hear of this, he complained to the police and as the result Subba Rao was charged with criminal breach of trust under section 409 of the Indian Penal Code. On 26th October 1932 Subba Rao was convicted and sentenced to two years' rigorous imprisonment by the Sub-Divisional Magistrate, who directed that the jewels should be returned to the respondent company on security being furnished. The appellant appealed to the Additional Sessions Judge of Coimbatore against the order of the Sub-Divisional Magistrate. The appeal was allowed and the Additional Sessions Judge directed that the jewels should be delivered to the appellant unconditionally. In accordance with this order the appellant obtained possession of the jewels from the Sub-Divisional Magistrate on 21st December 1932. In the meantime the respondent company had filed an application to this Court for the revision

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of the order of the Additional Sessions Judge. The application was heard on 10th August 1933 and was successful. This Court directed that the jewels should be delivered to the respondent company. The appellant did not obey the order and the respondent company was compelled to apply to the Sub-Divisional Magistrate to enforce it. The Sub-Divisional Magistrate accordingly issued a summons to the appellant calling upon him to produce and surrender the jewels. This the appellant did on 11th June 1934, but on the same day filed the suit out of which this Letters Patent Appeal arises, and obtained an interim order from the District Munsif directing the Sub-Divisional Magistrate to deposit the jewels in the District Munsif's Court pending the decision of the suit. The Sub-Divisional Magistrate complied with this order and the jewels have since remained in the District Munsif's Court.

In the written statement the respondent company pleaded that it was a pledgee of the jewels in good faith and was entitled to the benefit of the pledge by reason of the provisions of sections 178 and 178-A of the Indian Contract Act. The respondent company also pleaded that the suit was bad because the appellant had omitted to include in his plaint a prayer for possession of the jewels. The District Munsif found that the respondent company had accepted the pledge of the jewels in good faith and that it was protected by sections 178 and 178-A of the Contract Act, but dismissed the suit on the ground that the appellant was not entitled to maintain it without a prayer for consequential relief. The appellant appealed to the Subordinate Judge of Coimbatore who considered that the respondent company had not acted in good faith and therefore was not entitled to

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the benefit of the pledge, but he agreed with the District Munsif that the suit was not maintainable in view of the proviso to section 42 of the Specific Relief Act. The result was that he affirmed the decree dismissing the suit. The appellant then filed an appeal to this Court. This was heard by HORWILL J. who also held that the suit was not maintainable without a prayer for consequential relief.

The learned Judge discussed the decisions of this Court in *Vedanayaga Mudaliar v. Vedammal*(1), *Malaiyya Pillai v. Perumal Pillai*(2) and *Natesa Ayyar v. Mangalathammal*(3) and came to the conclusion that the law was correctly stated in the case last mentioned. We do not share this opinion, but, before examining the cases cited, there is an earlier decision of this Court which calls for mention, namely, the decision of TURNER C.J. and MUTTUSWAMI AYYAR J. in *Ramanuja v. Devanayaka*(4). In that case TURNER C.J. observed :

"Possession, whether it is of property or of an office, may be regarded either as a physical fact, or in contemplation of the legal right to it, and it is in the former sense it should be understood in coming to a finding under section 42 of the Specific Relief Act, as to whether the plaintiff is, or is not, able to seek further relief. It may be observed that the term relief presupposes the actual withholding of the fruit of the right of which a declaration is sought, and not its mere denial. A declaratory decree is all that a plaintiff requires when he has no need of the assistance of the Court to replace him in possession."

In our opinion the law is here correctly stated.

In *Vedanayaga Mudaliar v. Vedammal*(1) the facts were these. A minor was entitled to a certain property which was in the possession of his mother. The

(1) (1904) I.L.R. 27 Mad. 591.  
(3) (1936) 38 L.W. 194.

(2) (1911) I.L.R. 36 Mad. 62.  
(4) (1885) I.L.R. 8 Mad. 261.

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plaintiff filed an application under the Guardians and Wards Act for an order appointing him guardian of the property of the minor. Pending the hearing of this application he was appointed the receiver of the property and in this capacity he took possession of it from the mother. The validity of the order appointing the plaintiff receiver was challenged in an appeal to this Court, which held that the order had been wrongly passed and directed that the mother should be replaced in possession of the property. The minor was murdered and the receiver filed a suit for a declaration that he was entitled to the property of the minor as the nearest reversioner. The mother pleaded that the suit could not be maintained without a prayer for possession, but the Court held that the suit was maintainable. At the time the suit was filed the possession of the property was neither with the plaintiff nor with the mother, but was in *custodia legis*. As the possession was the possession of the Court all that was necessary was a declaration of title. That seems to us to be exactly the position here.

In *Malaiyya Pillai v. Perumal Pillai*(1) it was held that before the proviso to section 42 of the Specific Relief Act applied it must be shown that the defendant was in possession, and that as against him the plaintiff could obtain an order for delivery of possession. In that case proceedings were taken under sections 145 and 146 of the Code of Criminal Procedure and a receiver was appointed to hold possession of the property in dispute. The order was subsequently cancelled by this Court and the receiver was directed to deliver possession to the defendant. At the time the suit was filed the property was still in the possession

(1) (1911) I.L.R. 36 Mad. 62.



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of the receiver. It was held that in such circumstances there was no necessity to claim consequential relief. This decision is in complete accord with the decision in *Vedanayaga Mudaliar v. Vedammal*(1). These appeals were heard by Division Benches and are binding on us. But there is also a decision of the Privy Council to the same effect; *Sunder Singh-Mallah Singh Sanatan Dharam High School Trust, Indaura v. The Managing Committee, Sunder Singh-Mallah Singh Rajput High School, Indaura*(2). The suit there had reference to a school. At the time the suit was filed the school was in the possession of the founder, who was merely holding it until certain disputes had been decided by the Court. He was willing to hand the property over to those declared to be entitled to it. The plaintiffs merely asked for a declaratory decree. The Subordinate Judge considered that it was necessary to ask for possession, his reason being that the plaintiffs were neither in possession nor in control of the management of the school. As a decree for possession was not sought, he dismissed the suit. On appeal the High Court held that the Subordinate Judge was wrong. The defendants were not in possession or in a position to deliver possession of the properties and there was no further relief available to the plaintiffs against the defendants. The Judicial Committee agreed with the High Court.

I will now state the facts in *Natesa Ayyar v. Mangalathammal*(3). There the plaintiff was the widow of one Viswanatha Ayyar, who was also survived by his father and a brother. A mortgage had been executed in favour of the plaintiff's husband and on his death his father brought a suit on the mortgage

(1) (1904) I.L.R. 27 Mad. 591. (2) I.L.R. [1938] Lah. 63 (P.C.).  
(3) (1933) 38 L.W. 194.

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and obtained a decree, as a result of which certain moneys were brought into Court towards the satisfaction of the decree. The father instituted a suit as manager of the joint family and claimed that the mortgage formed part of the joint estate. The father died without withdrawing the moneys from Court and the surviving son then applied for payment out to him of the moneys as the legal representative of his father. The plaintiff objected to this and claimed that the mortgage was the separate property of her husband. She then filed a suit to obtain a declaration of her right to the moneys. PAKENHAM WALSH J. held that a prayer for consequential relief was essential. He considered that the case was distinguishable from *Vedanayaga Mudaliar v. Vedammal*(1) and *Malaiyya Pillai v. Perumal Pillai*(2). It is true that the decision in *Natesa Ayyar v. Mangalathammal*(3) was accepted as being correct in a Letters Patent Appeal which followed, but no reasons were given in the judgment. We do not agree that *Natesa Ayyar v. Mangalathammal*(3) was distinguishable. The question which arose there was really the same question which arose in *Vedanayaga Mudaliar v. Vedammal*(1) and in *Malaiyya Pillai v. Perumal Pillai*(2) and, if they were rightly decided, *Natesa Ayyar v. Mangalathammal*(3) was wrongly decided. Inasmuch as the judgment of PAKENHAM WALSH J. was approved of on appeal we have been asked to refer the present appeal to a Full Bench. It is not necessary to do so as the judgment of the Privy Council in *Sunder Singh-Mallah Singh Sanatan Dharam High School Trust, Indaura v. The Managing Committee, Sunder Singh-Mallah Singh Rajput High School, Indaura*(4) shows that *Vedanayaga*

(1) (1904) I.L.R. 27 Mad. 591.  
(3) (1933) 38 L.W. 194.

(2) (1911) I.L.R. 36 Mad. 62  
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*Mudaliar v. Vedammal*(1) and *Mulayya Pillai v. Perumal Pillai*(2) were rightly decided.

The fact that when the present suit was filed the jewels were in the possession of the Sub-Divisional Magistrate, who as the result of the decision of this Court in the revision application was bound to hand them to the respondent company unless otherwise directed, makes no difference. All the Court has to consider is, who has possession. The jewels have not been in the possession of the respondent company since 21st December 1932. At the time of the institution of the suit the jewels were *in custodia legis* and have remained *in custodia legis*. The Court must deliver them to the person who shows a title. Therefore it was not necessary for the appellant to ask for anything more than a mere declaration. The appeal will be allowed and a decree passed in terms of the prayer with costs throughout.

A.S.V.

(1) (1904) L.L.R. 27 Mad. 591. (2) (1911) L.L.R. 36 Mad. 62.

# APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and  
Mr. Justice Somayya.

VIJAYATHEN SRÉEDEVY alias KOZHICKOTE KISHAKKE  
KOVILAGATH VALIA THAMBURATTI (SECOND  
APPELLANT), APPELLANT,

1939,  
February 21.

v.

