26

THE INDIAN LAW REPORTS

MADRAS SERIES

CONTAINING

ASES 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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1940

1st January to 31st December

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1939

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WILL—Executors—Power to carry on business and to pledge the credit of business for same—Mortgage on general assets—No express power to charge general assets—General assets not bound by mortgage—Indian Succession Act (XXXIX of 1925), sec. 307 (1)—Effect of.

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THE

INDIAN LAW REPORTS

(*MADRAS SERIES*)

PRIVY COUNCIL.

J.C.*
1939,
July 21.

NADIMPALLI NARAYANARAJU AND ANOTHER, APPELLANTS,

v.

YENNAMSETTI SURYANARAYUDU AND OTHERS, RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Estates Land Act (Madras Act I of 1908), *sec.* 3 (5)—*Post-settlement grant by zamindar of portion of a village—Mokhasa lands granted as manyam—Grantee, whether landholder.*

Where a zamindar makes a post-settlement grant of a portion of a mokhasa village as manyam, the grantee is a landholder within section 3, sub-section (5), of the Madras Estates Land Act.

Appalanarasimhulu v. *Sanyasi*(1) and *Gadadhara Das Bavaji* v. *Suryanarayana Patnaik*(2) referred to.

Brahmayya v. *Achiraju*(3) approved.

APPEAL (No. 39 of 1937) from a judgment and decree of the High Court (October 16, 1934, and October 31, 1935) which reversed a decree of the Subordinate Judge of Vizagapatam (December 17, 1927).

* *Present*: LORD ROMER, SIR GEORGE RANKIN and Mr. M. R. JAYAKAR.

(1) (1912) I.L.R. 38 Mad. 33. (2) (1921) I.L.R. 44 Mad. 677.
(3) (1922) I.L.R. 45 Mad. 716 (F.B.).

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

Subba Row for appellants.—The land itself was granted by Exhibit C and not merely the melvaram or the right to collect rent. The payment of Rs. 50 was subsequently imposed, wrongly in my submission, but this sum was paid and is still being paid. This is not rent. The land is not an estate within any of the sub-clauses in section 3 (2) of the Act, for it is not a permanently or temporarily settled estate, it is not a portion of an estate separately registered and it is not a "village" as defined in section 3 (19). If the land is not an estate, the appellants are not landholders within section 3 (5), for "rents" in that sub-section means rents in an "estate" as defined in sub-section 2. The landholder here is the proprietor of the permanently settled estate of Vizianagaram.

[Reference was made to *Gadadhara Das Bavaji* v. *Suryanarayana Patnaik*(1), *Bhupatiraju* v. *Venkataratnam*(2) and *Brahmayya* v. *Achiraju*(3).]

I rely on the judgment of WALLIS C.J. and KUMARASWAMI SASTRI J. in *Gadadhara Das's* case (1). Exhibit C shows there was no other person in occupation at the time of the grant. The grant is a *muzara vasathi* grant and not an inam. Minor inams and portions of a village were not intended to be included in the Act. The High Court was not right in its interpretation of the word "manyam".

There are many kinds of manyam and it is not possible to arrive at the implication of the word without looking at the surrounding facts.

I admit Exhibit C is the root of the appellants' title but, to construe it, it is necessary to see how the property was dealt with by the parties. It was not treated as an inam. The payment of Rs. 50 was imposed as an assertion of a right to resume. The zamindar had no right to impose it.

The onus is on the party who challenges jurisdiction to show the Court has no jurisdiction; *Ramayya* v. *Lakshminarayana*(4).

(1) (1921) I.L.R. 44 Mad. 677. (2) (1921) 41 M.L.J. 512.
(3) (1922 I.L.R. 45 Mad. 716 (F.B.).
(4) (1934) L.R. 61 I.A. 177; I.L.R. 57 Mad. 443.

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If the word 'rents' is given what I submit is its correct meaning, that is, rents of an estate, respondents 1 to 3 are not ryots within section 3 (15) and the appellants are not landholders and the case is not governed by the Act. If the land is service land, as the fifth respondent contends it is, it is not ryoti land within section 3 (16).

Hyam for respondents 1 to 3.—The suit lands are a portion of the permanently settled estate of Vizianagaram fetching a rent of Rs. 300. Being a part of an estate, the rights of the parties in respect thereto are governed by section 9 of the Act.

I submit that the appellants are landholders within section 3 (5). If they do not fall within the first part of the definition, they fall within the second part. I do not admit that they are not within the first part, but I rely on the second, for they are persons entitled to collect rents of a portion of an estate, the rents which would be due to the zamindar.

A strict interpretation of section 3 (2) would lead to an anomaly.

I adopt the reasoning of the learned Judges who differed from SCHWABE C.J. in *Brahmayya* v. *Achiraju*(1).

[Reference was made to *Bhupatiraju* v. *Venkataratnam*(2), *Venkata Sastrulu* v. *Seetharamudu*(3), *Mallu Nayudu* v. *Chinna Gavuru*(4), *Seetayya* v. *Appadu*(5), *Suryanarayana* v. *Bullayya*(6) and *Ganapati Rao* v. *Sattamma*(7).]

The appellants cannot rely on the later documents to support their claim.

I submit respondents 1 to 3 fall within section 3 (6). If the grantee is not a ryot, he is a landholder.

Sidney Smith for the fifth respondent, stated the case for the fifth respondent and submitted that he was unnecessarily made a party to the appeal.

The fourth respondent was not represented.

Subba Row replied.—It was not intended by the Act to bring in lands less than a whole village.

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The JUDGMENT of the Judicial Committee was delivered by SIR GEORGE RANKIN.—This is an appeal

(1) (1922) I.L.R. 45 Mad. 716 (F.B.). (2) (1921) 41 M.L.J. 512.
(3) (1919) L. R. 46 I.A. 123; I.L.R. 43 Mad. 166.
(4) A.I.R. 1925 Mad. 1146. (5) A.I.R. 1926 Mad. 526.
(6) A.I.R. 1927 Mad. 568. (7) A.I.R. 1928 Mad. 960.

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by the plaintiffs from a decree of the High Court of Madras (16th October 1937), dismissing a suit brought in the Court of the Subordinate Judge at Vizagapatam to recover possession of certain agricultural lands in the village of Thagarampudi. The trial Court's decree (17th December 1927) had been in favour of the plaintiffs. Of the defendants to the suit (who numbered 15) five are respondents to this appeal: the first three respondents (defendants 3 to 5) being the persons in possession of the suit lands, while respondents 4 and 5 (defendants 14 and 15) are impleaded as persons claiming title thereto as against the plaintiffs.

Much of the detail of the case has for the purposes of this appeal become unimportant; since the decree appealed from did not decide the question of title disputed between the plaintiffs and respondents 4 and 5, but dismissed the plaintiffs' claim to eject the first three respondents on the ground that the plaintiffs were landholders within the meaning of the Madras Estates Land Act (Madras Act I of 1908) and by section 9 thereof could not maintain ejectment in the civil Court against a ryot.

The plaintiffs claim title under Exhibit C, an instrument, dated 11th May 1811, which is expressed as follows:

"Patta, dated Saturday the 3rd day of Vaisakha Bahulam of the year Prajotpatti (11th May 1811), executed and granted by Sri Narayana Gajapatiraju Maharajulingaru, to Nadimpalli Venkatapatiraju.

Whereas, in the village of Thagarampudi of my *mokhasa* (lands granted either free as reward or on light rent) Vaddade taluk, I have granted to you land fetching a fixed rent of Rs. 300, as *manyam*, and 10 *visams* (⅛th part) of land known as the *vudika manu garuvu* (name of land) for a tope to be planted thereon, you shall bring them to extensive cultivation and profits, and be living happily, enjoying the same hereditarily."

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The grantor was the proprietor of the estate of Vizianagaram and the grantee Venkatapatiraju was the eldest of three brothers who were joint. The other two were called Murtiraju and Gajapatiraju. By what right the grantor could afterwards modify his grant is a question which has not been clearly answered, but by a letter to the grantee, dated 21st August 1826, he purported to impose for the future a rent or payment of Rs. 50 per annum and this has ever since been paid. The terms of the letter are as follows:

"In respect of the land granted to you in the village of Thagarampudi, a reduction of Rs. 50 has been ordered from the current year Vijaya, and deducted out of your *muzara*. So, you shall pay these Rs. 50 every year in our Sirkar and be obtaining receipts."

The lands were at first enjoyed by the joint family, but the brothers separated and each became entitled to a one-third share therein. At some date which is not now material they appear to have divided the lands between them each paying to the zamindar Rs. 16–10–8. The plaintiffs are great-grandsons of the original grantee Venkatapatiraju who was the eldest brother, but their suit has reference to the one-third share of the youngest brother Gajapatiraju of which they claim to be purchasers. They seek to obtain possession of one-half only of that one-third share, and the pedigree table of Gajapatiraju's branch [*vide* page 6] will assist to show how they deduce their title.

Gajapatiraju died in 1859 leaving a widow and two daughters. In 1861 the widow relinquished her interest and the daughters became entitled. In 1918 the younger daughter Chinna Appala died leaving her sister and two grandsons by a pre-deceased son (respondents 4 and 5). The plaintiffs say that thereupon the whole of Gajapatiraju's interest vested in the elder daughter Datla Pedda, that in 1919

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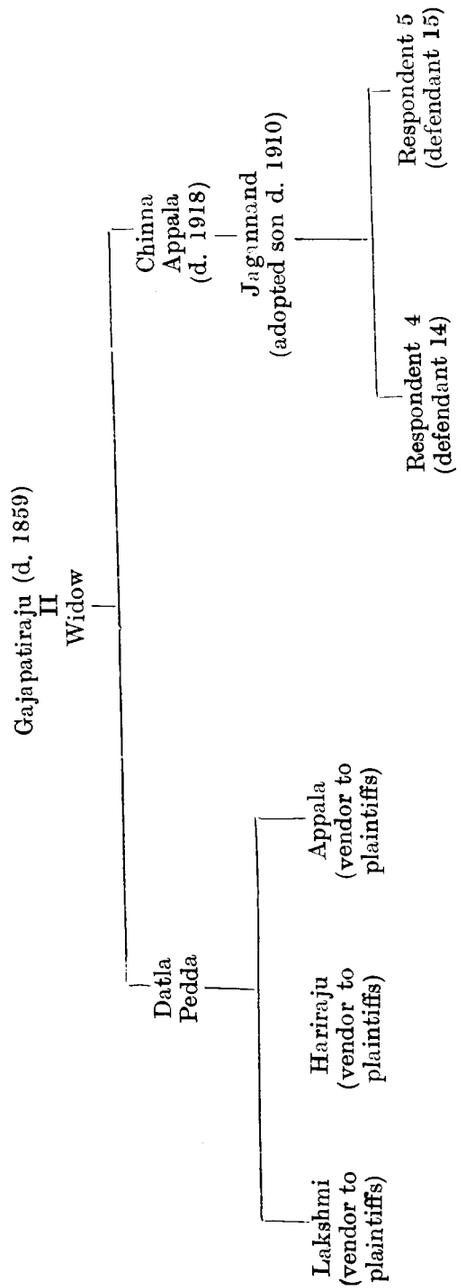

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Datla Pedda's three sons were the reversioners of her father, and that she relinquished her interest so as to accelerate theirs. The plaintiffs by sale deed, dated 27th April 1921, purchased from these three sons of Datla Pedda the whole of the interest of her father Gajapatiraju for Rs. 32,000. On 24th September 1924, they brought the present suit to recover possession of the half share in Gajapatiraju's lands which his younger daughter Chinna Appala had possessed. The first three respondents were also in possession of the other half share (which Datla Pedda had possessed) but as they had certain rights therein as mortgagees this other half share was not included in the suit.

Respondents 4 and 5 claim title to the suit lands by saying that the instrument of 1811 has long since ceased to have effect; that it created no more than a service tenure neither heritable nor transferable but resumable at will; that on the death of Gajapatiraju the lands were sequestered or resumed by the zamindar and regranted as a new tenure to his widow; and that on her death one half was granted to each of her two daughters separately. Hence respondents 4 and 5 claim to be entitled to the lands held by their grandmother Chinna Appala which are the lands in suit. Whether or not on this case the first three respondents could claim to have a ryoti interest in the lands, it is clear that the plaintiffs could have no interest at all. The plaintiffs do not seek to avail themselves in any respect of the case made or evidence adduced by respondents 4 and 5.

The first matter for consideration is the case made by the plaintiffs for ejectment of the first three respondents. These respondents are the cultivators in possession of the lands in suit. They or their ancestors (at some date not readily ascertainable) became tenants

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of the plaintiffs' vendors or their predecessors. Notice to quit has been given to these respondents but they claim that they are ryots with occupancy right who cannot be ejected by the civil Court. The plaintiffs who have to succeed upon the strength of their own title disclose a title of which the root is the grant of 1811, and the question is as to the character of the right which they allege and prove. At one stage of the case it appears to have been contended (i) for the plaintiffs that the grant merely gave to the grantees the *kudivaram* interest on favourable terms, (ii) for the first three respondents, that agricultural tenants were on the land at the time of the grant so that it gave to the grantees the *melvaram* interest only. It is now conceded, however, on both sides, and very properly, that the grant of 1811 was of both *varams*. Their Lordships are unable to attach importance for the purposes of this appeal to the documents upon which the plaintiffs based a contention that the zamindar had treated the grantees under Exhibit C as ryots giving them the usual *jirayati* leases. The operation and effect of Exhibit C as a document of title cannot be determined upon the basis of subsequent documents which contradict it on essential matters. Their Lordships are not satisfied, on the other hand, by any of the exhibits that at the date of the grant of 1811 agricultural tenants other than the grantee were already on the land.

The question which presents itself on the threshold of the case, and which has been decided by the High Court against the plaintiffs, is whether the interest granted by Exhibit C is one which constitutes the plaintiffs landholders within the meaning of the Act of 1908. The words *mokhasa* and *manyam* occur in the grant and both appear in Wilson's Glossary as

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meaning in the south of India lands held either at a low assessment or altogether free on condition of or in consideration of services. The word *inam* does not appear in the terms of the grant. The word *muzara* appears in the letter of 1826 and the words *muzara-vasathi* appear in some of the later documents: they are said to mean "allowance" or "remission". The word *kattubadi* (translated by "quit-rent" for want of a nearer word) appears in the plaintiffs' conveyance of 27th April 1921 to describe the annual payment under Exhibit C. But the title upon which the plaintiffs seek ejectment is put forward as a transferable and heritable right to the lands under Exhibit C upon payment to the zamindar of the annual sum of Rs. 50 or a due proportion thereof. If this would constitute the plaintiffs "landholders" under the Act of 1908, then the first three respondents claim to be ryots entitled to a permanent right of occupancy under section 6 and protected from ejectment by the civil Court under section 9 of the Act.

The definitions which bear upon the question whether the plaintiffs' title if made out gives them the status of a "landholder" are to be found in certain sub-sections of section 3 of the Act.

"By sub-section 2, 'Estate' means—

(*a*) any permanently settled estate or temporarily settled zamindari;

(*b*) any portion of such permanently settled estate or temporarily settled zamindari which is separately registered in the office of the Collector;

(*c*) any unsettled palaiyam or jagir;

(*d*) any village of which the land-revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been made, confirmed or recognised by the British Government, or any separated part of such village;

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(*e*) any portion consisting of one or more villages of any of the estates specified above in clauses (*a*), (*b*) and (*c*) which is held on a permanent under-tenure.

By sub-section 5, 'Landholder' means a person owning an estate or part thereof and includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor in title or of any order of a competent Court or of any provision of law.

By sub-section 11, 'Rent' means whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land in his estate for the purpose of agriculture.

By sub-section 15, 'Ryot' means a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the landholder the rent which is legally due upon it.

By sub-section 16, 'Ryoti land' means cultivable land in an estate other than private land."

On these definitions it is to be observed that clause (*d*) of sub-section 2 relates to a grant made prior to the Permanent Settlement and to a village not now part of a zamindari whereas clause (*e*) relates (though not exclusively) to villages which are part of a zamindari but are held on permanent under-tenure. The lands now in question do not constitute a village but are only part of a village and they cannot be held to come within any of the clauses which define the word "estate". On the other hand the word "estate" as employed in the Act has not the abstract meaning "quality or quantity of the interest of the holder". The plaintiffs' title if made out can only constitute them "landholders" upon one or other of two grounds: First, that they come within the words in sub-section 5 "or part thereof". Secondly, that they are within the extended meaning given to the word "landholder" by the provision that it "includes

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every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor-in-title". The application of these expressions to what have been called "minor inams" has been considered by the High Court of Madras in a series of decisions. In 1912 in *Appalanarasimhulu* v. *Sanyasi*(1) it was held by SUNDARA AYYAR and SADASIVA AYYAR JJ. that, though a minor inam was not an "estate" within the Act, the inamdars were landholders because

"there is no reason why the holder of an under-tenure should not be held to be a person entitled to collect rents of a portion of the estate out of which the under-tenure is carved".

The learned judges considered that

"if the tenure-holder is not bound to make any payment to the zamindar for his tenure he will then be a person owning a part of the estate".

In *Gadadhara Das Bavaji* v. *Suryanarayana Patnaik*(2) WALLIS C.J. dissented from the conclusion that a minor inamdar was a "landholder." He was of opinion that so long as the zamindar reserves an interest to himself, as by way of rent, no matter how insignificant it be, he continues to be the owner. He considered that in the definition of "rent" in sub-section 11 the words "in his estate" could not apply to an inamdar and excluded such a person from the extended meaning given by the clause which refers to persons entitled to collect the rent of a portion of an estate. SADASIVA AYYAR J. however held the inamdar to be a landholder on both of the grounds already mentioned. As to the first ground, he laid stress on the fact that in the case of an entire village clause (*e*) of section 3 (2) treats a permanent

(1) (1912) I.L.R. 38 Mad. 33.

(2) (1921) I.L.R. 44 Mad. 677.

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under-tenure as an estate and its holder as owner of the estate. He considered that there was already a catena of decisions in the High Court that a minor inamdar was a landholder. When this case came before three judges on Letters Patent Appeal, AYLING J. took the view that

"it may be conceded at once that so long as the zamindar reserves to himself a quit-rent the inamdar cannot be regarded as the owner of the lands in the ordinary legal meaning of the term."

But on the second ground he thought it clear that when the inamdar's grant was only of the *melvaram* it was a transfer by the owner of the right to collect the rent of a portion of the estate. Where, however, the grant was of both *varams* he had more difficulty but came to the same conclusion:

"When we say that the grant was of both *varams* we merely mean that the rights of the grantee in respect of the land were not limited by the necessity of respecting the right of any person possessed of the *kudivaram* at the time of the grant."

COUTTS TROTTER J. proceeded entirely upon the second ground observing that he was unable to gather from the language of this Act any general intention with regard to the position of minor inamdars. KUMARASWAMI SASTRI J. held that a minor inamdar was not a landholder where the grant to him was of both the *varams*. He thought that if the grantee was himself the occupancy ryot at the time of the grant, it could not divest him of that character and convert his sub-tenants into occupancy ryots; while if the land was at the time in the absolute disposal of the grantor, the object of the grant was to allow the grantee to occupy and enjoy the lands on favourable terms and not to create minor landholders. In such cases he considered the grantee could not be regarded as

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collecting rents from himself by virtue of the grant of the *melvaram*. The result of the Letters Patent Appeal was that by a majority of two judges to one the minor inamdar was held to be a landholder.

The matter came before a Full Bench in *Brahmayya* v. *Achiraju*(1) where the patta had been held to be a grant in inam and not a mere lease on favourable terms to a *jirayati* tenant. The question was framed as follows:

"Where a zamindar makes a post-settlement inam grant of a portion of a village with both varams on a permanent kattubadi, is the grantee a landholder within the meaning of section 3 (5) of the Madras Estates Land Act?"

SCHWABE C.J. thought that such an inamdar was not owner of a part of the estate and was not entitled to collect rent by virtue of any transfer. The provision as to persons entitled to collect rent was in his opinion intended for purchasers of part of an estate, mortgagees, or farmers of an estate and did not apply to an inamdar collecting rent under leases granted by himself. OLDFIELD J. found the considerations upon each side to be evenly balanced and the question difficult. He thought the liability of the inamdar for quit-rent need not be regarded as inconsistent with the character of landholder under the Act but that in any case a grantee of both *varams* of a part of a village was a person entitled to "collect the rent by virtue of a transfer from the owner", and that this very general language could not be read subject to an unexpressed restriction. PHILLIPS J. held that the word "owner" was applicable to the inamdar notwithstanding the reservation of an annual payment and that the grantee of both *varams* was entitled to collect rents which would previously have been payable to the grantor.

(1) (1922) I.L.R. 45 Mad. 716. (F.B.).

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DEVADOSS J. relied much on the definition of "estate" as excluding mere parts of villages:

"The word estate does not mean land but all the rights, liabilities and duties attaching to or incident to certain classes of tenure as defined by section 3 (2). The words 'part of an estate' have been put into the definition of landholder so as to include the transferee of a portion of the estate either by operation of law or by act of parties. An inamdar is not a transferee of the whole or any portion of the estate."

He further considered that where the grant is of vacant land the inamdar is not to be considered as having the right to collect rent but as having the *kudivaram* right himself plus a portion of the *melvaram*, and does not lose the character of ryot. VENKATA-SUBBA RAO J. regarded the definitions of "estate" and "landholder" as inconsistent but thought it more in consonance with the intention of the Legislature to regard minor inamdars as landholders. He considered that they were owners of part of an estate notwithstanding liability for *kattubadi* and that they came within the language of sub-section 5 as persons entitled to collect rents.

By this decision of three Judges against two, after long debate and much difference of opinion it was established by authority of the highest Court of the Province in March, 1922, that the minor post-settlement inamdar holding under a grant of both *varams* on a permanent *kattubadi* is a "landholder" under the Act of 1908. This decision was confirmatory of a course of decisions that had been given since 1912 and earlier though not without some dissent. For a considerable number of years tenants under such inamdars have been entitled to rely upon the special protection granted by the Act to ryots and their Lordships would be loath to disturb titles taken or dealt with on that footing. They do not conceal

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from themselves that neither of the two grounds above-mentioned is free from difficulty. They discard all argument from the presumed general intention of the Act as treacherous and inconclusive. But they cannot agree that "part of the estate" or "portion of the estate" does not refer to the land itself by the word "estate", nor do they feel any confidence in the doctrine that so long as the zamindar reserves any interest however insignificant a permanent grantee from him cannot be the owner. It may be that the words "or part thereof" were given a place in the definition of landholder without full appreciation of their effect in connection with the definition of "estate"; but there is no presumption to that effect; the words cannot be ignored; and good reason must be found in the Act itself for restricting their *prima facie* meaning. Their Lordships, as to the second ground, notice that not only does the definition of "estate" employ the word "estate" but the definition of "landholder" employs the word "rents" and the definition of "rent" employs the word "landholder." They feel more difficulty than was felt by the majority of the learned judges in Madras in regarding the extension, given to the meaning of the word "landholder" by the clause as to collection of rents, as applicable to an inamdar. But on either ground they are satisfied that the Full Bench decision of 1922 represents a careful and reasonable solution of a stubborn ambiguity in the Act, and that it ought not now to be overruled having regard to the time which has elapsed and to the character of the interests affected thereby. They are wholly unable to distinguish the present case so as to regard the reasoning of the majority of the Full Bench as inapplicable thereto, nor can they hold that Exhibit C is a mere *jirayati* patta on favourable terms. The plaintiffs' title, if it

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be made out, is to a permanent under-tenure of a portion of a village on a small annual payment by whatever name the payment may be described. In their Lordships' judgment they claim an interest which must be held to clothe them with the character of landowner and to put the cultivating tenants under them in the position of ryots, to whom sections 6 and 9 apply. The plaintiffs' claim to eject the first three respondents must therefore fail.

It was contended that even so the High Court ought not to have dismissed the suit without deciding the dispute as to title between the plaintiffs and respondents 4 and 5. Their Lordships, however, are not prepared to remand the case for a decision on this point. Having regard to their pleading the plaintiffs have no right to such an order since they impleaded respondents 4 and 5 without asking for any declaration as to title against them and merely as persons who might object to the relief sought against the first three respondents. The matter is one to be decided now upon the balance of convenience to the parties on both sides and their Lordships see nothing to induce them on this point to interfere with the decree of the High Court which has left the question of title open.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay one set of costs to the first three respondents and another to the fifth respondent.

Solicitors for appellants : *Douglas Grant & Dold.*

Solicitors for respondents 1 to 3 : *Barrow Rogers & Nevill.*

Solicitor for respondent 5 : *Harold Shephard.*

The fourth respondent was not represented.

C.S.S.

APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Gentle and Mr. Justice Somayya.

IN RE AN ADVOCATE.*

1939, May 1.

Legal Practitioner—Agreement to be remunerated by share of profits of litigation, only in the event of success in a suit—Professional misconduct.

Where it appeared that an Advocate originally entered into an agreement with a lady who had instituted a suit for maintenance by which he was to be paid fourteen per cent of whatever was received in the suit but later agreed to be remunerated on the basis of the taxed costs which might be recovered from the other side and the payment out of the decretal amount of what he had advanced, with the result that in either case he was to receive nothing unless the suit was successful,

held, that for an Advocate to enter into an agreement of the nature of either of the said agreements amounted to professional misconduct of which the Court would take serious notice.

NOTICE under section 12 (3) of the Indian Bar Councils Act issued to an Advocate of the High Court of Judicature at Madras, calling upon the said Advocate to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court for his professional misconduct rendering himself liable to be dealt with under section 10 (1) of the Indian Bar Councils Act.

K. Umamaheswaran for *Advocate-General* (*Sir A. Krishnaswami Ayyar*) for Government.—The complainant is the brother of a widow named Manikkammal. She filed a suit on the Original Side of the High Court for arrears of maintenance and for future maintenance. Her brother was conducting the litigation on her behalf. Various Advocates were engaged to conduct the suit for her but instructions were withdrawn

* *In re* An Advocate.

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from them later on. The respondent was engaged in 1933 to conduct the suit. He agreed to take for his fee fourteen per cent of the decreed amount including costs after the successful termination of the litigation. Five allegations were made against him by the complainant. The Tribunal of the Bar Council on enquiry sent a report in favour of the respondent. [All the five charges were then read.]

[LEACH C.J.—We accept the report of the Tribunal on all the charges except the second which seems to be a serious one. What is the evidence relating to that charge ?]

[The evidence of the complainant was referred to.] The second charge is based on Exhibit A, a letter written by Manikkammal. It clearly shows that she agreed to pay the respondent after the suit was successful fourteen per cent of the amount which might be decreed for arrears of maintenance.

[LEACH C.J.—This agreement surely amounts to professional misconduct. The Advocate was to receive nothing unless the suit was successful. In other words, "no cure, no pay."]

Exhibit B is another letter written by Manikkammal where she, after complaining of the non-fulfilment of the terms of the agreement by the respondent, refers to Exhibit A, the first letter. Exhibit E is another letter by which she reminds the respondent of his agreement to conduct the case and complains that he was not acting as per the terms of the agreement. On 14th March 1939 the respondent took a promissory note for Rs. 750 from the complainant and his sister the plaintiff. On that date she gave a letter Exhibit J-1 authorizing the respondent to take that sum of Rs. 750 from the amount decreed. It also states that the respondent should collect the taxed costs in the suit and pay the stamp duty to the Government (since the suit was filed by the plaintiff as a pauper) and all other Court expenses, etc., and permits the respondent to take the balance for himself.

[LEACH C.J.—This is a new agreement. Even here "no cure, no pay."]

C. R. Rajagopalachari for respondent.—The complainant here has filed this petition with a view to blackmail the respondent and to extort as much money as possible. The complainant has been a friend of the respondent's family. There were many money dealings between them. In the course

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of those dealings the complainant owed the respondent Rs. 1,800. To avoid paying this amount the complainant instituted these proceedings. Exhibit 1 is a notice demanding Rs. 10,000 from the respondent. The proceedings are in the nature of blackmail and not *bona fide*. The respondent had already spent Rs. 4,000 for this litigation. He cannot recover even a pie of it. That itself is a sufficient punishment. It is true that the respondent acted foolishly in entering into this speculative agreement and he has suffered for it sufficiently. In view of the above facts his case may be considered leniently.

K. Kuttikrishna Menon for the Bar Council.

LEACH C.J.

The JUDGMENT of the Court was pronounced by LEACH C.J.—The respondent is an Advocate practising in this Court. He was charged with professional misconduct. Five charges were framed against him and these were investigated by a Tribunal constituted under the Indian Bar Councils Act. The Tribunal has reported favourably to the respondent on all the charges. We accept the report except so far as it concerns the second charge. We consider that in this case the charge has been substantiated.