AYDROSS KURTKKAL AND ANOTHER (RESPONDENTS),  
RESPONDENTS.\*

*Malabar Compensation for Tenants' Improvements Act (I of 1900), ss. 10 and 19—Trees spontaneously grown during tenancy—Felling by tenant of—Full compensation to landlord for—Payment of—Agreement between landlord and tenant as to—Precluded by Act, if—Felling not an improvement to the estate—Waste committed by tenant—Landlord's right to compensation for—Effect of Act upon.*

A kanam demise of certain lands in Malabar executed in 1923 provided that if the tenant cut trees, such as teak, etc., from the lands without obtaining the written consent of the landlord, he should be answerable for the costs of such trees and should surrender the property irrespective of the twelve years' term if the landlord demanded it. The landlord sued to recover from the tenant a sum representing a claim for damages for the wrongful felling of a number of teak trees growing on the property. The twelve years' period had expired, but the tenant was still in possession of the property. It was either admitted or found that the said trees had not been sown by the tenant but had grown spontaneously, that the tenant had cut down the trees for the purpose of selling the timber for his own benefit and had sold it for his own benefit and that the landlord's claim for compensation did not exceed the value of the trees as timber.

*Held*: The Malabar Compensation for Tenants' Improvements Act, 1899, does not preclude a landlord and a tenant from agreeing that the tenant shall pay full compensation

\* Letters Patent Appeal No. 18 of 1937.

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when he fells trees spontaneously grown during the tenancy and the felling does not constitute an improvement to the estate and the landlord was therefore entitled to recover from the tenant the full value of the timber felled by him.

The landlord's right to compensation for waste committed by the tenant is left unaffected by the Malabar Compensation for Tenants' Improvements Act. Even if, in the present case, the tenant had not sold the timber his action in felling the trees would still be waste as it did not lead to an improvement to the estate.

Scope and effect of section 19 of the Act explained.

*Raja of Cochin v. Kittunni Nair*(1) explained and distinguished.

*Kelu Nair v. Valia Thamburatti*(2) relied upon.

APPEAL under Clause 15 of the Letters Patent from the judgment of VENKATARAMANA RAO J., dated 20th November 1936 and passed in Second Appeal No. 1853 of 1931 preferred to the High Court against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in Appeal Suit No. 200 of 1930 preferred against the decree in Original Suit No. 316 of 1929, District Munsif's Court, Manjeri.

*K. P. Ramakrishna Ayyar* for appellant.

*N. R. Sesha Ayyar* for respondents.

#### JUDGMENT.

LEACH C.J.

LEACH C.J.—The appellant was the plaintiff in the suit out of which this appeal arises. She is the owner of certain lands in Malabar and in 1923 executed a kanom demise of the lands in favour of the respondent, who executed a counter-part (kychit). The demise, which was a renewal of an earlier demise, was for the usual period of twelve years. Although this period has expired, the respondent is still in possession of the property. The suit was filed by the appellant to

(1) (1916) I.L.R. 40 Mad. 603 (F.B.). (2) (1922) 16 L.W. 310.

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recover a sum of Rs. 643 from the respondent. Of this amount Rs. 37-7-7 was claimed on the ground that the appellant had been compelled to pay to Government the land revenue owing to default by the respondent. The demise provided that the land revenue should be paid by the tenant. The balance of the claim, Rs. 605-8-5, represented a claim for damages for the wrongful felling of twenty-five teak trees growing on the property. It is common ground that the trees had not been sown by the tenant, but had grown spontaneously. It is also common ground that the appellant's claim for compensation did not exceed the value of the trees as timber. The kanom demise contained the following clause :

"If I cut trees such as veciti, teak, jack, etc., from the parambas without obtaining the written consent of the kovilagam, I shall be answerable for the costs of such trees and shall surrender the properties irrespective of the twelve years' term if the kovilagam demands it."

The appellant contended that by virtue of this clause she was entitled to recover the full value of the trees, there being nothing in the Malabar Compensation for Tenants' Improvements Act, 1899, to deprive her of this right.

The case was tried by the District Munsif of Manjeri, who found that the respondent had not defaulted in the payment of land revenue and dismissed the suit so far as this claim was concerned. He held that the appellant was entitled to compensation for the trees which the respondent had cut down, but limited the amount to Rs. 37-8-0, which represents eight annas per tree. The appellant accepted the decision of the District Munsif so far as it concerned the claim in respect of the money paid to Government, but appealed to the Subordinate Judge of Calicut against the finding of the District Munsif that she was only entitled

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to compensation at the rate of eight annas per tree. While holding that the appellant was entitled to an amount of compensation larger than that awarded by the District Munsif, the Subordinate Judge refused to accept the contention that she was entitled to the full value of the trees. He held that the appellant was entitled to Rs. 187-8-0 being a quarter of the amount claimed. In arriving at this decision the Subordinate Judge apparently had regard to the provisions of section 10 of the Malabar Compensation for Tenants' Improvements Act. The appellant then appealed to this Court. The appeal was heard by VENKATARAMANA RAO J., who refused to interfere with the decree of the Subordinate Court. The learned Judge considered that the provisions in the kanom demise for the payment of the full value of the trees was penal and contrary to section 19 of the Act. In his opinion the appellant was only entitled to "reasonable" compensation and the amount awarded by the Subordinate Judge was reasonable.

The question which falls for decision is whether the Act precludes a landlord and a tenant from agreeing that the tenant shall pay full compensation when he fells trees spontaneously grown during the tenancy and the felling does not constitute an improvement to the estate. The scheme of the Act is to provide for compensation being paid to a tenant for improvement when he is required to quit the land held by him. The main sections relating to the payment of compensation are sections 9, 10, 13 and 19. Section 9 relates to an improvement producing an increase in the value of the annual net produce. When the improvement is not an improvement to which section 13 applies and has caused an increase in the value of the annual net produce of the holding, the Court shall

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determine, as nearly as may be, the average net money value of the increase and the number of years during which the increase may reasonably be expected to continue, and shall then ascertain the present value "at six per cent of an annuity equal to such money value for such number of years" and shall also determine the cost of making the improvement. If the present value of the annuity does not exceed the cost of making the improvement, the present value shall be the compensation to be awarded. If the present value of the annuity exceeds the cost of making the improvement, the compensation to be awarded shall be the cost together with one-half of the excess. Section 10 deals with the case where the improvement is not an improvement within the meaning of section 9, but consists of timber trees or other useful trees or plants spontaneously grown during the period of the tenancy or sown or planted by the tenant, or any of the other persons mentioned in section 5. Where the improvement is of the nature contemplated by section 10, the compensation to be awarded shall be three-fourths of the sum which the trees or plants might reasonably be expected to realize, if sold by public auction to be cut and carried away. Therefore, under this section, if at the end of the tenancy there are trees which have spontaneously grown or been sown by the tenant, the tenant gets three-fourths of the value of such trees as timber and the landlord one-fourth. By virtue of section 13 when the improvement consists in the protection and maintenance of timber or fruit trees or of other useful trees or plants not sown or planted by the tenant or of such trees or plants spontaneously grown prior to the commencement of the tenancy, the compensation to be awarded shall be the proper cost of the protection and maintenance.

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Section 19 says that nothing in any contract made after the first day of January 1886 shall take away or limit the right of a tenant to make improvements and to claim compensation for them in accordance with the provisions of the Act. As I have already indicated, the learned Judge, in holding that the appellant was not entitled to the full value of the timber felled by the respondent, relied on this section. I fail, however, to see how section 19 can apply to a case like the present one. The section merely prevents a tenant from entering into a contract which takes away or limits his right to make improvements and on the termination of the tenancy to claim compensation for them in accordance with the Act. When the tenant is required to quit, his landlord must pay him three-quarters of the value of the trees which have grown spontaneously, but that does not mean that the tenant is entitled to commit waste, and the respondent here committed waste. It was the appellant's case that the respondent had deliberately cut the timber for the purpose of selling it to a timber merchant. Before giving his decision VENKATARAMANA RAO J. called for a finding on the question whether the felling of the trees was in itself an act of improvement within the meaning of the Act. He also called for a finding whether the felling was for the purpose of building farm houses or making any other improvements. The Subordinate Judge recorded evidence and answered the questions in the negative. It was not necessary for him to hold that the respondent had cut down the trees for the purpose of selling the timber for his own benefit and he confined his findings to the wording of the issues framed by VENKATARAMANA RAO J. Before us the learned Advocate for the respondent conceded that the trees were

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felled and that the timber was sold by the respondent for his own benefit. He, however, contended that the respondent was entitled in law to do this. This argument cannot be maintained, as the landlord's right to compensation for waste committed by the tenant is left unaffected by the Act. Even if the respondent had not sold the timber, his action in felling the trees would still be waste as it did not lead to an improvement to the estate.

The learned Judge in the course of his judgment discussed at length the decision of this Court in *Raja of Cochin v. Kittunni Nair*(1). In that case the following question was referred to a Full Bench for decision :

"Whether a provision in a Malabar lease that a tenant shall pay kuttikanom or some fee to his landlord in respect of trees cut down is contrary to the provisions of section 19 of the Malabar Compensation for Tenants' Improvements Act ?"