The complainant is the brother of one Manikkammal, who instituted in 1932 a suit on the Original Side of this Court in which she asked for a decree for maintenance as a Hindu widow. She sued as a pauper. She claimed that she was entitled to maintenance at the rate of Rs. 500 per mensem and to a sum of Rs. 52,000 as arrears of the allowance. Through her brother she engaged various Advocates to conduct her suit, but subsequently withdrew her instructions. In July 1933 the complainant approached the respondent with a view to the respondent acting for his sister. The respondent agreed and the complainant alleges that it was arranged that the respondent's remuneration was to be fourteen per cent of the sum which might be decreed in the suit, including costs. The

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second charge is based on this agreement. The actual charge reads:

"That you having been engaged in Civil Suit No. 168 of 1932 on the file of the High Court for the plaintiff accepted a share of the profits of litigation for your professional remuneration, viz., fourteen per cent of the sum that may be decreed in the suit including costs."

The Tribunal thought that no definite agreement had been entered into, but that after discussion the matter was left at large. An examination of the correspondence which passed between the complainant and the respondent shows that the conclusion of the Tribunal cannot be supported.

The complainant in the course of his evidence said:

"I went to the respondent. This was in May or June 1933. That was the very first time I saw the respondent. The respondent called for the papers which I gave him, having got them from Mr. Sankara Narayana. A week later, he said he would take up the case, provided I agreed to pay him twenty per cent of the amount that may be realised in the suit. I bargained with him and ultimately reduced the demand to fourteen per cent of the moneys. I told him the suit must be finished within a month or two. He agreed to do so. He promised to pay Rs. 100 for the maintenance of the plaintiff till the suit was disposed of within the time mentioned above. He agreed to engage a senior. My sister signed a letter confirming the arrangement referred to above and I passed that letter to the respondent."

This letter is dated 26th July 1933 and the copy of it (Exhibit A) reads as follows:

"Regarding Civil Suit No. 168 of 1932 I request you to kindly conduct the suit and accept my Vakalat with a competent senior and I hereby agree to pay you fourteen per cent of the amount I get in the said suit for arrears of past maintenance."

The respondent says that he has no recollection of having received this letter, but there can be no doubt

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that he did receive it. On 6th November 1933 the plaintiff wrote a letter to the respondent saying that he had only paid her Rs. 23 for her maintenance, whereas he had agreed to help her to the extent of Rs. 100. The letter proceeds:

"Further as per your terms mentioned in my agreement letter taken by you about your fees, you have not till now engaged any senior Counsel to conduct the suit and so I am in a fix how you are going to finish the case shortly as per your frequent promises."

In the concluding paragraph of this letter there is a further reference to the letter of 26th July 1933.

On 19th January 1934 the plaintiff wrote to the respondent a letter in which she states:

"You took an agreement from me to pay you fourteen per cent from the amount that may be decreed in my favour and you undertook (i) to meet all the expenses in the case, (ii) to engage a senior either Mr. S. Duraiswami Ayyar or Mr. K. S. Krishnaswami Ayyangar and to pay their fees and (iii) to pay me a sum of Rs. 100 for my food expenses and to finish off the case within a month from the re-opening of the Court after summer vacation."

This letter was shown to the respondent but he handed it back to the plaintiff saying that he would fulfil his agreement.

It is abundantly clear that the respondent did finance the litigation to the extent of at least Rs. 300 and advanced various other sums to the complainant and his sister. On 14th March 1934 he took a promissory note from the complainant and his sister for Rs. 750 which included the Rs. 300 I have just referred to. On the same date the complainant's sister signed a letter in which she authorized the respondent to take the Rs. 750 out of the amount which might be decreed in her suit. The letter adds:

"I and my brother are liable to pay you these amounts only, after obtaining decree against the defendants and not

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before. I further agree with my full consent and knowledge to collect the taxed costs that may be ordered in the suit and pay the Government stamp duty for the plaint and all other Court expenses, etc., and take the balance yourself."

This really amounted to a new agreement. Instead of the respondent having fourteen per cent of the proceeds of the suit he was to be paid his advances out of the monies recovered under the decree and to have for his services the balance of the taxed costs after meeting Court charges. But here again he was not to receive anything unless the suit was successful.

There are other letters which support the charge, but it is not necessary to refer to them. Sufficient has been said to make it clear that the respondent did enter into an agreement by which he was to be paid fourteen per cent of whatever was recovered in the suit but later agreed to be remunerated on the basis of the taxed costs which might be recovered from the other side and the payment out of the decretal amount of what he had advanced. In both the cases the agreement was "no cure, no pay". The Advocate was to receive nothing unless the suit was successful.

For an Advocate to enter into an agreement of the nature of that embodied in Exhibit A or of that embodied in the letter of 14th March 1934 (Exhibit J-1) amounts to professional misconduct, and the Court is bound to take serious notice of it. To allow conduct of this nature to pass without punishment would only lead to the encouragement of agreements of this nature. The Court must take steps to prevent Advocates speculating in litigation, and that is what the respondent has done. A great deal has been said of lack of *bona fides* on the part of the complainant and it has been suggested that the complaint filed was in the nature of blackmail. We are not concerned

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here with the conduct of the complainant. We are concerned with the conduct of the respondent and there is abundant evidence to show that he has been guilty of professional misconduct. It is said that as the result of his connection with this litigation he has lost a large sum of money. We are told that the amount by which he is out of pocket is over Rs. 4,000. This is of course punishment in itself but we consider that it is not sufficient. We consider that the conduct of the respondent has been such that he should be suspended from practice for three months from this date. We would add that the fact that the punishment inflicted by the Court is limited to suspension for three months does not mean that it will be so limited in another case. Agreements of this nature cannot be tolerated and in future the Court will not take such a lenient view.

V.V.C.

APPELLATE CIVIL.

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

SEENI MADAR SAHIB (PETITIONER), PETITIONER,

1939, April 28.

v.

ABDUR RAHMAN SAHIB AND ANOTHER (RESPONDENTS), RESPONDENTS.*

Election—Two successful candidates—Single petition to set aside election—Maintainability—Election rules framed under Madras Local Boards Act (XIV of 1920)—Applicability and effect of—Desirability of amending the said rules.

For one of the wards of a panchayat board two candidates had to be elected. One of the seats was a reserved seat; the

* Civil Miscellaneous Petition No. 5334 of 1938.

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other was a general seat. There were two candidates for each seat. The petitioner was one of the candidates for the reserved seat but was unsuccessful. He filed a petition, to which he made the successful candidates the respondents, asking that both elections should be set aside. The petition averred that there had been impersonation and that the persons impersonated were the same in both the cases. The Election Commissioner held that the petitioner should have filed two petitions but gave him the option of treating the petition as an election petition in respect of one of the two seats.

Held that the Election Commissioner should have treated the petition which had been filed as a petition in each case and required the petitioner to make further provision with regard to costs.

The decision of the Election Commissioner meant that the petitioner was called upon to choose whether he would drop his charges against one of the two successful candidates, and for that there was no warrant in the Election Rules framed under the Madras Local Boards Act, 1920.

The desirability of amending the rules pointed out.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ to the Election Commissioner (District Munsif) of Tiruvellore calling for the records in Original Petition No. 40 of 1938 (Election Petition No. 3 of 1938) on his file and to quash the proceedings therein.

V. Ramaswami Ayyar and *M. Natesan* for petitioner.

V. T. Rangaswami Ayyangar and *K. Ramaswami Ayyangar* for respondents.

LEACH C.J.

The ORDER of the Court was delivered by LEACH C.J.—The petitioner in this case was a candidate at the election held on 28th June 1938 of members to the Tiruvellore Panchayat Board. For the sixth ward of the board two candidates were to be elected. One of the seats was reserved for the Muhammadan community; the other was a general seat. There were two candidates for each seat and the

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petitioner was one of the candidates for the reserved seat. He was unsuccessful and he filed a petition in which he asked that both elections should be set aside. The successful candidates are the respondents to this petition. Before the Election Commissioner a preliminary objection was taken to the validity of the petition. It was said that inasmuch as the petitioner was asking that the election in respect of the reserved seat and the election in respect of the general seat be set aside he should have filed two petitions. The Election Commissioner accepted this contention and gave the petitioner the option of treating the petition as an election petition in respect of one of the two seats. The petitioner then filed an application to this Court for a writ of *certiorari* with a view to the order of the Election Commissioner being quashed. A writ *nisi* was issued and the Court is now called upon to decide whether the rule shall be made absolute.

In holding that it was necessary for the petitioner to file a petition in respect of each election the Election Commissioner had regard to the fact that the Election Rules framed under the Madras Local Boards Act, 1920, are drafted in the singular and that a deposit of twenty-five rupees has to be made in respect of the costs of the respondent. It is true that there is no express provision enabling an unsuccessful candidate or a voter to challenge the election of two candidates in one petition, but it does not necessarily follow from this that the Election Commissioner was justified in refusing to treat the petition which was filed as a petition in each case. The petition averred that there had been impersonation and that the persons impersonated were the same in both the cases. Each voter was given two ballot papers. There were four ballot

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boxes and a voter had the right to put the ballot papers in whichever box he selected, but he was not allowed to put two ballot papers in one box. It is obvious that in this case it would have been convenient to have tried the two matters together. Under the English rules this petition would have been accepted but it would have been treated as a petition in each case. *See* sections 22 and 23 of the Parliamentary Elections Act, 1868, and section 91 (3) of the Municipal Corporations Act, 1882. We consider that there was no justification for the action which the Election Commissioner took. He could have treated the petition as a petition in each case and could have required the petitioner to make further provision with regard to costs. His decision meant that the petitioner was called upon to choose whether he would drop his charges against one of the two successful candidates, and for this there is no warrant in the rules.

We consider that the rule should be made absolute and the order of the Election Commissioner quashed. The record will be returned to the Election Commissioner to proceed with the hearing of the petition according to law. The petitioner is entitled to his costs.

In order to prevent such questions arising in future it may be desirable to effect an amendment in the rules.

A.S.V.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Patanjali Sastri.

R. V. RAJARATHNA CHETTIAR (PLAINTIFF), APPELLANT,

1939, April 18.

v.

SHARI SHAICK MAHABOOB SAHIB AND FOUR OTHERS (DEFENDANTS), RESPONDENTS.*

Mahomedan law—Minors—Agreement with de facto *guardian of minors agreeing to finance litigation on condition of receiving share in fruits thereof—Minor getting property in litigation—Suit to enforce agreement to get share of same—Agreement void* ab initio*—Indian Contract Act (IX of* 1872), *sec.* 68*—Minor liable to pay back amounts properly spent for litigation and for his maintenance—"Reimburse" in section—Meaning of—Indian Limitation Act (IX of* 1908), *art.* 61*—Applicability of.*

Certain Mahomedan minors who were parties in a suit were without funds to carry on the same. The *de facto* guardian of the minors entered into an agreement with the appellant by which the latter agreed to finance the litigation on condition of his receiving one half of what was recovered by the minors as the result of the suit after allowing for the repayment of the amounts advanced. There was no provision in the agreement for payment of interest. The appellant financed the suit and also provided money for the maintenance of the minors. The minors got a substantial amount in the said suit. In a suit for the recovery of half the amount got by the minors in the said suit and of the amount advanced for the maintenance of the minors and for the expenses of the said suit,

held: (1) The agreement was void *ab initio* so far as the minors were concerned and the personal law of the minors did not impose upon them any obligation to pay interest.

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* Original Side Appeal No. 30 of 1936.

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(2) Under section 68 of the Indian Contract Act the plaintiff was entitled to get back the amounts properly spent by him for the litigation and for the maintenance of the minors with interest at a fair rate, namely, six per cent per annum from the dates when the moneys were advanced, subject to the law of limitation governed by article 61 of the Indian Limitation Act.

Quaere.—Whether the word "reimburse" in section 68 of the Indian Contract Act would include the payment of interest on the monies advanced.

APPEAL against the judgment and decree of WADSWORTH J. dated 26th February 1936 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 420 of 1932.

V. Govindarajachari and *T. Krishnaraja Naicker* for *V. Radhakrishnayya* for appellant.

T. Aravamuda Ayyangar for second respondent.

K. Rajah Ayyar and *N. Srinivasa Ayyangar* for respondents 3 to 5.

First respondent was not represented.

The JUDGMENT of the Court was delivered by

LEACH C.J.

LEACH C.J.—In order to appreciate the questions which arise in this appeal it is necessary to trace the course of events for some eleven years before the institution of the suit. The grandfather of the second, third, fourth and fifth respondents, one Chidri Ismail, was a dealer in skins and hides and carried on business in partnership with another Muhammadan, named Dhabaywallay Manjalay. In 1921 Chidri Ismail instituted on the Original Side of this Court a suit (Civil Suit No. 697 of 1921) for the dissolution of the partnership and for the taking of accounts. He died before the suit came on for hearing and his heirs were made plaintiffs in his stead. Chidri Ismail had a son, Chidri Abdul Rahiman, and a daughter, Masum Bi.

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Chidri Abdul Rahiman married one Sakina Bi, by whom he had three children, the third, fourth and fifth respondents in this appeal. Masum Bi married the first respondent, and the second respondent is the issue of that marriage. Chidri Ismail's son, daughter, son-in-law, daughter-in-law, and his four grandchildren were all made plaintiffs in the suit. The grandchildren were minors and were minors at all times material to the questions involved in this appeal. Masum Bi died in 1924 and Chidri Abdul Rahiman in 1925. On 16th August 1926 the partnership suit was dismissed for default and on 7th September 1926 an application was filed on behalf of the surviving plaintiffs asking for its restoration to the list. On 10th December 1926 the application was granted so far as the minor plaintiffs were concerned, but was dismissed as against the major plaintiffs, Sakina Bi and the first respondent. The major plaintiffs appealed, but the appeal was dismissed on 8th February 1929 on the undertaking that no objection would be taken by the defendant-respondent to the minor plaintiffs proceeding with the suit and recovering whatever they were entitled to as heirs of Chidri Ismail. On 11th December 1929 a preliminary decree was passed in favour of the minor plaintiffs and the Official Referee was directed to take the accounts. On 4th March 1931 the Official Referee submitted his report, but before it was taken into consideration by the Court a compromise was agreed upon under which the defendant was to pay to the minor plaintiffs a sum of Rs. 50,000 in satisfaction of their claims, and a decree embodying the terms of the settlement was passed. The partnership assets included immovable properties and the receivers who had been appointed were authorized to realize

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sufficient of the properties to pay the amount to the minor plaintiffs.