The Full Bench consisted of WALLIS C.J. and ABDUR RAHIM, OLDFIELD, SRINIVASA AYYANGAR and PHILLIPS JJ. They all answered the question in the negative. By kuttikanom is meant a customary fee of eight annas per tree or some such sum as may be agreed upon. It is common ground that the word "kuttikanom" only implies the payment of a small charge per tree felled. This case is, therefore, an authority for the proposition that section 19 of the Act does not prevent the parties from entering into an agreement by which the tenant shall pay a small fee in the event of trees being felled by him for the purpose of making an improvement. The judgment in *Raja of Cochin v. Kittunni Nair*(1) did not deal with the position where the felling is not for an improvement, but for the tenant's own purposes. VENKATARAMANA RAO J. considered that the Court dealt with the question on

(1) (1916) I.L.R. 40 Mad. 603 (F.B.).

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the footing that the felling of trees was not an improvement, but this is not so. The Court was only concerned with the case of felling of trees for the purpose of improvement and deciding whether in such a case the landlord was entitled to be paid a small fee in respect of each tree felled notwithstanding the provisions of section 19. The judgment does not support the judgment now under appeal.

The right of a landlord and a tenant to agree upon the terms of the tenancy can only be limited by statute. The agreement entered into by the parties in this case does not run contrary to the Transfer of Property Act or the Contract Act, and, unless there is a provision in the Malabar Compensation for Tenants' Improvements Act which prevents the appellant from recovering from the respondent the full value of the timber felled by him, the appellant is entitled to succeed. There is clearly no such limitation in the Act and therefore I hold that the appellant is entitled to the full amount of the compensation claimed by her.

I am supported in my opinion by the judgment of RAMESAM J. in *Kelu Nair v. Valia Thamburatti*(1), a case in which the landlord was allowed the full amount claimed by him as compensation in respect of trees felled by the tenant. RAMESAM J. dealt with the case where the act of felling of trees was an act of improvement and the case where it was not. In the first case the imposition of a small kuttikanom fee would, he said, relying on the decision of the Full Bench in *Raja of Cochin v. Kittunni Nair*(2), not contravene the provisions of section 19; but if the fee imposed was the full value of the trees it would, he said, contravene the section. In a case falling in the second category there was nothing which contravened the provisions of

(1) (1922) 16 L.W. 310.

(2) (1916) I.L.R. 40 Mad. 603 (F.B.).

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section 19 in charging the full value. An examination of the record in the case decided by RAMESAM J. discloses the fact that the clause in the kanom demise there was of the same nature as the clause in this case.

Apart from there being no statutory prohibition of such a clause it is only right that a landlord should be allowed to make a stipulation for the payment of the full value when the felling is not an improvement within the meaning of the Act. If the trees were allowed to grow to maturity the landlord would be entitled to one-fourth of the value of the matured trees at the termination of the tenancy. The felling of trees before reaching maturity would clearly affect his pocket. The Court is only concerned here with the felling of trees spontaneously grown during the tenancy and my observations are limited to a case like the present one.

For the reasons indicated I would allow the appeal and grant a decree for the full value of the timber, namely Rs. 605-5-5, with costs here and below on this amount.

SOMAYYA J.—I agree.

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## APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice  
Krishnaswami Ayyangar.

1938,  
September 2. MINOR MINAKSHI IYER BY NEXT FRIENDS, (1) MANICKA  
GOPALA AYYAR AND (2) S.R.M. SITARAMA AYYAR,  
(PETITIONER), APPELLANT,

v.

NOOR MUHAMMAD ROWTHER AND NINE OTHERS (RES-  
PONDENTS NOS. 1, 2 AND 6 TO 12 AND PARTY NEWLY  
ADDED), RESPONDENTS.\*

*Code of Civil Procedure (Act V of 1908), O. XXI, r. 52—Fund in custody of Court—Dispute as to title to, between decree-holder in suit in which fund realised and attaching decree-holder in another suit decree in which transmitted to custody Court for execution—Determination by custody Court of, if must be in suit in which fund realised—Determination of dispute by it in suit decree in which is transmitted to it for execution—Permissibility—Attaching decree-holder under transmitted decree aggrieved by determination—Appeal by, under section 47, Civil Procedure Code, against adverse order—Right of—Execution—Questions of benami in—Power of Court to go into.*

In Original Suit No. 33 of 1924 on the file of the Sub-Court of Kumbakonam in which a decree had been passed in favour of K, a sum of Rs. 2,983-2-6 was deposited into Court to the credit of that suit by the judgment-debtors therein. The appellant, who held a decree for money against the heirs of A passed by the Sub-Court of Ramnad in Original Suit No. 32 of 1925 and transmitted for execution to the Sub-Court of Kumbakonam, filed an execution petition in the latter Court for the attachment of the said sum of Rs. 2,983-2-6, alleging that it was an asset of A and that it really belonged to his heirs and K was only a benamidar for the latter, and an attachment was made. The legal representatives of K, who had died in the interval, filed an execution application contesting the attachment on the ground that the sum in question

\* Appeals Against Orders Nos. 420 and 421 of 1935.

belonged to them and not to A's heirs. The Subordinate Judge who heard both the petitions together dismissed the appellant's petition and allowed the application of the legal representatives of K, the respondents, holding that the amount in question belonged to K and not to A's heirs and that in any event he could not, as an executing Court, go into the question whether the fund in Court belonged to A's heirs and only stood benami in the name of K. The orders were made in Original Suit No. 32 of 1925 and the appellant appealed to the High Court against the same. A preliminary objection was taken to the maintainability of the appeals on the ground that the Sub-Court of Kumbakonam was the custody Court only in respect of Original Suit No. 33 of 1924 and had jurisdiction to determine the question in dispute only in that suit and not in Original Suit No. 32 of 1925 in which the appellant was seeking execution, that even if the Sub-Court purported to deal with the question in the latter suit it must be deemed to have done so only in the former and the orders under appeal must be deemed to have been made therein, and that the appellant not being a party to Suit No. 33 of 1924 had no right of appeal from the said orders.

*Held* that section 47, Civil Procedure Code, was applicable to the case and the appellant had a right of appeal.

The orders were made in Suit No. 32 of 1925 and were allowed to be so made without any objection by the respondents. It is now too late to permit the preliminary objection, which is a purely technical one. Further, all that Order XXI, rule 52, Civil Procedure Code, directs is that the custody Court should be the Court to determine the dispute and the lower Court had sufficient jurisdiction as it had the fund in its custody. There is no warrant in the Code for holding that the dispute must be or must be deemed to have been dealt with and determined only in the one suit rather than in the other, so long as it is the custody Court that has enquired into it.

*Held further* that it was open to the Court below to go into the question whether the fund in Court really belonged to A's heirs and only stood benami in the name of K.

Observations in *Palaniappa Chettiar v. Subramania Chettiar*(1) dissented from, if by them it was intended to lay

(1) (1924) I.L.R. 48 Mad. 553, 558, 559.

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down as a universal rule that it is not open to the Court in execution to enquire into questions of benami and adjust the rights of parties according to its findings.

APPEALS against the orders of the Court of the Subordinate Judge of Kumbakonam dated 8th August 1935 and made respectively in Execution Petition No. 172 of 1929 and Execution Application No. 163 of 1930 in Original Suit No. 32 of 1925 (Sub-Court, Ramnad).

*S. Panchapagesa Sastri* and *R. Krishnaswami Ayyangar* for appellant.

*A. Viswanatha Ayyar* for *A. Sundaresan* for tenth respondent.

*S. Hanumantha Rao*, Court guardian for respondents 2, 5, 6, 7 and 9.

Other respondents were unrepresented.

*Cur. adv. vult.*

The JUDGMENT of the Court was delivered by KRISHNASWAMI AYYANGAR J.—The disputes which have given rise to these appeals relate to a fund in Court standing to the credit of Original Suit No. 33 of 1924 on the file of the Sub-Court, Kumbakonam. It is a sum of Rs. 2,983-2-6 representing the value of the share of one Adamsa Rowther in a rice mill situated in Pandaravadai village. Adamsa died in 1919 involved in debts, but he had left considerable properties in and round Pandaravadai. He appears to have carried on a business in Saramban in the Federated Malay States which was after his death taken over by his son-in-law, Abdul Rahiman, and continued by him. Kadir Bacha was a brother of Adamsa who has figured prominently in the arrangements made by Adamsa's heirs for the discharge of his debts. These heirs were Noor Mahomed and Mahomed Ibrahim his sons, Mohideen Bivi a daughter, and Zuleka Bivi

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his second wife. A major portion of his properties was transferred by them to their uncle Kadir Bacha on 28th May 1922 by a deed which shows that, except for a comparatively small amount, the consideration of Rs. 35,000 was the undertaking by the transferee to pay and discharge the debts of the deceased. There were also certain other transfers by the heirs, but for the purpose of these appeals it will be sufficient if we refer in particular to the one on 5th August 1923 of Adamsa's interest in the rice mill to his son-in-law Abdul Rahiman. It may at once be mentioned that this transfer is attacked by the appellant in Civil Miscellaneous Appeal No. 420 of 1935 as a nominal one, not intended to pass title to the property but brought about solely for the purpose of screening it from the creditors and for the secret benefit of the heirs.

At the time of this transfer there were admittedly disputes regarding the rice mill, Adamsa's heirs claiming his half share, his partner Mandia Esumsa vigorously denying it. After his purchase, steps were apparently taken by Abdul Rahiman to assert his rights against Esumsa, and they resulted in criminal proceedings between the parties which were finally settled by a reference to arbitration. An award was made on 9th December 1923 by which Esumsa and his son were directed to pay a sum of Rs. 3,000 and odd to Abdul Rahiman. This amount was however not paid, and it therefore became necessary for Abdul Rahiman to institute Original Suit No. 33 of 1924 for the recovery of the money. While the suit was pending, Mohideen Bivi, his wife, died and thereafter the feelings between him and her brothers became strained, so much so that Noor Mahomed felt it necessary to institute criminal proceedings against Abdul Rahiman. These proceedings, it is clear from the complaint Ex. QQ,



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had reference to a claim against Abdul Rahiman due to a withholding by him of certain valuable securities appertaining to Adamsa's estate including a business letter relating to a rice mill in India which was obviously none other than the mill at Pandaravadai. A settlement was ultimately arrived at on 16th March 1927 evidenced by a writing Exhibit PP signed by Abdul Rahiman, Noor Mahomed and Kadir Bacha. By it Abdul Rahiman undertook to pay Rs. 1,000 and \$50 to Noor Mahomed in full settlement of the promissory note and dealings of Adamsa and to give a transfer of the rice mill in favour of Kadir Bacha, who was at this date on terms of cordiality with Noor Mahomed. In pursuance of this compromise, Abdul Rahiman executed the transfer on 17th March 1927 conveying his interest in the rice mill then under litigation in Original Suit No. 33 of 1924 for an alleged consideration of Rs. 3,000. Thereupon, Kadir Bacha brought himself on the record in place of Abdul Rahiman, and finally obtained a decree by consent for a sum of Rs. 2,900, against which a sum of Rs. 2,983-2-6 was deposited into Court on 29th October 1929 by the judgment-debtors but not before the issue of process in execution. As we have said the true ownership of this fund is the question that has to be decided in the appeals. Kadir Bacha having died on 29th November 1929 his heirs claimed payment to themselves. This claim is opposed by Minakshi Ayyar who is the appellant in Civil Miscellaneous Appeal No. 420 of 1925.

Minakshi Ayyar's claim arises out of an attachment of the identical fund in execution of the decree obtained by him in Original Suit No. 32 of 1925 on the file of the Sub-Court at Ramnad. This suit was one filed by his father Ayyavu Ayyar for the recovery

of a sum of Rs. 16,000 or thereabouts due on dealings between him and the deceased Adamsa. The heirs of Adamsa as also his brother Kadir Bacha were joined as defendants, the claim so far as the latter was concerned being based on his undertaking to pay a sum of Rs. 5,500 to Ayyavu Ayyar contained in the sale deed of 28th May 1922 already referred to. On the death of Ayyavu Ayyar pending the suit, Minakshi Ayyar, his minor son, was substituted in his place. On 10th September 1927 a decree for Rs. 16,369-5-6 was passed against the heirs of Adamsa, and for a portion of it, viz., for Rs. 7,788-14-0, Kadir Bacha was made liable. Kadir Bacha discharged his liability by payment of a sum of Rs. 9,945-14-0 into Court, part of the sale proceeds of a property which he had purchased from Adamsa's heirs as already mentioned. There still remained a balance of over Rs. 11,000 to be realized, and execution of the decree had therefore to be taken out. There was first a transmission of the decree to the Tanjore Sub-Court, and later the decree was transferred to the Sub-Court, Kumbakonam, the very Court which held in its custody, though to the credit of a different suit, namely, Original Suit No. 33 of 1924, the sum of Rs. 2,983-2-6 referred to above. Execution Petition No. 172 of 1929 is the execution petition of Minakshi Ayyar, seeking attachment and payment out of the money as being an asset of Adamsa on the allegation that the transfer first to Abdul Rahiman and afterwards to Kadir Bacha was not supported by consideration and was but an attempt by Noor Muhammad and the other heirs of Adamsa to keep the property in the names of relations, so as to evade the creditors and secure it for themselves after the disputes were over. An attachment was accordingly made on 9th October 1929. The opposing

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claimants were the legal representatives of Kadir Bacha—he seems to have died on 29th November 1929—who filed Execution Application No. 163 of 1930 contesting the attachment on the ground that the fund in Court absolutely belonged to them and not to Adamsa's heirs who had according to them no interest whatever in it. The Subordinate Judge who heard both the petitions together has dismissed Execution Petition No. 172 of 1929 and allowed Execution Application No. 163 of 1930, holding that both the transfers, the first to Abdul Rahiman and the second in favour of Kadir Bacha, were real and not merely colourable transactions, and that the money truly belonged to Kadir Bacha and, after his death, to his heirs who have since sold their right to one Dawood Mohideen. Minakshi Ayyar, the decree-holder, has preferred these appeals, Civil Miscellaneous Appeals Nos. 420 and 421 of 1935, against the said order.

This is a somewhat long narrative, but it is necessary to set it out in order to understand the nature of the disputes. It will be seen that the lower Court as the custody Court held the fund to the credit of Original Suit No. 33 of 1924 and was at the same time moved to execute the decree in Original Suit No. 32 of 1925 passed by the Ramnad Sub-Court but transmitted to it for execution. A preliminary objection to the maintainability of these appeals was taken by the respondents' learned Advocate. The argument, if we followed it rightly, was this. Under Order XXI, rule 52, Civil Procedure Code, any question of title or priority between the decree-holder and any other person not being the judgment-debtor claiming to be interested in the attached property by virtue of any assignment, attachment or otherwise has to be determined by the custody Court. It was said that the

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Kumbakonam Sub-Court which was the custody Court had no doubt jurisdiction to determine the question but it could do so only in Original Suit No. 33 of 1924 in which the money was realized and brought into Court, and not in Original Suit No. 32 of 1925 in which the appellant was seeking execution. Even if the Court purports to have dealt with it in Original Suit No. 32 of 1925 it must be deemed to have done so only in Original Suit No. 33 of 1924 as it is in respect of that suit alone the Court can be regarded as the custody Court. Proceeding on this footing it was next urged that the order under appeal must be deemed to have been made in Original Suit No. 33 of 1924, a suit to which neither Minakshi Ayyar nor his father, Ayyavu Ayyar, was a party, for the purpose of section 47, Civil Procedure Code, and, not being a party, he had no right of appeal under that section, nor under Order XLIII, rule 1, which contains no provision for an appeal in favour of a stranger such as Minakshi Ayyar was. We are clear that there is no substance in this objection. The order in question was one undoubtedly made in Original Suit No. 32 of 1925 as the cause-title to it plainly shows, and was at any rate allowed to be so made without any objection by the respondents. It is now too late to permit such a purely technical objection to be raised. We may also observe that all that the rule directs is that the custody Court should be the Court to determine the dispute and the lower Court had, in our opinion, sufficient jurisdiction as it had the fund in its custody. We see no warrant in the Code for holding that the dispute must be or must be deemed to have been dealt with and determined only in the one suit rather in the other, so long as it is the custody Court that has enquired into it. We are accordingly of opinion that

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under section 47, Civil Procedure Code, which we hold is applicable to this case, the appellant has a right of appeal, and overrule the preliminary objection.

Coming now to the merits, it is necessary before entering on a discussion of the facts to advert to a point of law which has found favour with the learned Subordinate Judge. He has held that an executing Court cannot, having regard to the ruling in *Palaniappa Chettiar v. Subramania Chettiar*(1), go into the question whether the fund in Court really belonged to Adamsa's heirs and only stood benami in the name of Kadir Bacha. According to him the person whose name appears as the decree-holder must be held to be the person really entitled to the fruits of the decree and whatever claims Adamsa's heirs or creditors may have against Kadir Bacha in other proceedings, in execution proceedings the plea of benami cannot be accepted. He therefore came to the conclusion that it was Kadir Bacha's heirs who were entitled to draw the amount in Court. After carefully considering the decision in *Palaniappa Chettiar v. Subramania Chettiar*(1) and Order XXI, rule 16, of the Civil Procedure Code on a construction of which it is based, we are unable to agree with the view taken by the learned Subordinate Judge. It may be sound policy to discourage benami transactions in general tending, as they very often do, to the effective concealment of fraud to the embarrassment of Courts. But unless statutorily bound, the Court must continue to do its duty of unravelling the truth however cleverly hidden by false or fictitious trappings, and administer justice according to the true rights of parties such as they may be found to be on enquiry. It may again be

(1) (1924) I.L.R. 48 Mad. 553.

a desirable end to thwart the attempt frequently made by unscrupulous debtors to throw obstacles in the way of a successful litigant realizing the fruits of his decree, and prevent the Court from being side-tracked into a long and tedious enquiry having the effect of delaying or defeating a *bona fide* decree-holder. Even if such were the obvious purpose of the obstruction, the Court must still do its duty by holding the enquiry and get at the truth, subject no doubt to such rules of procedure as the Legislature has laid down. In the present instance, we find nothing in the language of Order XXI, rule 16, lending support to the view that the Subordinate Judge has taken. By that rule the transferee of a decree by assignment in writing or by operation of law is entitled to apply for execution of the decree subject to the conditions mentioned in the rule. The question may arise by way of a corollary, and did arise in *Palaniappa Chettiar v. Subramania Chettiar*(1), whether any person other than the transferee can apply under the rule. In that case, a person who claimed to be the real owner of a decree which had been, it was found, at his instance, transferred to his agent, made the application, and it was held that he had no right to make it, as Order XXI, rule 16, did not give him the right. SRINIVASA AYYANGAR J. observed :

"It seems to me that Order XXI, rule 16, is perfectly clear on the point. It speaks of the decree being transferred by assignment in writing or by operation of law, and provides that in such cases the transferee may apply for execution. When the Statute speaks of 'an assignment in writing' and 'the transferee', the proper construction of the words would necessitate our holding that the transferee referred to is the transferee named as such in the assignment in writing.

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To hold otherwise would be not to give proper effect to the words of the Statute."