The minor plaintiffs were without funds to carry on the litigation and the appellant alleges that he financed the suit and also provided money for their maintenance. On 20th March 1928 an agreement was entered into under which the appellant was to provide Rs. 1,000 for the expenses of the suit and of the appeal of the major plaintiffs against the order dismissing the application for restoration so far as they were concerned. For his financial help the appellant was to receive one-half of what was recovered as the result of the suit, after allowing for the repayment of the loan. There was no provision in the agreement for the payment of interest. In his plaint Chidri Ismail had valued the relief sought by him at Rs. 1,50,000. The agreement was signed by the first respondent on his own behalf and as the guardian of the second respondent, and by Chidri Jehangir, the brother of Chidri Ismail, on behalf of himself and of the third, fourth and fifth respondents. Chidri Jehangir was acting as the next friend of the third, fourth and fifth respondents in the partnership suit and at the most can only be regarded as a *de facto* guardian.

On 3rd September 1932 the appellant instituted the suit out of which this appeal arises. He claimed to be entitled to Rs. 30,992-0-9 made up of Rs. 5,992-0-9, the amount which he alleged he had advanced for the maintenance of the minors and for the expenses incurred in Civil Suit No. 697 of 1921, and Rs. 25,000 being one-half of the amount decreed in that suit. The case was tried by WADSWORTH J. who held that it had not been proved that any amount had

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been advanced by the appellant for the maintenance of the minors, but that the agreement of 20th March 1938 was binding on them subject to "relief against harshness". He considered that it would not be fair to allow the appellant to have half the decretal amount, but he was of the opinion that he was entitled to recover all that he had advanced for the purposes of the litigation with interest at twenty per cent. On this basis he directed the Official Referee to take an account of the monies advanced for the expenses of the previous suit. The Official Referee took the account on the basis of actual expenditure and having received the report the learned Judge passed a decree against the respondents for Rs. 10,733-3-11. Of this sum Rs. 4,727-9-9 represented advances by the appellant for the expenses of the previous suit and Rs. 6,005-10-2 interest thereon at twenty per cent per annum. The appellant has appealed against the decree and the minor respondents have filed a memorandum of cross-objections. Before us the appellant has not pressed his claim that he should receive half the amount awarded to the minor plaintiffs in Civil Suit No. 697 of 1921, but has contended that he should be allowed interest at the rate of seventy five per cent per annum on the sums which he advanced for the purposes of the suit. He challenges the finding that he had advanced no money for maintenance and says that he should be awarded in this connection Rs. 1,264-7-0, being the difference between Rs. 5,992-0-9, the amount claimed for maintenance and litigation expenses, and Rs. 4,727-9-9, the amount awarded for litigation expenses. The second, third, fourth and fifth respondents have raised the following contentions: (i) The agreement of 20th March 1928 is not binding upon them, (ii) even if the appellant

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could have claimed relief under section 68 of the Contract Act he is barred from the benefit of that section because the suit was based on the agreement and no alternative plea was advanced, (iii) in any event, the appellant is not entitled to interest on the sums advanced by him, (iv) the account had been taken on a wrong basis and (v) article 61 of the Limitation Act applies in respect of all sum sadvanced by the appellant.

The plea advanced by the minor respondents that the appellant is not entitled to claim recompense by way of interest on the ground that he had not advanced this plea in his plaint may be disposed of at once. An examination of the plaint shows that this objection cannot be sustained. In paragraph 19 of the plaint the appellant avers that the amounts advanced by him for the conduct of the litigation and for the maintenance of the minors were lent for necessary purposes and the minors are bound to repay him. No mention is made of interest, but if the appellant is in law entitled to interest on monies advanced for necessaries we think that he has sufficiently indicated his case to justify the award of interest.

We consider that in holding that the appellant was entitled to sue on the agreement of 20th March 1928 the learned Judge erred. It is a well-settled principle of the general law that a guardian cannot impose a personal liability on his ward and therefore a minor cannot be bound by a personal covenant in a contract entered into by his guardian; *Waghela Rajsanji* v. *Shekh Masludin*(1) and *Indur Chunder Singh* v. *Radhakishore Ghose*(2). The minor's personal

(1) (1887) I.L.R. 11 Bom. 551 (P.C.). (2) (1892) I.L.R. 19 Cal. 507 (P.C.).

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law may, however, affect the position. For instance, the natural guardian of a Hindu minor has power without the Court's sanction to mortgage or sell any part of the minor's estate in a case of need, or for the benefit of the estate; *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(1). In cases of necessity the guardian of a Hindu minor may borrow money upon a promissory note and the minor's estate is liable for repayment with interest at a proper rate. The minor is not liable on the note, but on the debt evidenced by the note. His liability is created by his personal law. This question was fully discussed in the judgment of a Division Bench of which I was a member in Letters Patent Appeal No. 39 of 1936.* This judgment has not yet been reported, but it is not necessary to travel over the same ground. I have sufficiently indicated the effect of the personal law of a Hindu minor.

It has been argued on behalf of the appellant that the Muhammadan law is very much the same as the Hindu law and that the agreement of 20th March 1928 can be enforced under the Muhammadan law. The basis for this statement is the rule that a *de facto* guardian has power to sell the goods and chattels of his ward for the ward's imperative necessities. The power to sell or pledge movables cannot confer a right to bind minors to a covenant to transfer their property, even in part. The learned Advocate subsequently had to concede that this was so and that his client could not base his claim on the agreement, but inconsequentially he asked the Court to hold that the appellant was entitled to interest because

(1) (1856) 6 M.I.A. 393.

* Since reported as *Annamalai* v. *Muthuswami*, I.L.R. [1939] Mad. 891.

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a Court of Equity in setting aside an unconscionable bargain could impose terms. I cannot imagine a Court of Equity awarding against minors interest at the rate of seventy-five per cent per annum whatever the risk, but it is not a question of setting aside an unconscionable bargain on terms. The agreement was void *ab initio* so far as the minors were concerned. As there is no agreement in law and as the personal law of the minors does not impose upon them any obligation to pay interest—in fact Muhammadan law is against the charging of interest—the appellant is confined to his remedy under the provisions of section 68 of the Indian Contract Act.

Section 68 of the Contract Act entitles a person who has supplied necessaries to a minor to reimburse himself from the minor's property. On behalf of the respondents it was conceded that the money which was advanced for the expenses of the partnership suit would come within the section, provided that the money was properly expended for the purposes of the suit. They, however, contended that all that the appellant was entitled to was the recovery of the amounts which had been properly expended without interest. In this connection our attention was drawn to the decision in *Fisher* v. *Mowbray*(1), where it was held that an infant cannot bind himself in a bond with a penalty conditioned for payment of interest as well as principal, and to the judgment in *Baylis* v. *Dineley*(2) which was to the same effect. The English law and the Indian law with regard to contracts by minors are not the same. Under the English law the contract of a minor is voidable. In this country it is void, and we have to consider the

(1) (1807) 8 East 330; 103 E.R. 369
(2) (1815) 3 M. & S. 476; 105 E.R. 689.

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position in the light of the Contract Act, rather than in the light of English cases. While by reason of section 11 of that Act a minor is incapable of contracting, section 68 allows a person who has supplied a minor with necessaries to reimburse himself from the minor's property. The appellant has contended that reimbursement must include the payment of interest, as otherwise a person who lends money to a minor and is not repaid for an appreciable period of time suffers loss. He could, it is said, only be reimbursed if he were repaid the principal together with the amount he would have received if he had use of the money. Section 32 of the Trusts Act was here referred to. That section allows a trustee to reimburse himself out of the trust property all monies expended by him *inter alia* for the support of the beneficiary. The section expressly provides that where he has paid the expenses out of his own pocket he has a first charge upon the trust property for such expenses and interest. The learned Advocate for the appellant also drew our attention to three cases in which interest had been allowed in respect of claims falling within section 68 of the Contract Act; *Phalram* v. *Aiyub Khan*(1), *Sri Nath* v. *Jagannath*(2) and *Watkins* v. *Dhunnoo Baboo*(3). In none of these cases, however, was the question of the right to interest raised. It was granted apparently as a matter of course.

The question whether the word "reimburse" should be given the meaning which the appellant would have is one of some difficulty, but in order to decide whether the appellant is entitled to interest it is not necessary to decide this particular question. We consider that he is entitled to interest on the

(1) (1926) I.L.R. 49 All. 52. (2) (1929) I.L.R. 52 All. 391.
(3) (1881) I.L.R. 7 Cal. 140.

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ground that interest would be allowed by a Court of Equity. The proviso contained in the Interest Act leaves it open to the Court to allow interest in any case in which interest would be allowed by a Court of Equity; *Bengal-Nagpur Railway Company, Limited* v. *Ratanji Ramji*(1). That a Court of Equity would allow interest in a case like the one now before us is to be gathered from the decision in *Martin* v. *Gale*(2). There, a minor executed a deed to secure the repayment of monies advanced to him for necessaries. When he came of age the lender sued to enforce his security. JESSEL M.R. held that he was not entitled to do so, but that he was entitled to have an account (i) for all monies advanced to the minor before he attained majority and expended by him on necessaries or in paying debts incurred for necessaries, (ii) for an inquiry whether any such sums had been re-paid and (iii) for an order for repayment of the amounts found due with interest at four per cent. That case is analogous to the case now before us and we hold that the appellant is entitled to recover monies advanced by him for the purposes of the litigation with interest, but at a fair rate. A fair rate we consider would be the Court rate which is six per cent per annum.

It follows that the account which has been taken of the advances will have to be reopened. The respondents have asked that in the course of the further inquiry the trial Court should be directed to examine the sums provided by the appellant for litigation expenses and reject all amounts not shown to have been reasonably required for the purposes of the litigation. When the matter was before the Official Referee all that the appellant was called

(1) I.L.R. [1938] 2 Cal. 72 (P.C.). (2) (1876) 4 Ch. D. 428.

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upon to prove was that he had provided the amounts claimed by him. It was not suggested that the amounts provided had not been properly spent. This was accepted. Therefore it is too late in the day for the respondents to say that the account should be taken on a new basis. Subject to what is said in the appeals against the final decree (Original Side Appeal No. 8 of 1938 and Original Side Appeal No. 24 of 1938) and to the law of limitation which I will deal with in a moment, the account as settled by the trial Court will stand and interest will be calculated at six per cent on the various amounts supplied from the dates of advancement.

The respondents have contended that this suit falls within article 61 of the Limitation Act and therefore the appellant cannot recover sums which were advanced more than three years before suit. The appellant contends that the proper article is article 120. We are of the opinion that the article which applies is article 61. This article fixes a period of limitation of three years for money payable to the plaintiff for money paid for the defendant. The monies which the appellant paid were paid for necessaries of the minors. Support for the opinion that article 61 applies is to be found in the judgment of the Lahore High Court in *Piare Lal* v. *Lajja Ram*(1). Further support is to be obtained from the decision of this Court in *Kandaswamy Pillai* v. *Avayambal* alias *Thangachi Ammal*(2). That case related to a claim under section 70 of the Contract Act, which entitles a person to recover money which he has paid for another, not intending to do so gratuitously, and the other person has enjoyed the benefit of the payment. There is

(1) (1935) I.L.R. 17 Lah. 78. (2) (1910) I.L.R. 34 Mad. 167.

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no difference in principle between section 70 and section 68 of the Contract Act, and if article 61 applies to section 70, it must apply to section 68. In the taking of the new account regard must, therefore, be had to the provisions of article 61 of the Limitation Act. So far as the third, fourth and fifth respondents are concerned the law of limitation will apply to all payments made three years before the date of the institution of the suit, namely, 3rd September 1932. This date, however, does not apply to the second respondent. The appellant has asked the Court to hold that all payments made three years before 2nd March 1931 can be recovered proportionately against the second respondent, because on that date the first respondent, his lawful guardian, signed an acknowledgment of the amount due in respect of the advances for maintenance and litigation expenses. The Official Referee refused to accept the statement that the first respondent signed the acknowledgment on 2nd March 1931 and held that he must have signed at some date subsequent to 11th July 1932. The report of the Official Referee was accepted by the learned Judge and we see no reason to come to a contrary conclusion. Therefore so far as the second respondent is concerned he will be liable for his share of the money paid for litigation expenses after 11th July 1929.

The only question which remains to be considered is the appellant's claim that he should be allowed the sum of Rs. 1,264–7–0 for maintenance. We consider that the learned trial Judge should have directed the Official Referee to take an account in respect of the maintenance claim as there was sufficient evidence on the record to justify this course. In addition to the oral testimony of the appellant there were his

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account books and a letter (Exhibit C) from the mother of the third, fourth and fifth respondents asking the first respondent to raise money from the appellant for the maintenance of the minors. The learned Judge refused to order an account because there was no evidence that any particular sum had been utilized for the support of any particular minor. What had been utilized for the respective minors had, however, never been inquired into. All that the appellant was required to do was to satisfy the Court that monies had been provided. How much had been provided and how much had been spent on the minors respectively were matters to be inquired into by the Official Referee. The maintenance claim can only be decided after an investigation in the first place by the Official Referee and he will be directed to take the account. The appellant will be entitled to interest at the rate of six per cent per annum on any amounts found due. Article 61 of the Limitation Act applies here also.

The result is that the appellant fails on his claim to interest at the rate of seventy-five per cent, but is awarded interest on his payments at the rate of six per cent and he succeeds on his claim for an account of the monies advanced for maintenance. The respondents have failed in their contention that the appellant is not entitled to any interest, but have succeeded in part on their claim for the reopening of the account and on the question of limitation. The decree of the Original Side will be set aside so far as the second, third, fourth and fifth respondents are concerned, but it will stand against the first respondent, who has not appealed. The case will be remanded to the Original Side to be disposed of in accordance with this judgment so far as the second, third, fourth

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and fifth respondents are concerned. The decree under appeal provides for a personal decree against the minors. There can be no personal decree against them. The decree which is passed will be against their properties only. In drawing up the final decree care will be taken to allocate liability to the minor respondents according to the respective shares in the estate.

In dealing with the question of costs WADSWORTH J. allowed two sets for the respondents. This has been objected to and we consider that there should only be one set. The parties will pay and receive, here and below, proportionate costs, one set, but there will be a certificate for two Counsel on each side.

Attorney for respondents: *N. T. Shamanna.*

G.R.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Somayya.

1939, March 13.

RAMASWAMI GOUNDAN AND TWO OTHERS (RESPONDENTS 2, 4 AND 5), APPELLANTS,

v.