As explained by the learned Judge, the decision purports merely to give effect to a principle implicit in the language of the rule which in terms recognises a right in the transferee only to apply for execution and it was held that he alone and none other, whatever his true position or right may be, could take advantage of the rule for the purposes of execution. With that proposition we are inclined respectfully to agree, but we must however express our dissent from certain other observations which occur at pages 558 and 559 of the report if by them the learned Judge intended to lay down as a universal rule that it is not open to the Court in execution to enquire into questions of benami and adjust the rights of parties according to its findings. The observations are these :

"It is also clear that the Code of Civil Procedure did really intend to prevent benamidars coming in and making applications to the Court on the general basis of the law relating to benami transactions. . . . It would lead to very serious consequences if we should allow the law of benami to have any operation with regard to suits and proceedings and records of Court, and if only on that ground, it would be desirable to disallow any such contention."

The language here employed is very wide, suggesting as it does that it would be proper to ignore a plea of benami if it tends to affect suits, proceedings and records of Court. The facts of the case itself did not, so far as we can see, call for such a sweeping observation and we are unable, with the utmost respect, to treat it as any better than an *obiter dictum*. The learned Judge himself in this connection refers in support of the proposition only to section 66, Civil Procedure Code, which in terms limits the prohibition to an attack on the title of the person claiming title under a purchase certified by the Court, and expressly saves the right of

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a third person to proceed against the property ostensibly sold to the certified purchaser if in fact and in truth it is liable to satisfy a claim of such third person against the real owner. We cannot see any warrant in the provisions of the Code for enlarging the prohibition so as to cover suits and proceedings or the records of Court in general. To do so would result in many cases in the promotion and not in the suppression of fraud. Provisions of this character, restrictive as they are of the rights of parties and the jurisdiction of the Courts, should, we think, be strictly construed, and ought not to be extended beyond the plain language of the rule. In this connection it would be apposite to quote the observations of the Privy Council in *Mussumat Buhuns Kowur v. Lalla Buhooree Lall*(1):

"It is well known that benami purchases are common in India, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not, by any general measure, declared such transactions to be illegal; and therefore, they must still be recognised and effect given to them by the Courts except so far as positive enactment stands in the way, and directs a contrary course."

After referring to the enactment contained in section 260 of the Code of 1859 corresponding to section 66 of the present Code, and stating that it was clear and definite and was confined to a suit against the certified purchaser, their Lordships went on to say :

"The present suit, which is the converse of that pointed at in the section, is not within the words or scope of it . . . it would be especially unsafe so to construe the Act as by inference to import into it prohibitory enactments which would exclude any inquiry into the truth in any suit between the parties."

Though their Lordships were dealing with a suit, we think there can be no difference in the principle to be applied whether it is a suit, or an execution

(1) (1872) 14 M.I.A. 496.

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proceeding and we accordingly hold that there is no legally valid objection to an enquiry into the merits of the present case.

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[His Lordship then discussed the evidence in, and the circumstances of, the case and proceeded :—]

Differing from the learned Subordinate Judge we hold that both Exhibits A and III represent benami transactions brought about for the purpose of helping Noor Muhammad and the other heirs to retain for themselves the value of the property seemingly conveyed under them and that the decree-holder in Original Suit No. 32 of 1925 is entitled to obtain satisfaction out of the fund in Court standing to the credit of Original Suit No. 33 of 1924. We accordingly accept both the appeals, allowing Execution Petition No. 172 of 1929 and dismissing Execution Application No. 163 of 1930 with costs here and in the Court below, one set in Civil Miscellaneous Appeal No. 420 of 1935. The amount paid by the appellant to the Court guardian for fees and purchase of printed papers will be included.

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## APPELLATE CIVIL.

*Before Mr. Justice Madhavan Nair and  
Mr. Justice Abdur Rahman.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,  
REPRESENTED BY THE COLLECTOR OF NORTH ARCOT,  
(EIGHTH DEFENDANT), APPELLANT,

1939,  
January 6.

v.

M. A. C. ARUNACHALA MUDALIAR AND TWELVE OTHERS  
(PLAINTIFFS 1 AND 2 AND DEFENDANTS 1 TO 7 AND 9 TO 12),  
RESPONDENTS.\*

*Land Improvement Loans Act (XIX of 1883), sec. 4—"For the purpose of making any improvement" in—Meaning of—Improvements made before the granting of loan—Loan utilised for discharging debts previously contracted in connection with said improvements—Inapplicability of section 4 to said improvements.*

The words "for the purpose of making any improvement" in section 4 of the Land Improvement Loans Act apply to improvements which had not been effected at the time when the loan was granted by Government and do not apply to improvements which had already been carried out at the time when the loan was granted though the loan was utilised for discharging the debts previously contracted in connection with the said improvements.

APPEALS against the decree of the Court of the Subordinate Judge of Vellore, dated 27th November 1933 and 16th August 1935, in Original Suit No. 69 of 1932.

*Government Pleader (B. Sitarama Rao) for appellant.*

*K. Rajah Ayyar and K. S. Rajagopalachari for first and second respondents.*

*Ch. Raghava Rao for respondents 10 to 13.*

*Other respondents were not represented.*

*Cur. adv. vult.*

\*Appeals Nos. 77 of 1934 and 296 of 1935.

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THE JUDGMENT of the Court was delivered by ABDUR RAHMAN J.—This is an appeal by the Secretary of State for India and arises out of a suit filed by one Arunachala Mudaliar and his son on the basis of a mortgage deed (Exhibit A) executed in their favour by Narainaswami Naidu and his sons on 19th July 1925. Since priority was being claimed on behalf of the Secretary of State in respect of a sum of Rs. 5,000 advanced to Narainaswami Naidu on various dates between 28th September 1925 and 6th May 1926, he was also impleaded as a defendant in the suit. The trial Court decreed the plaintiffs' claim and overruled the plea of priority raised on behalf of the Secretary of State, and the only question which we have now been called upon to decide is if the decision of the trial Court is correct.

The facts which have given rise to this litigation are simple and may be set forth here. It appears that Narainaswami Naidu was desirous of installing a suction gas pumping plant on his land and intended to move the Government for an advance of Rs. 5,000, to effect this improvement. Before making a formal application, he seems to have approached the Assistant Industrial Engineer first and laid the proposed project before him for his consideration. The officer made two reports in this connection in April and May 1923 (Exhibit XII). In view of the uncertainty of the result of the application which he intended to make and at all events of the inordinate delay which an application of this nature would involve before it could be finally disposed of, he borrowed a sum of Rs. 2,000 on 26th May 1923 from the plaintiffs for purchasing an oil engine and executed a promissory note in their favour (Exhibit C). Narainaswami then presented an application to the Supervisor of Industries on

1st June 1923 (Exhibit II) in which he asked for "an agricultural loan of Rs. 5,000". During the investigation which proceeded on this application, he made two statements on 23rd July 1924 (Exhibit XVII) and on 9th September 1924 (Exhibit XVIII) to which we shall advert later. This application was rejected on 23rd October 1924, but Narainaswami made another attempt to secure the loan and addressed a letter to the Director of Industries on 26th February 1925 (Exhibit G) which was referred to the Collector. He was again examined by the Tahsildar on 10th April 1925 (Exhibit XIX) who recommended the loan to be advanced to him (Exhibit XXII) and this was finally sanctioned by the Director on 13th July 1925 and communicated to Narainaswami by means of a letter dated 16th July 1925 (Exhibit XXI). The plaintiffs at this stage appear to have been approached for another loan of Rs. 1,000 or so and they found an opportunity to have a deed of mortgage for Rs. 7,500 executed by Narainaswami and his sons in their favour (Exhibit A). This deed was executed on 19th July 1925 in consideration of the two prior promissory notes (Exhibits B and C) and of a sum of Rs. 1,007-11-0 which is stated to have been advanced at the time of the execution of the deed.

There is no doubt that the action of the plaintiffs in getting their simple money debt converted into a secured debt at this stage when the Director of Industries had sanctioned a loan for Rs. 5,000 six days earlier excites one's suspicion against the *bona fide* nature of this transaction but, in the absence of any other evidence, it is impossible to rest our decision on a surmise and a conjecture. They may have been duped by Narainaswami and his sons in the same manner as the Secretary of State and his officers

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have been. It is equally probable that the knowledge of Narainaswami having made or revived his application to the Government for a loan, or of the Director having sanctioned it, was deliberately kept back from the plaintiffs. It is easy to conceive that, if they had come to know of these facts, they would not have advanced a further sum of Rs. 1,000; but taking advantage of their position as creditors, they availed themselves of the opportunity afforded to them by agreeing to make a further advance only on the condition of their debt being secured. Whatever be the case, no question was put to Rungaswami Mudali (first witness for the plaintiffs) who was a clerk of the plaintiffs for twenty years and no evidence was produced on behalf of the appellant which would justify an inference of this nature.

To resume the narrative, Narainaswami executed a mortgage deed in favour of the Secretary of State on 5th August 1925 (Exhibit XXIV) under which some of the lands mortgaged to the plaintiffs were again mortgaged to him—but the mortgage deed recites that the debt was advanced under the provisions of the Land Improvement Loans Act (XIX of 1883) and those of the Agriculturists' Loans Act (XII of 1884). The learned Government Pleader contends that, in spite of the fact that the deed of mortgage in favour of the Secretary of State is subsequent to that of the plaintiffs, the former should have been held to have priority as the loan was advanced under the provisions of and for a purpose covered by the Land Improvement Loans Act and not under the Agriculturists' Loans Act. He urges that a reference to both the Acts in the forms, Exhibits III (a) and III (c), in Narainaswami's application, Exhibit XIII, and in the mortgage deed, Exhibit XXIV, was made under

a mistake as to the purposes for which the money could have been advanced, and that it fell under the provisions of the Land Improvement Loans Act alone and not under the provisions of the other Act. The learned Counsel on behalf of the respondents contends on the other hand that a reference to both the Acts was deliberate as the purposes for which the money was advanced fell partly under one Act and partly under the other. The determination of this question is important as a loan granted under the provisions of the Land Improvement Loans Act would have priority over the debts due to other mortgagees who have a charge or incumbrance on the land for the benefit of which it was granted by the Government.