LAKSHMANA REDDI AND TWO OTHERS (APPELLANTS 2 AND 3 AND THIRD RESPONDENT), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 9—Festival day in temple—Right to lead a horse—Suit of civil nature cognizable by civil Court—No compellable duty on plaintiff's part to bring a horse or to lead it on the festival day—Office—Test of.

The plaintiff sued to establish his right to lead the horse on a particular festival day in a village temple whenever that

* Letters Patent Appeal No. 53 of 1937.

RAMASWAMI v. LAKSHMANA.

festival was performed, alleging that leading the horse was an office, that he and his predecessors had been performing that office from generation to generation and that therefore he was entitled to be protected against disturbance from the temple authorities. There were admittedly no emoluments attached to the office, and there was no compellable duty on the part of the plaintiff to bring a horse or to lead it on the festival day in question.

Held that what was claimed by the plaintiff was not an office but merely an honour and that the suit was not one of a civil nature cognizable by a civil Court under section 9 of the Code of Civil Procedure.

One test which is necessary to constitute an office is a corresponding compellable duty.

Srinivasa Thathachariar v. *Srinivasa Aiyangar*(1) relied upon.

APPEAL under Clause 15 of the Letters Patent against the judgment of KING J. in Second Appeal No. 50 of 1933 preferred to the High Court against the decree of the Court of the Subordinate Judge of Salem in Appeal Suit No. 41 of 1930 (Original Suit No. 759 of 1927, District Munsif's Court, Salem).

S. S. Ramachandra Ayyar for appellants.

K. S. Desikan for respondents 1 and 2.

Third respondent was not represented.

SOMAYYA J.

The JUDGMENT of the Court was delivered by SOMAYYA J.—There is a Mari Amman temple in a village called Thammampatti and a Selli Amman temple in Koneripatti, a hamlet of the above village. The two plaintiffs claimed two different rights but we are concerned in this appeal only with the right claimed by the first plaintiff. The right claimed by him is the right to lead the horse on a particular festival day whenever that festival is performed. It is said that this festival is not performed every year or at stated

(1) (1899) 9 M.L.J. 355.

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intervals but that it is performed whenever funds permit. The right that is claimed is not a right to worship but a right to an office. It is claimed that leading the horse is an office, that the plaintiff and his predecessors have been performing this office from generation to generation and that therefore the plaintiff is entitled to be protected against disturbance from the defendants. The District Munsif of Salem decreed the suit holding that the plaintiff had established his right. On appeal the Subordinate Judge of Salem upheld the contention but he made a very important addition to the decree of the trial Court. He held in effect that the first plaintiff could not be compelled to perform this act of leading the horse and that, if he did not bring a horse at the time of the festival and was not willing to lead it, the defendants would be entitled to make other arrangements for the conduct of the festival. The decree of the Subordinate Judge accordingly directs that in the event of the first plaintiff's failure or refusal to lead the horse, the Perithanakars and Kariakars are entitled to make other necessary arrangements for the conduct of the festival. With this modification the Subordinate Judge confirmed the decree granted by the trial Court. There was a second appeal filed in this Court and the appeal was disposed of by KING J. He confirmed the decree of the Subordinate Judge but granted a certificate under Clause 15 of the Letters Patent.

We are concerned in this appeal with the question whether the right that is claimed by the first plaintiff is a right to an office which can be made the subject-matter of a suit in a civil Court under section 9 of the Code of Civil Procedure. That section says:

"The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature

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except suits of which their cognizance is either expressly or impliedly barred."

An explanation is added that a suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies. The point that we have got to decide is whether the suit in this case is of a civil nature and whether it is for a right to an office. There are admittedly no emoluments attached to the office. As was held by this Court in *Srinivasa Thathachariar* v. *Srinivasa Aiyangar*(1) the conception of an office involves a corresponding obligation to perform the duties of the office. It was pointed out by the learned Officiating Chief Justice at page 358 that

"the term office, in the sense with which we are concerned, implies, of course, a duty in the office-holder to be discharged by him as such—*see*, if authority were necessary, Kent's Commentaries where it is pointed out 'offices consist in a right, and correspondent duty, to execute a public or private trust and to take the emoluments belonging to it'".

In this case on the findings of the Subordinate Judge which were accepted by KING J. there is no compellable duty on the part of the first plaintiff. He cannot be compelled to bring a horse or to lead it if he chooses not to do either. Provision is accordingly made that, if he did not bring a horse or if he refused to lead it, the temple authorities might make other arrangements to bring a horse or to have it led. Mr. Desikan, the learned Advocate for the respondents, argues that this provision is only meant as a rule of suspension in case the office-holder does not do the duty properly, but how it strikes us is that this provision has an important bearing on the question whether

(1) (1899) 9 M.L.J. 355.

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there is an office at all. The evidence taken as a whole leads to the conclusion that, to start with, there was no compellable duty at all but that, if the plaintiff chose, he might bring a horse and lead it. The mere circumstance that in the past a member of the plaintiff's family was allowed to do it is not a guide or a test for deciding whether what is claimed by the plaintiff is an office. The decisions relied on by the learned Counsel for the respondents are all in cases where the right to perform worship in a temple or other religious institution was the subject of dispute. If the trustees or other persons in charge of a religious institution deny the right of worshipping to a member of the public who has a right to perform worship therein, then that member has got a right to have it declared that he is entitled to perform worship. These decisions are of no help in considering the question whether what is claimed in a particular case is an office or not. One test which is necessary to constitute an office is a corresponding compellable duty. That being absent in this case, we are of opinion that what is claimed is not an office but merely an honour.

The result is that this Letters Patent Appeal must be allowed, the decrees of the lower Courts set aside and the suit dismissed with costs throughout. It follows that the memorandum of objections must be dismissed but we do not award costs.

A.S.V.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Somayya.

P. RM. ST. SUBRAMANIA CHETTIAR (RESPONDENT), APPELLANT,

1939, March 31.

v.

FELIX JOSEPH SARPRASADAM AND THREE OTHERS, (APPELLANTS AND NIL), RESPONDENTS.*

Executor—Borrowing for proper purpose—Creditor's right of recourse against estate—Conditions—Probate of testator's will—Borrowing by executor for obtaining—Creditor's right in case of.

In a proper case a creditor can stand in the shoes of an executor and be given his remedy against the estate.

The executrix under a will by which properties were bequeathed, *inter alia*, to her minor sons borrowed money from the appellant for the purpose of taking out probate of the will and executed a promissory note for the amount in her capacity as executrix and as guardian of her sons. Probate was obtained, but the executrix failed to repay the amount borrowed whereupon the appellant filed a suit against the executrix and her sons for the recovery of the same. The amount was found to have been borrowed and utilised for the purpose of obtaining probate.

Held that the appellant was not entitled to a charge against the estate but that he was entitled to stand in the shoes of the executrix for the purpose of recovering the amount from the estate.

APPEAL under Clause 15 of the Letters Patent against the judgment of VARADACHARIAR J., dated 23rd November 1936 and passed in Second Appeal No. 91 of 1935 preferred against the decree of the District Court of Trichinopoly in Appeal Suit No. 1 of 1934—

* Letters Patent Appeal No. 51 of 1937.

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Original Suit No. 408 of 1932 on the file of the Court of the Principal District Munsif of Trichinopoly.

K. Rajah Ayyar for *K. S. Desikan* for appellant.

A. V. Narayanaswami Ayyar for respondents 1 to 3.

V. Subramaniam for fourth respondent.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—Santhanathammal, the grandmother of the first, second and third respondents, died on 17th August 1928, leaving a will by which she bequeathed her properties to her grandsons and others. She appointed the fourth respondent, who is her daughter-in-law and the mother of the first, second and third respondents, her executrix. On 6th March 1929, the fourth respondent and her mother, Kanikaimari Ammal who was the fifth defendant in the suit out of which this appeal arises, borrowed from the appellant a sum of Rs. 1,700 for the purpose of taking out probate of the will. A promissory note was executed by the fourth respondent and her mother for this amount and the instrument stated the purpose for which the money was borrowed. The fourth respondent executed the promissory note in her capacity as executrix and as guardian of her sons. The probate was obtained but the fourth respondent failed to repay to the appellant the money which she had borrowed from him for the purpose. The consequence was that the appellant was compelled to file a suit in the Court of the District Munsif of Trichinopoly for the recovery of the money. The defendants to the suit were the respondents to this appeal and Kanikaimari Ammal. The fourth respondent denied that the money had been paid to her by the appellant, but the District Munsif held that this was untrue. A personal decree was passed against the fourth respondent and her mother, but the suit was dismissed as against the estate. The appellant

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appealed to the District Judge of Trichinopoly against the finding of the District Munsif that the estate was not liable. The respondents to this appeal were the first, second and third respondents in the present appeal. The appellant, however, did not make the fourth respondent a party. The District Judge allowed the appeal, holding that the appellant was entitled to a charge against the estate. The grandsons of the testatrix then appealed to this Court. The appeal was heard by VARADACHARIAR J. who restored the decree of the District Munsif. Before VARADACHARIAR J. the appellant asked that he be allowed the benefit of the indemnity to which the executrix would be entitled in law from the estate if it was shown that the money had been applied for purposes necessary for or beneficial to the estate. The learned Judge refused to accept this contention on the ground that the pleadings did not justify a decree being passed against the estate. The present appeal has been filed against the judgment of the learned Judge under Clause 15 of the Letters Patent, a certificate having been granted.

The appeal first came before us on 23rd February and after hearing the arguments we were unable to share the opinion of VARADACHARIAR J. that the plaint was not sufficiently widely drawn to allow the appellant to stand in the shoes of the executrix. The prayer in the plaint reads as follows :

> "I therefore pray that the Court may be pleased to pass a decree directing defendants 4 and 5 to pay to the plaintiff the amount noted hereunder together with subsequent interest and cost of this suit—the fourth defendant from out of the estate of the deceased Sandanathammal which she is managing as executrix and which belongs to defendants 1 to 3, and the fourth and fifth defendants personally."

In our opinion there is here a claim for a decree against the estate as well as against the fourth respondent and

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her mother. The plaint was written in Tamil and the words used may not be as precise as the words which an expert draughtsman in English would use, but we consider that they were sufficiently precise for the purpose. In these circumstances we thought it proper to make the executrix a respondent in the appeal. In accordance with our direction she was served with notice of this appeal and became the fourth respondent. The judgment of VARADACHARIAR J. shows that he would have adopted this course himself had he considered that the plaint was sufficiently widely drawn to permit of an order being made against the estate. The case comes on for hearing with the fourth respondent before us.

We agree with the opinion of VARADACHARIAR J. that the District Judge was wrong in holding that the appellant was entitled to a charge, but we consider that he is entitled to stand in the shoes of the executrix, for the purpose of recovering the money from the estate. Section 321 of the Indian Succession Act, 1925, provides that the expenses of obtaining probate shall be paid next after the funeral expenses and death-bed charges. Mr. Subramaniam on behalf of the fourth respondent has contended that no order should be passed allowing the appellant to stand in her shoes as the executrix. Why his client has adopted this attitude is not far to seek. She is a woman and although she has been held personally liable, it will be difficult, if not impossible, to execute a personal decree against her. She borrowed the money from the appellant for obtaining probate, and for her to say that the appellant should not be allowed the benefit of the indemnity which she herself enjoys is dishonest. The appellant provided the money for a necessary purpose and she utilized it for that purpose. It is not

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disputed that in a proper case a creditor can stand in the shoes of an executor and be given his remedy against the estate. This is a proper case in which the appellant should be allowed to stand in the shoes of the executrix, and we will allow the appeal to this extent.

The case will be remanded to the trial Court for inquiry as to what rights the fourth respondent has against the estate in respect of the sum of money borrowed for obtaining the probate. The trial Court will draw up a fresh decree based on its findings in the inquiry arrived at in the light of this judgment. It will not be open to any of the respondents to contend that the money was not borrowed from the appellant for the purpose of obtaining probate or to contend that this was not a necessary purpose. There are findings, and they are conclusive, that the money was borrowed by the fourth respondent from the appellant for the purpose of obtaining probate and that it was borrowed for a proper purpose. The inquiry will proceed therefore on this basis. The decree against the fourth respondent and the fifth defendant will stand in so far as they are personally concerned.

Before VARADACHARIAR J. the first, second and third respondents contended that, if the estate was to be made liable, the rate of interest mentioned in the promissory note was excessive. In view of the decision of the learned Judge on the other questions arising in the case which led to the restoration of the decree of the District Munsif it was not necessary to go into this question. It has been agreed by the parties that the question of the rate of interest so far as the estate is concerned shall be decided by the District Munsif on remand.

As the appellant did not make the fourth respondent a party in his appeal to the District Judge, and failed

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to make her a party in this Court, we make no order as to costs either in this Court or in the District Court.

The memorandum of objections will be dismissed but there will be no order as to costs.

A.S.V.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Patanjali Sastri.

1939, March 28.

VALIA MALIYAKKAL SAYID MUHAMMAD JIFFIRI ATTAKOYA THANGAL AND TWO OTHERS (DEFENDANTS 1, 4 AND 5), APPELLANTS,

v.

SEYID MUHAMMAD BIN ALABI AYIDROSS KUNHIKOYA THANGAL (PLAINTIFF), RESPONDENT.*

Interest Act (XXXII of 1839), sec. 1 proviso—Inam grant confirmed at the time of Inam Settlement—Land revenue, land cess and education tax in respect of land covered by—Amounts paid by inamdar in respect of—Suit by him for recovery with interest from persons in possession of land—Interest upon amount paid for land revenue—Inamdar's right to—Conditions—Land cess—Amount paid as—Inamdar, if entitled only to half of—Madras Local Boards Act (XIV of 1920), sec. 88—Applicability and effect of—Interest on amount—Inamdar's right to—Art. 120 of Indian Limitation Act (IX of 1908)—Applicability of, to claim to recover land cess—Education tax paid by inamdar—Recovery of—Inamdar's right of—Madras Elementary Education Act (VIII of 1920) before amendment by Madras Elementary Education Amendment Act, 1931—Case governed by—Rule framed under sec. 36 of that Act—Scope and effect of.

The respondent, an inamdar of land situate in the district of Malabar under an inam grant made by Tippu Sultan and

* Second Appeal No. 712 of 1935.

ATTAKOYA v. KUNHIKOYA.

confirmed at the time of the Inam Settlement, sued the appellants, persons in possession of a portion of the land covered by the grant, for the recovery with interest of a sum of money made up of land revenue and amounts paid by the respondent in respect of land cess and education tax over a period of twelve years. The suit was filed in 1932 and the respondent's case with regard to the land cess and education tax was that he had been compelled to pay the amounts to Government and therefore was entitled to recover them from the occupiers of the land. The inam grant did not fix the dates when the land revenue was to be paid to the inamdar, all that he got under the instrument being the right to collect the land revenue. And no notice in writing had been given to the appellants that interest would be claimed in default of payment of the amount paid by the respondent for land revenue or land cess.

Held: (i) The respondent was not entitled to interest in respect of the amount due for land revenue because the case did not fall within the proviso to section 1 of the Interest Act.

Bengal-Nagpur Railway Company, Limited v. *Ratanji Ramji*(1) relied upon.

(ii) The respondent was only entitled to half the amount of the land cess paid by him in respect of the six years immediately preceding the suit. He was not entitled to interest on the said amount.

For the purposes of section 88 of the Madras Local Boards Act, 1920, the respondent must be taken to be the landholder and the appellants his tenants. The second proviso to that section gave the respondent the right to recover half the amount paid by him from the appellants. That right was subject, however, to the law of limitation and the article of the Indian Limitation Act which applied was article 120.

Bhupathi Raju v. *Subba Rao*(2) and *Rajah of Vizianagram* v. *Thammanna*(3) referred to.

(iii) The respondent was not entitled to recover anything in respect of the amount paid by him for education tax.

The case was governed by the provisions of the Madras Elementary Education Act, 1920, before its amendment by the Madras Elementary Education Amendment Act, 1931.

(1) I.L.R. [1938] 2 Cal. 72 (P.C.).
(2) (1931) I.L.R. 55 Mad. 646. (3) I.L.R. [1937] Mad. 498 (F.B.).

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There was no provision in the unamended Act that the landholder should be allowed to recover the tax or any portion of it from the tenant and the rule framed under the power conferred by section 36 of that Act did not, and could not, supply the deficiency.

Nagabushanam v. *Venkanna*(1) referred to.

APPEAL against the decree of the District Court of North Malabar in Appeal Suits Nos. 5 and 9 of 1934 preferred against the decree of the Court of the District Munsif of Quilandy in Original Suit No. 648 of 1932.

K. Kuttikrishna Menon for appellants.

B. Pocker for respondent.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The respondent's predecessors-in-title obtained an inam grant from Tippu Sultan. The grant was confirmed in 1866 at the time of the Inam Settlement. The validity of the grant had, however, been recognized for many years before that. The land in respect of which the respondent holds the grant is situate in Malabar. In 1932 he filed a suit in the Court of the District Munsif of Quilandy to recover from the appellants, who are in possession, a sum of Rs. 450-4-11 made up of land revenue and amounts paid by him in respect of land cess and education tax over a period of twelve years. He also claimed interest. With regard to the land cess and education tax the respondent's case was that he had been compelled to pay the amounts to Government and therefore was entitled to recover them from the occupiers of the land. The appellants denied that the respondent was entitled to recover anything from them. The District Munsif held that the respondent had the right to recover the amount claimed for land revenue with interest and also the amount claimed in respect of

(1) (1929) I.L.R. 53 Mad. 151.

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land cess, but in that case without interest. He rejected the claim so far it related to the education tax. An appeal and a cross-appeal were filed in the Court of the District Judge, North Malabar. The District Judge held in favour of the respondent on all the points and decreed the suit. The appeal before us is from the decree of the District Judge. The learned Advocate for the appellants concedes that the respondent is entitled to recover from them the amount claimed in respect of land revenue, but he challenges the findings of the District Judge on the other points. The questions which the Court is called upon to decide are therefore these : (i) Whether the respondent is entitled to interest in respect of the amount of the arrears of land revenue ; (ii) whether anything is recoverable from the appellants in respect of land cess and education tax ; and (iii) if they are liable in respect of land cess or for education tax, what is the period of limitation ?

It is clear that the respondent is not entitled to interest in respect of the amount due for land revenue unless the case falls within the proviso contained in the Interest Act. The inam grant does not fix the date when the land revenue is to be paid to the inamdar and no notice in writing was given to the appellants that interest would be claimed in default of payment. The proviso to the Interest Act, however, leaves it open to the Court to award interest where a Court of Equity would recognize the claim. This was the construction placed upon the proviso by the Privy Council in the recent case of *Bengal-Nagpur Railway Company, Limited* v. *Ratanji Ramji*(1). In delivering the judgment of the Board, Sir SHADI LAL

(1) I.L.R. [1938] 2 Cal. 72 (P.C.).

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quoted the observations of Lord TOMLIN in *Maine and New Brunswick Electrical Power Co.* v. *Hart*(1) where Lord TOMLIN said :

> " In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance."

In *In re Drax. Savile* v. *Drax*(2) the Court of Appeal recognized that interest was payable when a settlement or contract contained a provision that a certain sum should be charged on land and be paid at a fixed time. In the case before us neither of these conditions is fulfilled. It is true that the trial Court and the District Court considered that the respondent was entitled to a charge and this finding has not been expressly challenged by the appellants in their memorandum of appeal. I shall state presently what we consider should be the form of the decree, but, for the purposes of deciding whether interest is recoverable or not, we have to consider whether a Court of Equity would grant it.

In *Subbaroya Goundan* v. *Ranganada Mudaliar*(3) WALLIS C.J. observed that it was well settled that by virtue of an assignment from Government of the right to land revenue the inamdar did not acquire a charge upon the land and that the assignee was left to recover rent from the occupiers under the Madras Rent Recovery Act. SESHAGIRI AYYAR J. indicated that had it been open to him to do so he would have come to a different conclusion, but he recognized that the principle of *stare decisis* applied. The decision in that case was that where *jodi* is payable by an inamdar

(1) [1929] A.C. 631.
(2) [1903] 1 Ch. 781.
(3) (1915) I.L.R. 40 Mad. 93.

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to Government it is recoverable as revenue and is a first charge on the interest of the inamdar, but where a zamindar has been given the right to collect *jodi* payable by an inamdar to Government he has no charge on the interest of the inamdar for arrears. In the course of his judgment WALLIS C.J. pointed out that in *Kasturi Gopala Ayyangar* v. *Anantaram Thivari*(1) it was laid down broadly that assignees of revenue could not proceed under section 42 of the Madras Revenue Recovery Act and had only a personal claim, and referred to the earlier decisions to the same effect. We are bound by those decisions, but, assuming we were not and were disposed to hold that in this case there was a charge, the respondent would still be disentitled to ask a Court of Equity to award him interest. As I have indicated, his grant does not stipulate when the land revenue shall be paid to him. All that he gets under the instrument is the right to collect the land revenue. If it is not paid within the year or by the end of the year he has his remedy by suit. He could by giving notice in accordance with the provisions of the Interest Act make sure of a right to interest in default of payment, but he does not come within the provisions of the Madras Revenue Recovery Act, which only applies to the payment of revenue due to Government. In these circumstances the respondent is not entitled to interest and the decision of the District Judge on this question will be reversed.

The claim in respect of the land cess payments requires a consideration of certain sections of the Madras Local Boards Act, 1920. Section 74-B states that in every district, a land cess being a tax on the annual rent value of lands shall be levied in accordance with the provisions of the Act. Section 81

(1) (1902) I.L.R. 26 Mad. 730.

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provides that the cess shall be levied upon a landholder or sub-landholder. Section 88 says that every landholder and sub-landholder shall pay the land cess due in respect of lands held by him, but there are two provisos. The first allows the landholder or sub-landholder as the case may be to recover the amount paid by him from an intermediate landholder. If there is no intermediate landholder and the land is occupied by a tenant the second proviso allows the landholder or sub-landholder or an intermediate landholder to recover half the amount of the cess from the tenant. The definition of " landholder " is given in section 3 (9) and reads as follows :

" ' Landholder ' includes all persons holding under a sanad-i-milkiat-istimrar, all other zamindars, poligars, shrotriyamdars, jagirdars and inamdars, all persons registered as proprietors under section 5 of the Madras Limited Proprietors Act, 1911, and all persons farming the land revenue under Government ; all holders of land in the district of Malabar under whatever tenure ; and all holders of land under ryotwari settlement, or in any way subject to the payment of land revenue direct to Government, and all registered holders of land in proprietary right."

Section 3 (21) describes a "sub-landholder" as a person, not being a landholder, who (i) holds a portion of an estate consisting of one or more revenue villages on an under-tenure created, continued or recognized by the proprietor of the estate, or is entitled to collect the rents otherwise than as agent or servant of the landholder, and (ii) is registered as a sub-landholder in the office of the Collector. Sub-section 22 defines " tenant " as including all persons who, whether personally or by an agent, occupy land under a landholder or an intermediate landholder, and whether or not they pay rent to the landholder or intermediate landholder as the case may be.

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The appellants and the respondent both come within the definition of " landholder." The appellants are the holders of land in the district of Malabar and the respondent is an inamdar. Neither the appellants nor the respondent are within the definition of " sub-landholder ", but the appellants come within the definition of " tenant ". In *Bhupathi Raju* v. *Subba Rao*(1) it was pointed out that a person could not at the same time be a tenant in respect of the land of which he was the intermediate landholder. It is obvious that the appellants cannot be both the landlords and the tenants of the same land. The definition of " landholder " in section 3 (9) is subject to there being nothing repugnant in the subject or context, and to treat the appellants as landholders and tenants would not only be contrary to the scheme of the Act, but would be impossible. In this case the landholder for the purposes of section 88 must be taken to be the respondent and the appellants must be taken to be the tenants. This very same grant had to be construed on a previous occasion by this Court. The case was *Alubi* v. *Kunhi Bi*(2), where a Division Bench held that the respondent was in the position of a landholder and the occupiers of a portion of the land covered by the grant were tenants. There is consequently authority for the statement that the appellants can only be regarded as tenants of the respondent.

This being the position and the respondent having paid the land cess, he is entitled to recover half of it from the appellants. The District Judge held that he was entitled to recover the whole under sections 69 and 70 of the Contract Act but this is not so. The respondent could recover the full amount from the

(1) (1931) I.L.R. 55 Mad. 646. (2) 1880) I.L.R. 10 Mad. 115.

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appellants only if he were " interested " in making the payments, but not personally liable. If he is liable for the money—and by reason of section 88 of the Madras Local Boards Act he is—he could only recover the full amount from the appellants by virtue of some statutory provision in that behalf. The only statutory provision is that contained in the second proviso to section 88 of the Madras Local Boards Act, which gives him the right to recover half the amount paid by him. The right is subject, however, to the law of limitation and the article of the Limitation Act which applies is article 120; *Rajah of Vizianagram* v. *Thammanna*(1). The respondent is, therefore, only entitled to half the amount of the land cess paid by him in respect of the six years immediately preceding the suit. The claim for interest fails for the reasons already given.

The remaining question is whether the respondent was entitled to education tax. The District Judge here again erred. The case is governed by the provisions of the Madras Elementary Education Act, 1920, before its amendment by the Madras Elementary Education Amendment Act, 1931. Section 34 of the unamended Act provided for the levy of an education tax and section 36 stated that the assessment and realization should be " in accordance with the procedure prescribed ". Under the power conferred by section 36 the following rule was framed :

" The tax levied by a local authority under section 34 of the Act under any head of taxation specified therein, shall be treated as an addition to the tax levied under the heads by the local authority under the law for the time being in force governing it, and shall be assessed and recovered along with the said tax as an integral part of it."

(1) I.L.R. [1937] Mad. 498 (F.B.).

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There was no provision in the Act that the landholder should be allowed to recover the tax or any portion of it from the tenant and the rule did not, and could not, supply the deficiency; see *Nagabushanam* v. *Venkanna*(1). Under the Act as it now stands the respondent will in future be able to recover half of the education tax, but this was not the position at any time material to the present suit.

There will be a decree providing for the payment by the appellants to the respondent of (*a*) the amount claimed in respect of land revenue, but without interest, and (*b*) half the land cess paid by the respondent for the six years immediately preceding the suit, also without interest. The claim in respect of the education tax is disallowed *in toto*. As the appellants have not appealed against that part of the decree of the lower Court declaring a charge, the charge will be allowed to stand, but only to the extent of the amount payable under the decree of this Court. As the appeal has succeeded in part and failed in part the parties will pay and receive proportionate costs throughout.

A.S.V.

(1) (1929) I.L.R. 53 Mad. 151.

APPELLATE CIVIL.

1939, April 28.

Before Mr. Justice Burn and Mr. Justice Stodart.

T. S. P. L. P. CHIDAMBARAM CHETTIAR (PETITIONER), APPELLANT,

v.

MURUGESAM PILLAI (MINOR) AND TWO OTHERS (RESPONDENTS 2 TO 4), RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 182 (5)—Final Order —Meaning of—Order returning execution petition for amendment—"Final order", if—Execution petition not re-presented—Limitation, if saved by.

The expression "final order" in article 182 (5) of Schedule I of the Indian Limitation Act of 1908 means an order putting an end to the application in respect of which it is made and not merely the last order in point of time made on the application. An order requiring the petitioner to do something more in order that the Court may proceed with his execution petition does not contemplate the end of that execution petition at all and, therefore, is not a "final order" within the meaning of article 182 (5). An execution petition which is returned for amendment and which is not re-presented within the proper time cannot save limitation.

Per BURN J.—A decree-holder who takes no further action on an execution petition returned to him for amendment should be treated as if he had never put in his petition at all.

Per STODART J.—A direction of the Court that an application made to it in execution should be amended is not even an order at all.

Article 182 (5) does not provide for the case where an order is passed by the Court on a defective application. An application which does not conform to the requirements of Order XXI, rules 11 to 14, of the Civil Procedure Code, and which for that reason has to be kept in abeyance—if the Judge so wishes—to permit the defect to be remedied, is not an

* Appeal Against Order No. 157 of 1938.

application made in accordance with law within the meaning of article 182 (5). Even therefore if the direction allowing time for the remedy of the defect is regarded as an "order" of the Court, it would not be an order passed on an application made in accordance with law and would therefore fall altogether outside the provisions of article 182 (5).

Kesavuloo v. *Official Receiver, West Tanjore*(1) and *Rama Reddi* v. *Motilal Daga*(2) followed.

Municipal Council, Tanjore v. *Sundaresan*(3) approved.

Mottayya Padayachi v. *Rajagopalan* (4), *Shanmuga Pathar* v. *Swaminatha Pathar*(5), *per* PANDRANG ROW J. in *Chidambara Nadar* v. *Rama Nadar*(6) (when the case was before the Division Bench after the expression of opinion by the Full Bench), and Appeal Against Appellate Order No. 138 of 1937 disapproved.