This necessitates an examination of the various provisions of both the Acts referred to above. Section 4 of the Land Improvement Loans Act provides, as its name indicates, that loans may be granted under this Act for the purpose of making any improvement which adds to the letting value of the land. In the sub-clause of the same section "improvement" has been stated to include, besides other things, the construction of wells, tanks and other works for the storage, supply or distribution of water for the purpose of agriculture. The loans made under the Agriculturists' Loans Act can be made to owners or occupiers of arable land for the relief of distress, the purchase of seed and cattle or any other purpose not specified in the Land Improvement Loans Act, 1883, but connected with agricultural objects (section 4). A comparison of the two sections would thus show that if a loan could be granted under the Land Improvement Loans Act, it could not be granted under the Agriculturists' Loans Act.

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The relevant provision of section 7 of the Land Improvement Loans Act is to the effect that all loans granted under the Act along with interest and costs shall be recoverable out of the land for the benefit of which the loan has been granted as if they were arrears of land revenue due in respect of that land.

Section 8 of the Act provides that a written order under the hand of an officer empowered to make loans under the Act granting a loan for the purpose of carrying out a work described therein shall be conclusive evidence

(a) that the work described is an improvement within the meaning of the Act,

(b) that the person mentioned had at the date of the order a right to make such an improvement, and

(c) that the improvement is one benefiting the land specified.

After an examination of the various provisions of the Land Improvement Loans Act, there is little doubt that, if the loan was advanced for the purpose of installing a gas plant to facilitate the supply or distribution of water on Narainaswami's lands, it would fall within section 4 of the Act. The only question then is if it was advanced for that purpose. In this connection it will be interesting to note Narainaswami's statement recorded by the Revenue Inspector on 23rd July 1924 (Exhibit XVII) which reads as follows :

"The loan now applied for is not intended for sinking a well and purchasing an engine. I have applied for an agricultural loan of Rs. 5,000 for discharging the debt previously contracted in respect of this item. One year has elapsed since the date of purchase of the engine and lands are cultivated by this. The engine has been working. I have prepared and produced lists (Exhibit XVI) relating to

debts contracted in respect of engine and expenses. Amount spent till this date is Rs. 4,300. Cost of building to be constructed is Rs. 500 . . . . ."

He made a similar statement to the Tahsildar on 9th September 1924 (Exhibit XVIII). To the same effect was the statement which he made on 10th April 1925 (Exhibit XIX) after his application was rejected and was being reconsidered at his request.

In view of these statements Mr. Sitarama Rao contended that it was wholly immaterial whether the improvements were already carried out on the date of the order granting the loan or not, as long as the purpose for which the loan was granted is covered by section 4 of the Act. In other words, he argued that the improvements for which the loan is advanced need not necessarily be such as have to be carried out in future. It was suggested by him that an application by an intending borrower for the purpose of making one of the improvements mentioned in the Act is conclusive of the matter, if it is accepted by the officer empowered to make loans under the Act. Reliance was placed by him on a case decided by a Division Bench of this Court, *Sankaran Nambudripad v. Ramaswami Ayyar*(1).

The facts of that case, however, are distinguishable from the facts of the present one. It was found as a fact in that case that the borrower had utilised the portion of the loan advanced under the Act for the improvement already effected, while it has not been established in this case that any portion of the money taken by Narainaswami from the Government went to liquidate the debts incurred by him for making the improvements. Mr. Sitarama Rao characterises this fact as a mere accident in that case and urged

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(1) (1918) I.L.R. 41 Mad. 691.



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that this would not touch the principle on which the case was decided. We do not agree. There is no doubt that the learned Judges were greatly impressed by this fact, and the following remark made by SESHAGIRI AYYAR J., although liable to a different interpretation as well, must be understood to have been made in this sense. He observed :

"The test is not whether the improvement was subsequently made but whether the money was applied for the construction of agricultural improvements upon the property."

If the words "applied for" were used by the learned Judge in the sense of merely making an application to the Government, we would, with great deference, disagree. The whole case really turns on the interpretation of the words "for the purpose of making any improvement" used in section 4 of the Act. It is a well-known canon of construction, as observed by Lord WENSLEYDALE in *Grey and others v. Pearson*(1), that

"in construing wills and, indeed, statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no farther".

The business of an interpreter is not to improve upon the words of an enactment but to expound them. As observed by COCKBURN C.J. in *Palmer v. Thatcher*(2), the question for him is not what the Legislature meant, but what its language means, i.e., what the Act has said that it meant.

We have therefore to proceed on the principle enunciated by these eminent Judges and interpret the language of section 4 of the Land Improvement Loans

(1) (1857) 6 H.L.C.61.

(2) (1878) 3 Q.B.D. 346, 353.

Act. . To our minds, the words in the section are unambiguous and can be held to apply only to improvements which have not been effected at the time when the loan was granted and cannot be held to apply to improvements which had already been carried out at the time when the grant was made. A reference to section 8 of the same Act will not be out of place. The words used in that section are "for the purpose of carrying out a work" (thereby meaning improvement) and can be taken to mean only future improvements and not those which have already been made. We would have to face all kinds of difficulties and would not know where to draw a line, if we failed or refused to place a grammatical construction on these words. As an illustration we may take the case of a person who mortgaged his lands to A in 1910 and made certain improvements on those lands with the money received by him from A. Let us suppose that he mortgaged the same lands to B in 1922, discharged A's debt, re-mortgaged the same lands to C in 1934, discharged B's debt out of the money received from C, and then made an application in 1935 to the Government under section 4 of the Act. If the Government accepts his application and grants him a loan in 1936, would the claim of the Secretary of State be held to have priority over C's claim as a mortgagee? If the construction suggested by Mr. Sitarama Rao is correct, he must, to be logical, say that it would be so. But when this case was put to him by one of us he was not prepared to go to that extent and said that this construction would be unreasonable, but he would confine the operation of the section to those cases only where improvements were effected by a person while he was either contemplating to make an application under the Act or had made one before

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the improvements were made. Where is the guarantee that the application made by a person would necessarily be accepted by the Government? Are the mortgagees, who have taken a mortgage without any knowledge of the borrower's intention to make an application or of the fact that an application has already been made by him, to remain in suspense for all this time? The position is to our minds impossible and cannot be accepted. After all it is for the Government to see, at the time when a loan is being granted, if any improvements have already been effected by the borrower and, if it finds that they have been, its officers should see that the persons who have advanced loans for this purpose are satisfied. In this case there is a volume of evidence on the record from which it has been established that Narainaswami never concealed the fact that improvements for which the money was being asked for, except to a small extent of Rs. 500 or so, were carried out long before the order granting the loan was passed. In fact he stated that his object in taking the money was not to make improvements but to pay off the creditors from whom he had raised loans to carry out these improvements. Is the payment of such debts one of the purposes mentioned in section 4? The answer can only be one and that in the negative. There is no reason why we should read the words "for the purpose of making any improvement" as having the same meaning as the words "for the purpose of paying for an improvement" would have meant, if used in the section. There is nothing in the Act which would make the interpretation we are placing on these words repugnant to or inconsistent with the rest of the Act and surely there is no absurdity which this construction would entail. We

would therefore put a grammatical construction on these words and hold that they refer to future improvements only.

It cannot be denied, in our opinion, that the object of placing both these Acts on the statute book of India was to help the agriculturists and proprietors of agricultural lands and not to benefit the Government at least directly. If the assumption made by us be right, would it be correct to place the construction suggested by the learned Government Pleader on section 4 of the Land Improvement Loans Act? Why should it be presumed that the Legislature was trying to take away from them by one hand an advantage which was conferred on them by the other? It would be so, as in that case agriculturists would find it extremely difficult, if not impossible, to raise money on the security of their lands. Why should, one may well ask again, the mortgagees, who had already advanced moneys on the security of lands, be treated so unjustly? Why should they be deprived of their securities or their claims be deferred to those of the Government by an action of their own mortgagors in making applications and getting advances under the Land Improvement Loans Act? Why should the loans advanced by the Government under the two Acts be treated differently when the Agriculturists' Loans Act was passed only one year later? The answer to all these questions is not far to seek. While the loans advanced under the Agriculturists' Loans Act are, as provided in the Act, with the object of relieving the distress of agriculturists and for supplying seed, etc., objects which would not improve the letting value of the land, the purpose of advancing loans under the Land Improvement Loans Act is specifically declared to be the improvement of the lands

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themselves. This would then mean that it was expected by the Legislature that the letting value of the lands would be improved, if the loans advanced by the Government were utilised for the purpose for which they were advanced, at least to the extent to which the money taken by the landlords under the Act was spent on them. In that case, the prior mortgagees could not be reasonably held to have suffered in regard to their security, as they had advanced money at the time when the improvements were not effected and the securities on which they had advanced their money would thus remain unaffected. It may be contended that the value of their securities enhanced by improvements effected with the funds advanced by the Government under the Act should not be permitted to be taken advantage of by prior mortgagees in the same way as they could have done if the mortgagors had effected improvements with their own funds. But this is a different matter. The Government could reasonably, and perhaps justly, insist that if any money was advanced by it under the Act, it would have priority to that extent in view of the fact that the lands have been improved with the funds provided on its behalf; and it would be unfair for the prior mortgagees to improve their position at the cost of the Government, which might not in that case agree to advance any money at all and the agriculturists would suffer in consequence. Looked at even from this point of view, the same result would follow and we must hold that the money advanced by the Government should have preceded and not followed the improvements effected on the land. The Government cannot therefore be allowed to have priority in respect of advances applied for and made after the

improvements were carried out with funds belonging to a private individual.