APPEAL against the order of the Court of the Subordinate Judge of Trichinopoly, dated 11th October 1937, and made in Execution Petition No. 216 of 1936 in Original Suit No. 157 of 1924.

S. T. Srinivasagopalachari for *K. R. Rangaswami Ayyangar, T. R. Srinivasa Ayyangar* and *E. A. Viswanathan* for appellant.

K. G. Srinivasa Ayyar for third respondent.

Respondents 1 and 2 were not represented.

Cur. adv. vult.

JUDGMENT.

BURN J.

BURN J.—The only point in this appeal is one of limitation. The appellant's father got a decree in Original Suit No. 157 of 1924 on the file of the Subordinate Judge of Trichinopoly on 29th June 1925. The appellant is his adopted son. He presented his petition in execution (Execution Petition No. 216 of 1936) on 27th June 1936 and the learned Subordinate

(1) I.L.R. [1937] Mad. 112.
(2) I.L.R. [1938] Mad. 326.
(3) 1939 M.W.N. 426.
(4) 1936 M.W.N. 547.
(5) 1936 M.W.N. 547
(6) I.L.R. [1937] Mad. 616 (F.B.), 633.

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Judge has held that it was barred by limitation on the ground that it was not presented within three years after the final order passed on a previous application made in accordance with law to the proper Court for execution or to take some step in aid of execution; article 182 (5) of the Limitation Act.

The execution petition presented on 27th June 1936 is the fifth of the execution petitions presented by this decree-holder. The first was filed on 3rd November 1927 praying for arrest of the defendant; it was dismissed on 7th January 1928 as the judgment-debtor was not found for arrest. The second execution petition was presented on 3rd November 1930. This was returned on 4th November 1930 with an endorsement requesting the petitioner to show how he was entitled to attach a sum of money in deposit in Original Suit No. 6 of 1925. After two extensions of time had been given, the learned Counsel for the petitioner re-presented this petition on 24th November 1930 with an explanation. The petition was then returned on 26th November 1930 with an endorsement that the permission of the Court must be obtained to proceed against the properties in the hands of the receiver appointed by the Court. Two weeks' time was allowed for this. This endorsement was not complied with. The next application was "filed" on 3rd March 1931 and the second execution petition was "filed" along with it with the remark:

"On 3rd November 1930, petition was put in, but it was returned. It was not re-presented, it is filed herewith."

On this petition, on the 5th of March, the lower Court again required the petitioner to obtain the permission of the Court to proceed against the properties in the hands of the receiver appointed by the Court in Original Suit No. 6 of 1925 and allowed two weeks'

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time for complying with this. After two extensions, this was re-presented on the 6th of April with an application for permission to proceed against the receiver. It was again returned by the lower Court on the 7th of April with a requisition that the description of the property sought to be attached should be amplified and that the extent and survey numbers should be given. One week's time was allowed for this. On the 15th of April, the petitioner's pleader prayed for fifteen days time to obtain the necessary extracts from the survey registers. On the 25th of June, fifteen days further time was prayed for and granted by the Subordinate Judge in his order, dated 30th June 1931. The requisition was however not complied with and this petition did not come back to the Court until 30th June 1934, when the fourth execution petition was filed. In that, as in the third, the petitioner stated that he had put in previous execution petitions on 3rd November 1930 and 3rd March 1931 but they had been returned to him and therefore, he said, they were presented along with the fourth. This was returned on 3rd July 1934 with an endorsement requiring the petitioner: firstly, to file an affidavit with regard to the legal representatives of the decree-holder (this petition was presented by the present appellant, the adopted son of the original decree-holder); secondly, to obtain the consent of the Vakil who had appeared in the prior execution proceedings; thirdly, to put in a guardian petition for the minor legal representatives of the judgment-debtor; and fourthly, to produce the revenue extracts which had already been called for on the previous two execution petitions. The petitioner did not comply with these requisitions but appears to have applied for further time, for, on 18th July 1934, the

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lower Court has endorsed: "Time granted till 9th August 1934." The petitioner having taken the petition back, nothing more was heard of it until 27th June 1936, when he presented Execution Petition No. 216 of 1936. He then produced the second, third and fourth petitions with an endorsement on each of them in these words: "As a fresh petition is filed herewith, this petition may be dismissed." Now, the learned Subordinate Judge has held that none of the orders passed on the second, third and fourth execution petitions can be considered to be a "final" order within the meaning of article 182 (5) of the Limitation Act. The last final order on an execution petition is dated 7th January 1928 and the execution petition presented on 27th June 1936 is long out of time.

Hence this appeal by the decree-holder. His contention is that his Execution Petition No. 216 of 1936 is not barred by limitation because it was presented within three years from 30th June 1934 when the fourth execution petition was finally returned to him; the fourth execution petition was presented within three years of 30th June 1931 when the third execution petition was returned to him, and the third execution petition was presented within three years of 26th November 1930 when the second execution petition was finally returned to him. The second execution petition was presented on 3rd November 1930 within three years of 7th January 1928 on which date the first execution petition had been dismissed.

The question is: what is the meaning of the words "final order" in article 182 (5) of the Limitation Act? Learned Counsel for the appellant contends that it means simply the last order in point of time. He relies on the decision of PANDRANG ROW J. in

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Mottayya Padayachi v. *Rajagopalan*(1) and the decision of STODART J. in *Shanmuga Pathar* v. *Swaminatha Pathar*(2). On the other hand, learned Counsel for the appellant recognises that there are two decisions of Division Benches of this Court subsequent to these decisions of single Judges in which it has been held that "final" does not mean merely last in point of time. These are the cases of *Kesavuloo* v. *Official Receiver, West Tanjore*(3) and *Rama Reddi* v. *Motilal Daga*(4). There is also a decision of my own sitting singly, reported as *Municipal Council, Tanjore* v. *Sundaresan*(5). In the case of *Kesavuloo* v. *Official Receiver, West Tanjore*(3) VENKATASUBBA RAO and CORNISH JJ. have shown that "final" in article 182 (5) cannot be taken as meaning merely last in point of time. VENKATASUBBA RAO J. points out that the word "final" occurs not only in clause 5 of article 182 but also in clauses 2 and 6 and the meaning of the word "final" in clause 2 has been considered by their Lordships of the Privy Council in *Batuk Nath* v. *Munni Dei*(6) and *Abdul Majid* v. *Jawahir Lal*(7). The latter case, in my opinion, is very much in point. Article 182 (2) provides that the three years period of limitation for execution of a decree shall run, when there has been an appeal, from "the date of the final decree or order of the appellate Court . . . ". In the first of the cases before the Privy Council, an appeal was preferred to the Privy Council and it was dismissed for want of prosecution under Rule 5 of the Order in Council of 1853. It was contended on behalf of the assignee-decree-holder that the date on which the appeal had

(1) 1936 M.W.N. 547.
(2) 1936 M.W.N. 547.
(3) I.L.R. [1937] Mad. 112.
(4) I.L.R. [1938] Mad. 326.
(5) 1939 M.W.N. 426.
(6) (1914) I.L.R. 36 All. 284 (P.C.).
(7) (1914) I.L.R. 36 All. 350 (P.C.).

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been dismissed by the Privy Council was the date of the final decree or order of the appellate Court, and that the decree could be executed within three years from that date. This contention was disallowed by their Lordships. They held that, in such a case, there was no final order of the Privy Council within the meaning of article 179 (2) as it was then, corresponding now to article 182 (2). In the latter case again it was contended that the date of the dismissal by the Privy Council was the date of the final order or decree. Lord MOULTON observed:

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

In my opinion, this is the test to be applied in cases like the present. If an execution petition is returned to the decree-holder for some amendment, it is his duty to re-present it within the time allowed, or to get an extension of the time allowed, or to show cause why he should not comply with the requisition, or to pursue the matter in some way until he gets what can be properly described as a final order upon it. If, having received back his execution petition, he takes no further action upon it, then he should be treated in my opinion as if he had never put in his petition at all. This is what I said in my judgment in *Municipal Council, Tanjore* v. *Sundaresan*(1). It is not, in my opinion, permissible for a decree-holder to extend the period of limitation by simply failing to re-present an execution petition returned

(1) 1939 M.W.N. 426.

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for rectification. The proper way to deal with such a petition as that is to treat it as not having come into existence at all. In the present case, the first execution petition, as I have already said, was dismissed on 7th January 1928, the second execution petition was filed on 3rd November 1930 and was last returned to the petitioner on 26th November 1930 requiring him to get the Court's permission to proceed against the properties in the hands of the receiver and giving him two weeks' time to do so. Now he did not bring this back until 3rd March 1931 and, when he brought it back, he did not comply with the requisitions; he did not pray for excusing the delay in complying with the requisitions; he did not ask that anything whatever should be done with the second execution petition; he merely filed it with the third execution petition presented on 3rd March 1931. Now, on 3rd March 1931, execution was barred because that was already more than three years after 7th January 1928 when the first execution petition had been dismissed. As I have already said, the third execution petition was dealt with in the same way as the second and therefore no judicial determination of it has been made but it is quite conceivable that if the third execution petition had been re-presented in proper time, it would have been dismissed as barred by limitation. Certainly it would have been necessary to dismiss the second execution petition as barred by limitation when it was re-presented on 3rd March 1931, unless the petitioner had been able to persuade the Court to excuse the delay in re-presentation. If the delay were not excused, then this petition would have had to be treated as if it had been presented for the first time on 3rd March 1931, and that was beyond the period of limitation. Learned Counsel has suggested

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that we should refer this matter to a Full Bench because PANDRANG ROW J. in spite of the decision of a Bench of this Court in *Kesavuloo* v. *Official Receiver, West Tanjore*(1) in 1936, still adhered in 1937 to his former opinion—vide *Chidambara Nadar* v. *Rama Nadar*(2)—and again in *A. K. Narasimha Aiyar* v. *Veerappa Chettiar**. I regret I do not consider that this is a sufficient reason for referring this matter to a Full Bench. As I have already said, there are two Benches which have already expressed the view that "final" in article 182 (5) cannot be interpreted as being merely last in point of time. With respect, I think those decisions are correct. "Final" is a word which has many meanings but all of them I think involve the notion of putting an "end" to something. It is not possible to call an order a "final order" unless it puts an end to something or other. Now, in my opinion, it is impossible to say of any of these orders of return on the second, third and fourth execution petitions that they put an end to anything. They were expressly orders requiring the petitioner to do something more in order that the Court might proceed with his execution petition. They did not contemplate the end of that execution petition at all. Learned Counsel for the appellant wishes us to say that such orders as these ought to be construed as if they contained further clauses. He says that when an execution petition is returned for amendment within fifteen days it ought to be read as if it contained a statement that in default of re-presentation within fifteen days, it should stand dismissed. I am not able to accept this contention. Article 182 (5) refers

(1) I.L.R. [1937] Mad. 112. (2) I.L.R. [1937] Mad. 616 (F.B.), 663.

* Appeal Against Appellate Order No. 138 of 1937.

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expressly to "the date of the final order". It is not possible for this purpose to bring in some fictitious date of an order which has not been passed. Learned Counsel for the appellant has relied strongly upon the case of *Pitambar Jana* v. *Damodar Guchait*(1). But that case was before the amendment of the Act in 1927 as the ruling shows. It is therefore not applicable to this case. Learned Counsel has also referred to the decision of MADHAVAN NAIR J. in *Muhammad Abu Bakkar* v. *Ramakrishna Chettiar*(2). What is stated in that decision is that so long as the Court does not dismiss a petition, it must be deemed to be still pending. With respect I do not think that that principle can be applied to execution petitions of this kind where there is a period of limitation prescribed. If that view is taken, it is possible, as I have pointed out elsewhere, for a decree-holder to extend the period of limitation at his will by presenting a defective execution petition, and on its return to him by refraining from re-presenting it. This course could be taken before the amendment of article 182 in 1927. In 1927 it was the date of an execution petition that gave the start for the period of limitation of three years. Any execution petition presented within three years of the date of the presentation of a former execution petition was in time. It was therefore possible to present an execution petition with no intention of proceeding with it, and to take no further steps upon it for two years and three hundred and sixty-four days and then to come in with another execution petition. PANDRANG ROW J. in *Mottayya Padayachi* v. *Rajagopalan*(3) has expressed some views about the policy of the amending Act passed in 1927. With respect

(1) (1926) I.L.R. 53 Cal. 664. (2) A.I.R. 1933 Mad. 540.

(3) 1936 M.W.N. 547.

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it is not quite self-evident to me that the policy underlying the amendment was to give the decree-holder more time. I would prefer to follow the views on this subject expressed by VENKATASUBBA RAO J. in *Kesavuloo* v. *Official Receiver, West Tanjore*(1). I do not think, therefore, that there is any sufficient reason for putting this matter before a Full Bench. I am quite satisfied that the execution petitions which were returned for amendment and which were not re-presented within the proper time cannot save limitation.

The judgment of the learned Subordinate Judge is, therefore, in my opinion, correct, and this appeal should be dismissed with costs.

STODART J.

STODART J.—I agree with my learned brother. I think that my decision in *Shanmuga Pathar* v. *Swaminatha Pathar*(2) was wrong. In that decision I held that the expression "final order" in article 182 (5) of the First Schedule of the Limitation Act might be construed as the "last order" and that a direction of the Court that an application made to it in execution should be amended was, if the amendment was never made, the "last order" on that application. On further consideration I think that such a direction is not final in the sense in which that word should be construed, namely, as putting an end to the application; and I would go further and hold that such a direction is not an order at all. It is simply an intimation to the applicant that his petition cannot be admitted and acted upon unless he supplies the Court with further particulars or observes some formality which he has omitted to observe. There are in my opinion only three ways of dealing with an application for the execution of a decree, and these are unambiguously

(1) I.L.R. [1937] Mad. 112. (2) 1936 M.W.N. 547.