For the aforesaid reasons, we must hold that a sum of Rs. 4,150 out of Rs. 5,000 advanced by the Director of Industries does not fall within section 4 of the Land Improvement Loans Act and the appellant would not therefore have any priority to that extent over the plaintiffs.

As for the rest, the position is different. A sum of Rs. 675 was spent in constructing the engine shed after the grant was made and Rs. 175 were allowed by the Director to make further improvements to the installation. Mr. Raghava Rao's contention that Rs. 175 were also paid for a past improvement does not appear to be correct (see Exhibit XXXVI). This sum of Rs. 850 falls under section 4 and could be recovered by the appellant under section 7 of the Act with interest. The costs claimed by the Government against defendants 9 to 12 are not allowed and the appeal is in that respect rejected.

The result is that the appeal is allowed to this extent only and the decree of the lower Court would be modified accordingly.

As for costs, there is no reason why the respondents, who have succeeded to a large extent, should not be allowed to have them at least to the extent to which they have won. They would therefore have five-sixths of their costs in this Court and in the Court below.

Second Appeal No. 296 of 1935 is also dismissed.

G.R.

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## APPELLATE CRIMINAL.

*Before Mr. Justice Pandrang Row.*GOVINDA GOUNDAN AND FOUR OTHERS  
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AYI GOUNDAN AND ANOTHER (PETITIONERS),  
RESPONDENTS.\**Code of Criminal Procedure (Act V of 1898), ss. 133, 137 and  
139-A—Procedure to be followed under the sections.*

After the amendment of Chapter X of the Code of Criminal Procedure by the introduction of section 139-A, what is to be decided is whether the denial of the public right by the party against whom the order under section 133 was made is supported by any reliable evidence and, if there is any reliable evidence in support of such denial, the Magistrate has no option but to stay his hands and to refer the parties who moved him to take action to go to the Civil Court. He can proceed under section 137 only if he finds that there is no reliable evidence in support of the denial of the public right in the place in question.

Where in a case in which it could not be said that there was no such reliable evidence and the Magistrate himself did not say that there was no such reliable evidence, he proceeded to conduct an enquiry straightaway under section 137,

*held* that in doing so, the Magistrate assumed a jurisdiction which he did not possess and that his order should be set aside.

*Ude Singh v. Mohammada* (1), *Thakur Sao v. Abdul Aziz* (2) and *Kusha Mandal v. President, Gopalnagar Union Board* (3) followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court

\* Criminal Revision Case No. 780 of 1938.

(1) (1928) I.L.R. 10 Lah. 151. (2) (1925) I.L.R. 4 Pat. 783.  
(3) (1934) I.L.R. 61 Cal. 390.

to revise the order of the Court of the Sub-Divisional First Class Magistrate of Sankari, dated 30th September 1938 and made in Miscellaneous Case No. 63 of 1938.

*N. Somasundaram* and *M. Veluswamy* for petitioners.

*Public Prosecutor (V. L. Ethiraj)* for the Crown.

*C. S. Swaminathan* for respondents.

## ORDER.

PANDRANG ROW J.—In this case, the Sub-Divisional First Class Magistrate of Sankari has passed an order under section 137 of the Criminal Procedure Code making absolute the preliminary order made by him under section 133 of that Code. The order relates to the burial of a corpse in a certain place which was alleged by the petitioners in the case and also by the President of the District Board to be a public place. The respondents before the Magistrate who are the petitioners in this Court appeared before the Magistrate in response to the preliminary order which directed them to remove the corpse from the place in question and they contended that the place of burial was in their private possession and also that the burial did not cause annoyance to anybody. In these circumstances, the obvious procedure to follow was that prescribed in section 139-A of the Code which was introduced by the amending Act of 1923. Unfortunately, this section seems to have escaped the notice of the learned Magistrate who, instead of proceeding thereunder and deciding whether the evidence put before him by the respondents supporting the denial of the existence of any public right in the place in question was reliable, took evidence on both sides beginning with the evidence adduced on the side of

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the petitioners before him, and after considering the evidence on both sides, he came to the conclusion that the place of burial was definitely a public place. He puts it in paragraph 4 of his order as follows :

" On considering the evidence of the petitioners and the counter-petitioners, I have no hesitation in concluding that the alleged place of burial is definitely a public one. Though the counter-petitioners have examined a number of witnesses, they are persons of no worth comparatively while the petitioners' witnesses include the Health Inspector, two village officers and Oor Goundan of the village. They have all given evidence to the effect that the alleged place of burial is a public one . . . . The evidence of the counter-petitioners fails to refute this allegation. It appears to be true that Rama Goundan, the deceased father of the counter-petitioners installed the Pillayar in the Pillayar temple near the place of burial about twenty years ago. . . . The counter-petitioners allege that they have been storing manure and tying cattle on the site in question."

But the learned Magistrate refused to infer any right of possession from this evidence because village porambokes are generally made use of by the ryots for such purposes. As regards the evidence adduced about the planting of trees in the site by the respondents before him, he observed that it must have been recent. There is no doubt that the Magistrate has come to the conclusion that the place is a public one only after weighing the evidence adduced before him by both sides. This is not permitted by Chapter X as amended by the Act of 1923. This point has been stressed in several decisions of the High Courts. It is enough to refer to them and to give extracts from one or two of them. These decisions are reported as *Raghunandan v. Shew Nandan*(1), *Chunni v. Emperor*(2), *Hamid*

(1) (1932) 30 A.L.J. 339.

(2) (1933) 36 A.L.J. 1013.

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*Ali v. Emperor*(1), *Ude Singh v. Mohammada* (2), *Thakur Sao v. Abdul Aziz*(3) and *Kusha Mandal v. President, Gopalnagar Union Board*(4). The last two are Bench decisions. In *Ude Singh v. Mohammada*(2) ADDISON J. held that the Magistrate can proceed under section 137 only if he finds there is no reliable evidence in support of the denial of the public right in the place in question, and that where there is any reliable evidence, the Magistrate must stay proceedings. He observed also :

" It is not the duty of the Magistrate to come to a finding whether the evidence is sufficient in his opinion to support the case of the respondents ; all that he has to see is whether there is any reliable evidence in support of the denial of any public right . . . . If there is, the Magistrate must 'stay' his hands till the matter has been decided by a competent Civil Court."

Similar observations are to be found in the other decisions. As *per* MULLICK J. in *Thakur Sao v. Abdul Aziz*(3) :

" The law requires first of all that the party shall appear before the Magistrate and deny the existence of the public right in question. Secondly, that he shall produce some reliable evidence, and thirdly, that such evidence shall be legal evidence and shall support the denial. If these three conditions are satisfied, then the Magistrate's jurisdiction ceases to exist"—(see bottom of page 786 and the beginning of page 787).

The learned Judges who decided the case reported as *Kusha Mandal v. President, Gopalnagar Union Board*(4) point to the alteration of the law which was introduced by section 139-A of the Code, the law before the amendment being that the Magistrate had to decide whether the claim of the second party

(1) (1931) 32 Cr.L.J. 250.  
(3) (1925) I.L.R. 4 Pat. 783.

(2) (1928) I.L.R. 10 Lah. 151.  
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was *bona fide* or not, or in other words, whether the claim is a mere pretence or not. Before that amendment, no doubt, it was permissible and proper for the Magistrate to take evidence on both sides. But now what is to be decided is whether the denial of the public right by the second party is supported by any reliable evidence, and if there is any reliable evidence in support of such denial, the Magistrate has no option but to stay his hands and to refer the parties who moved the Magistrate to take action to go to the Civil Court. It cannot be said that there was no reliable evidence in support of the denial made by the petitioners nor does the Magistrate say there is no reliable evidence. As a matter of fact, the learned Magistrate appears to have lost sight of section 139-A of the Code and proceeded to conduct an enquiry straight away under section 137, Criminal Procedure Code. In doing so, he has assumed a jurisdiction which he did not possess and would not possess unless he had found beforehand that there was no reliable evidence to support the denial of the public right by the petitioners, that is to say, by the respondents before him.

The order of the Magistrate is totally without jurisdiction and it is therefore set aside. In view of the fact that there is some reliable evidence in this case in support of the denial, it is not open to the Magistrate to take further action in the same matter under Chapter X of the Code of Criminal Procedure.

V.V.C.

## APPELLATE CRIMINAL.

Before Mr. Justice Burn and Mr. Justice Stodart.

IN RE PALUVADI VENKATARAMAYYA *alias*  
PALUVADI VENKATARAMANAYYA (TWENTY-THIRD  
ACCUSED), PETITIONER.\*

1939,  
September 19.

*Code of Criminal Procedure (Act V of 1898), sec. 415—  
Sentence referred to in sec. 413 by which two or more of  
punishments therein mentioned are combined—Meaning of—  
Two or more sentences of fine, if included.*

A Sub-Magistrate who tried twenty-four persons convicted all of them under sections 147, 341, 355 and 323 read with section 149, of the Indian Penal Code but, considering that they were persons who might properly be dealt with under section 562, Criminal Procedure Code, he submitted the case to the Sub-Divisional First Class Magistrate under the provisions of section 562 (1) of the Criminal Procedure Code. The First Class Magistrate, dealing with the case under the provisions of section 380, Criminal Procedure Code, convicted all the twenty-four persons of rioting and sentenced them for that offence to pay a fine of Rs. 20 each and he convicted accused Nos. 6 and 24 under section 355 of the Penal Code also and sentenced them to pay a fine of Rs. 25 each for that offence. Accused No. 23 alone appealed to the Sessions Judge, alleging that accused Nos. 6 and 24, having been sentenced to pay two fines of Rs. 20 and Rs. 25, had a right of appeal under section 415-A of the Criminal Procedure Code and that, therefore, he (accused No. 23) having been convicted at the same trial had also a right of appeal. The Sessions Judge held that none of the twenty-four accused had any right of appeal and rejected the appeal. On a revision petition filed by accused No. 23 against the order of the Sessions Judge,

held that the Sessions Judge was right and the application for revision was unsustainable.

\* Criminal Revision Case No. 418 of 1939 (Criminal Revision  
Petition No. 338 of 1939).

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Section 415, Criminal Procedure Code, when it refers to two or more punishments, refers to two or more punishments of different kinds. In the present case the Sub-Divisional Magistrate did not pass any sentence by which any two or more of the punishments mentioned in section 413, Criminal Procedure Code, were combined. He did not combine any of the punishments in either of the sentences that he imposed. He imposed two separate sentences of fine. There was no combination of punishments in one sentence within the meaning of section 415, Criminal Procedure Code.

*Public Prosecutor, Madras v. Dasa Pai*(1) disapproved.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Kurnool Division in Criminal Appeal No. 7 of 1939 preferred against the judgment of the court of the Sub-Divisional First Class Magistrate of Markapur in Calendar Case No. 48 of 1938.

*K. S. Jayarama Ayyar* for petitioner.

*K. Venkataraghavachari* for Public Prosecutor (*V. L. Ethiraj*) for the Crown.

BURN J.

The ORDER of the Court was delivered by BURN J.— This is an application for revision of the order of the learned Sessions Judge, Kurnool, in Criminal Appeal No. 7 of 1939. That appeal was presented to the learned Sessions Judge from the decision of the Sub-Divisional First Class Magistrate, Markapur, in Calendar Case No. 48 of 1938. In that case the First Class Magistrate was dealing with twenty-four persons who had been tried by the Stationary Second Class Magistrate of Giddalore in Calendar Case No. 593 of 1937. The learned Sub-Magistrate found all the twenty-four accused persons guilty of rioting (section

(1) 1936 M.W.N. 213.

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147, Indian Penal Code) wrongful confinement (section 341, Indian Penal Code) assault with intent to dishonour (section 355, Indian Penal Code) and simple hurt (section 323, Indian Penal Code) read with section 149, Indian Penal Code. He convicted them under those sections but, considering that they were persons who might properly be dealt with under section 562, Criminal Procedure Code, he submitted the case to the Sub-Divisional Magistrate under the provisions of section 562 (1) proviso. The learned First Class Magistrate, dealing with the case under the provisions of section 380, Criminal Procedure Code, convicted all the twenty-four accused of rioting (section 147, Indian Penal Code) and sentenced them for that offence to pay a fine of Rs. 20 each; and accused Nos. 6 and 24 he convicted also under section 355, Indian Penal Code, and sentenced them to pay a fine of Rs. 25 each for that offence. The learned Sub-Divisional Magistrate did not say what he proposed to do with regard to the other convictions which had already been recorded by the Sub-Magistrate. But that is a matter which is not before us now and we do not propose to interfere with it.

The appeal presented to the learned Sessions Judge was on behalf of the twenty-third accused only. He had been convicted only of rioting (section 147, Indian Penal Code) and sentenced to pay a fine of Rs. 20. Under section 413, Criminal Procedure Code, the twenty-third accused would ordinarily have no right of appeal but the appeal was filed on his behalf under the provisions of section 415-A. It was alleged that the sixth and twenty-fourth accused, having been sentenced to pay two fines of Rs. 20 and Rs. 25, had a right of appeal under section 415-A and therefore the twenty-third accused having been convicted at

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the same trial had also a right of appeal. The learned Sessions Judge has held that none of the twenty-four accused had any right of appeal in this case. He therefore rejected the appeal referring the twenty-third accused to an application for revision to this Court if so advised. The twenty-third accused has applied for revision of the order of the learned Sessions Judge.

The only authority of this Court quoted by learned Counsel for the petitioner is the decision of KING J. in the case of *Public Prosecutor, Madras v. Dasa Pai*(1). That was a case in which on a summary trial a First Class Bench of Magistrates had sentenced one of several persons convicted under the Gaming Act to pay a fine of Rs. 25 for an offence under section 9 and a fine of Rs. 50 for an offence under section 8. The persons convicted appealed to the Sessions Judge and he held that an appeal lay. The learned Public Prosecutor filed a revision petition against that decision and KING J. held that the learned Sessions Judge's decision was correct.

With respect we think that the decision of KING J. in that case was wrong. The matter depends upon the interpretation of section 415, Criminal Procedure Code, which says:

"An appeal may be brought against any sentence referred to in section 413 or section 414 by which any two or more of the punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace."

It is contended on behalf of the petitioner that the learned Sub-Divisional Magistrate when he imposed upon the sixth and twenty-fourth accused two

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finer of Rs. 20 and Rs. 25 respectively was passing a sentence combining two of the punishments referred to in section 413. Now section 413 is as follows:

"Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session passes a sentence of imprisonment not exceeding one month only or in which a Court of Session or District Magistrate or other Magistrate of the First Class passes a sentence of fine not exceeding rupees fifty only."

There are two punishments here mentioned: (i) imprisonment and (ii) fine. But it is pointed out that in section 415 there is a reference to "any two or more" of the punishments mentioned in section 413 or section 414 and since in section 413 there are only two kinds of punishments mentioned and in section 414 there is one kind of punishment mentioned, namely, the punishment of fine, it is argued that if there are two or more sentences of fine this must be regarded as a sentence combining two of the punishments mentioned in section 413 or section 414. We are unable to accept this argument. We are of opinion that section 415 when it refers to two or more punishments is referring to two or more punishments of different kinds. The history of the Code is, we think, important in this connection and makes the matter clear. When section 415 was first enacted there were three kinds of punishments provided in both sections 413 and 414, namely, in section 413 a sentence of imprisonment not exceeding one month only, fine not exceeding Rs. 50 only or whipping only, and in section 414 a sentence of imprisonment not exceeding three months only, fine not exceeding two hundred rupees only or whipping only. In these circumstances, although it might possibly be argued that section 415 was to some extent superfluous, it could not be argued that it had no meaning. It was clear that it meant to

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refer to sentences in which two or more different kinds of punishments referred to in section 413 and section 414 were combined. After the modifications in section 413 and section 414 introduced in 1923 it is impossible to attribute any real meaning to the phrase "any two or more of the punishments therein mentioned" in section 415 so far as it relates at any rate to section 414. It is clear, we think, as EDGLEY J. stated in the case of *Kali Charan v. Adhar Mandal*(1), that section 415 has no application in a case in which two non-appealable sentences of fine have been passed and the aggregate amount of fine does not exceed Rs. 50. Learned Counsel for the petitioner has relied upon two decisions of the Oudh Chief Court reported as *Kandhai v. King-Emperor*(2) and *Makrand Singh v. Ganga*(3) and also upon the decision of CUMING J. in the case reported as *Akabbar Ali v. Emperor*(4). With respect we are not able to agree with those decisions. We prefer the opinion of MITTER J. in the case reported as *Nawabali Haji v. Jainab Bibi*(5) and the view of the learned CHIEF JUSTICE of Bombay and CRUMP J. in the case reported as *Shidlingappa v. Emperor*(6). Our decision can be rested upon the words of section 415 itself. It is not possible in this case to say that the learned Sub-Divisional Magistrate has passed any sentence by which any two or more of the punishments mentioned in section 413 are combined. The learned Sub-Divisional Magistrate did not combine any of the punishments in either of the sentences that he imposed. He imposed two separate sentences of fine. There is no combination of punishments in one sentence within the meaning of

(1) (1938) 43 C.W.N. 380.  
(3) (1937) I.L.R. 13 Luck. 618.  
(5) (1932) I.L.R. 59 Cal. 1131.

(2) (1931) I.L.R. 7 Luck. 501.  
(4) (1931) I.L.R. 59 Cal. 19.  
(6) A.I.R. 1928 Bom. 416.

section 415, Criminal Procedure Code. We think therefore that the learned Sessions Judge was correct and that this application for revision must be dismissed.

Learned Counsel for the petitioner has attempted to persuade us to interfere in revision finally against the order of the learned Sub-Divisional Magistrate. That is not the prayer in the petition which is for revision of the order passed by the learned Sessions Judge. But in so far as this is concerned we observe that the grounds taken for saying that the learned Sub-Divisional Magistrate was wrong in convicting the twenty-third accused (present petitioner) are all grounds of fact and not connected with any question of law. Learned Counsel points out that the Sub-Magistrate who tried the case recommended that all the accused should be dealt with under section 562, Criminal Procedure Code. But the learned Sub-Divisional Magistrate has given reasons for not dealing with them under that section and we do not think that there are sufficient grounds for interfering with the exercise of his discretion. We cannot interfere with the conviction on the facts. The twenty-third accused was convicted of rioting and let off with a fine of Rs. 20 which cannot be said to be excessive.

This petition is therefore dismissed.

V.V.C.

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