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defined in Order XXI, rule 17, of the Civil Procedure Code. If the application conforms to the requirements of rules 11 to 14, it must be admitted which means that it receives a serial number in the execution petition register and comes on in the usual course in open Court for the orders of the Judge. In such a case there will be a final order which will effectively dispose of the matters raised in the application. Secondly, if the application does not comply with the requirements of rules 11 to 14, it may be forthwith rejected. Thirdly, and this is the case now under consideration, if the application does not comply with the provisions of rules 11 to 14, the Judge, instead of rejecting it forthwith, may allow the defect to be remedied and if necessary may grant time to enable the applicant to do this. The practice universally followed by the Courts is to embody a direction to this effect on the application itself and to return it to the party. If, within the time allowed, the application is not re-presented nothing more is heard of it. In my opinion the direction of the Court stating that the application is defective, that the Court allows the defect to be remedied and that the Court grants time for that purpose—generally a certain number of days—is not an order at all, much less a final order. It sometimes happens that a decree-holder makes an application for the execution of a decree not with any idea of realising anything towards his decree, but in order to extend the time during which it is lawful for him to execute his decree. Such an application may be perfectly *bona fide*. He may know at the time that the judgment-debtor is not able to pay anything, or he may wish to give the judgment-debtor further time to pay, either at the request of the judgment-debtor himself or for a variety of other

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reasons. Nevertheless, in his own interests, it is necessary to present an application for the execution of the decree to the proper Court lest he should lose his remedy altogether. Since the amendment of the Limitation Act in 1927 (Act IX of 1927), the mere presentation of an execution application to the proper Court is not sufficient to extend the period of limitation. Surely enough time has now elapsed for decree-holders to realise that the law has been changed and that they must not only present an application but must see that it conforms to the requirements of rules 11 to 14 of Order XXI and that it is admitted and finally disposed of by an order of the Court. It may occasionally happen that an application does conform to the requirements of rules 11 to 14 but is nevertheless not admitted but is held in abeyance pending the furnishing of some further information which the Court requires but which should not properly be called for till a later stage is reached. In that case the attention of the Court may be drawn to the fact that the application is one which should be, under the provisions of rule 17, admitted and disposed of in the ordinary course. Lastly, I would like to say that in my opinion article 182 (5) of the First Schedule to the Limitation Act does not seem to provide for the case where an order is passed by the Court on a defective application. The relevant words are "the date of the final order, passed on an application made in accordance with law to the proper Court". But an application which does not conform to the requirements of Order XXI, rules 11 to 14, and which for that reason has to be kept in abeyance—if the Judge so wishes—to permit the defect to be remedied, is not in my opinion an application made in accordance with law. Even, therefore if the direction allowing time for the remedy of the defect is regarded as an "order" of the Court,

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it would in my view not be an order passed on an application made in accordance with law. If the application, on the other hand, were not defective, it would necessarily be admitted and a final order would be passed on it in due course. When it is defective and no order can be passed on it except an order—if order it can be called—that the defect can be remedied in a certain time, it seems to me that it falls altogether outside the provisions of article 182 (5).

I agree that this appeal must be dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth.

1939, April 3.

VELLAYA KONAR (DIED) AND ANOTHER (PLAINTIFF AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

v.

RAMASWAMI KONAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Court Fees Act (VII of 1870), sec. 7 (iv-A) as amended by the Madras Act (V of 1922) and art. 17-A (i) of schedule II of the Act—Suit by creditor under sec. 53 of the Transfer of Property Act (IV of 1882) for a declaration that an alienation by a debtor is void against creditors—Proper prayer—Article applicable in such a case.

A suit brought by a creditor under section 53 of the Transfer of Property Act for a declaration that an alienation by the debtor is void against the creditors is not a suit for cancellation of a document securing money or property falling under section 7 (iv-A) of the Court Fees Act as amended in Madras,

* Second Appeal No. 959 of 1935.

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but is a suit to obtain a declaration where no consequential relief is prayed, falling under article 17-A (i) of Schedule II of the same Act. The proper prayer in such a suit is a prayer for a declaration that the sale is not binding upon the creditors to the extent of their debts and not a prayer for the cancellation of the sale deed.

Case-law reviewed.

APPEAL against the decree of the Court of the Subordinate Judge of Tuticorin in Appeal Suit No. 115 of 1934 preferred against the decree of the Court of the District Munsif of Koilpatti in Original Suit No. 60 of 1934.

A. Swaminatha Ayyar and *S. Thyagaraja Ayyar* for appellants.

S. Ramaswami Ayyar for first respondent.

Second respondent was not represented.

JUDGMENT.

WADSWORTH J.

WADSWORTH J.—The question raised in this appeal is whether a suit brought by a creditor under section 53 of the Transfer of Property Act for a declaration that an alienation by the debtor is void against the creditors is a suit for cancellation of a document securing money or property falling under section 7 (iv-A) of the Court Fees Act as amended in Madras, or whether it is a suit to obtain a declaration where no consequential relief is prayed, falling under Article 17-A of Schedule II of the same Act. Both the Courts below have found that the suit falls under section 7 (iv-A). The plaint recites that the properties in suit are in the possession and enjoyment of the second defendant against whom the plaintiff got a decree on a promissory note, the suit being filed on 2nd August 1924 and decreed on 12th November 1924. It is alleged that on 19th June 1924 the second defendant collusively and with a view

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to cheat the plaintiff's claim, executed a sale deed in favour of his brother-in-law, the first defendant, conveying all his properties *benami* and for no valid consideration, there being no intention that the sale deed should be given effect to. The plaintiff therefore prays for a declaration that the properties conveyed to the first defendant are liable to be attached in realization of the decree debt obtained by the plaintiff against the second defendant and the plaint recites that the plaintiff sues for himself and as representing the other creditors of the second defendant. The judgments of both the Courts below seem to me to have proceeded on a misunderstanding of the cases quoted, one case in particular being quoted under one reference as supporting the plaintiff and the same case under another reference as supporting the contesting defendants and both the learned Judges seem not to have grasped the difference between a suit for the cancellation of an instrument and a suit for a declaration that the instrument is not binding upon the plaintiff. Leaving aside for the moment the complication due to the fact that the plaintiff in this suit sues in a representative capacity, the distinction between the two classes of suits seems to me to be well established by the decisions. When the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get that decree or deed cancelled or declared void *in toto*, and his suit is in substance a suit for the cancellation of the decree or deed even though it be framed as a suit for a declaration. But when he is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, he is

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not in a position to get that decree or that deed cancelled *in toto*. That is a thing which can only be done by parties to the decree or deed or their representatives. His proper remedy, therefore, in order to clear the way with a view to establish his title, is to get a declaration that the decree or deed is invalid so far as he himself is concerned and he must therefore sue for such a declaration and not for the cancellation of the decree or deed. This distinction was made clear in *Unni* v. *Kunchi Amma*(1) which is followed in *Chathu Kutty Nair* v. *Chathu Kutty Nair*(2) and the distinction is clearly observed in the cases quoted by the Court below, except that there is some obscurity arising from a decision of RAMESAM J. in *Balakrishna Nair* v. *Vishnu Numbudiri*(3) where, though the learned Judge quite clearly has this distinction in mind, he frames his formula in rather more general terms than were perhaps desirable and on those grounds has been criticized by the Bench which decided the case of *Venkatasiva Rao* v. *Satyanarayanamurty*(4). My attention has not been drawn to any decision which throws any real doubt on the general proposition that when a person seeks to establish title which cannot be established without removing a decree or an instrument to which he is himself a party, then whatever be the garb in which he dresses his suit, its substantial character must be a suit for the cancellation of the decree or instrument; but if the establishment of his title is being impeded by the effect of a transaction between other parties, he cannot legitimately ask for the cancellation of that transaction but can only ask for a declaration that so far as he is concerned it is not binding.

(1) (1890) I.L.R. 14 Mad. 26.
(2) (1923) 19 L.W. 249.
(3) 1930 M.W.N. 509.
(4) (1932) I.L.R. 56 Mad. 212.

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The respondent has quoted a decision of mine reported as *Venkatakrishniah* v. *Alli Sahib*(1), which on the facts falls clearly within the rule laid down in the decisions which I have quoted. It was a case of a minor whose lawful guardian on his behalf made an alienation, which the minor on attaining majority wished to get rid of as a preliminary to recovering possession of the properties alienated. He was through his guardian a party to the alienation and necessarily had to get the conveyance cancelled before he could get possession of the properties. The document of alienation, as I then stated, was an insuperable obstacle to the prayer for possession and it had to be declared void or cancelled. Therefore the relief came under section 7 (iv-A) of the Court Fees Act. Now on the basis of my observations in that case, it is contended that here the alienation from the second defendant to the first defendant is an insuperable obstacle to the attachment of the property as the properties of the second defendant in execution of a decree against the second defendant and that therefore the relief which the plaintiff prays for is in effect the relief of cancellation, more especially as the suit is filed not only in the interests of the plaintiff himself but also of the other creditors of the second defendant. It seems to me however that the same rule must be applied to suits under section 53 of the Transfer of Property Act. The matter is made clear by taking an extreme case. Suppose that the creditors together have debts amounting to Rs. 10,000 and that in fraud of the creditors the debtor alienates properties worth Rs. 50,000, are we to take it that the creditors by their suit under section 53 of the Transfer of Property Act are entitled or required to pray for the

(1) A.I.R. 1938 Mad. 921.

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cancellation of this alienation *in toto*? I do not think that they are. The form of the prayer would be for a declaration that the alienation is not binding or is void so far as the creditors are concerned. Except in so far as the creditors are concerned the alienation will stand and the creditors have no power to ask for its complete cancellation. The only circumstances in which a suit under section 53 of the Transfer of Property Act would in effect bring about the complete avoidance of the transfer would be in the case when the value of the properties alienated is less than the amount of debts. But as between the alienor and the alienee the transfer stands, subject only to the right of the creditors established by the decree to enforce their debts by the sale of the property just as if the transfer had not been made. What the creditors therefore seek is not the cancellation of the sale, but a declaration that it is not valid so far as their claims are concerned. In other respects, it may be perfectly good; that is a matter which does not concern the creditors; and the fact that they are creditors and that this transaction was entered into with the motive of defrauding them would not give them the right to have the sale cancelled except to the extent to which they have been defrauded. From this reasoning it seems to me to follow that the proper prayer in such a suit as that now filed is a prayer for a declaration that the sale is not binding upon the creditors to the extent of their debts and not a prayer for the cancellation of the sale deed.

In this view, I hold that the suit falls in substance under article 17-A (i) of Schedule II of the Court Fees Act and that the plaint has been wrongfully rejected by the Courts below. The appeal is therefore allowed and the suit remanded to the trial Court. Costs

throughout will abide by the result of the suit. Court-fee paid here and in the lower appellate Court to be refunded.

V.V.C.

APPELLATE CIVIL

Before Mr. Justice Burn and Mr. Justice Stodart.

NARAYANAN CHETTI AND ANOTHER, MINORS, BY THEIR MOTHER AND GUARDIAN UMAYAL ACHI (PETITIONERS), APPELLANTS,

1939, September 1.

v.

PANCHANATHAN CHETTIAR AND EIGHT OTHERS (RESPONDENTS 1 AND 4 TO 11), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 16—Applicability—Hindu father—Decree in favour solely of—Execution of, by his sons after his death—Recognition by Court which passed the decree, of the devolution on the sons, of the decree—Necessity—Sons entitled to the benefits of the decree along with father.

A decree passed solely in favour of a Hindu father cannot after his death be executed by his sons without recognition by the Court which passed the decree of the devolution upon them of the decree, even though the sons may be entitled along with their father to the benefits of the decree.

The sons are not "decree-holders" as defined in section 2 of the Code of Civil Procedure. The decree having been transferred to them by operation of law on the death of their father, Order XXI, rule 16, of the Code is applicable.

Ramsewakprasad v. *Saran Singh*(1) disapproved.

APPEAL against the order of the District Court of West Tanjore dated 14th April 1937 and passed in

*Appeal Against Order No. 31 of 1938.

(1) A.I.R. 1937 Pat. 607.

NARAYANAN v. PANCHANATHAN.

Execution Petition No. 4 of 1936 in Original Suit No. 93 of 1925, Sub-Court, Tanjore.

T. R. Venkatarama Sastri and *C. A. Seshagiri Sastri* for appellants.

N. Sivaramakrishna Ayyar for respondents.

BURN J.

The JUDGMENT of the Court was delivered by BURN J.—We cannot accept the contention on behalf of the appellants that they are decree-holders who can execute the decree without recognition by the Court which passed the decree of the devolution upon them of the decree. The appellants are not "decree-holders" as defined in section 2 of the Code of Civil Procedure. Their father was the sole decree-holder, and although the sons may well have been entitled along with him to the benefits of the decree—a thing which has yet to be investigated—it is impossible to say that they were, or are "decree-holders". The decree has been transferred to them by operation of law on the death of their father and Order XXI, rule 16, of the Code of Civil Procedure is applicable. With respect we are not able to agree with the learned Judge who decided the case of *Ramsewakprasad* v. *Saran Singh*(1). The decision of the learned District Judge on this point is in our opinion correct. This appeal is accordingly dismissed with costs.

A.S.V.

(1) A.I.R. 1937 Pat. 607.

APPELLATE CIVIL—FULL BENCH.

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

IN RE AN ADVOCATE, PETITIONER.*

1939, August 21.

Advocate—Struck off the rolls for professional misconduct—Reinstatement—Circumstances held sufficient.

Though the act of professional misconduct for which the name of an Advocate was struck off the roll of Advocates was a very grave one, the Court is not precluded from reinstating him when adequate punishment has been imposed and he has shown that he has rehabilitated himself in such a manner that he is fitted to be admitted into the profession again.

PETITION praying that in the circumstances stated therein the High Court may be pleased to review the order, dated 15th October 1931, disbarring him and reinstate him on the roll of Advocates.

T. R. Venkatarama Sastri (with him *K. S. Sankara Ayyar*) for petitioner.—The petitioner who was in affluent circumstances in the beginning, got into financial troubles later on. He was charged with having misappropriated his client's money to the extent of Rs. 4,800. He was suspended from practice on 25th April 1927 and final orders removing him from the roll of Advocates were passed on 15th October 1931. The petitioner was adjudicated an insolvent on 14th February 1927 and the final discharge was made on 8th December 1930. He rendered all possible help to the Official Assignee in the collection of the assets. After his final discharge he worked as a clerk in the office of Mr. Shamanna, a solicitor in Madras, till 1934. Then he obtained a clerk's post in the firm of Messrs. King and Partridge, who are also solicitors in Madras. Mr. Shamanna and Messrs. Jones and Miller of Messrs. King and Partridge, who had opportunities of observing him closely, speak highly of his honesty and integrity of character. Mr. Nugent Grant, who also had opportunities of knowing the petitioner intimately, testifies to his probity.

* Civil Miscellaneous Petition No. 3117 of 1939.

AN ADVOCATE, *In re.*

[The certificates given by Mr. Shamanna, Mr. Jones, Mr. Miller and Mr. Grant were then referred to.] The petitioner no doubt misappropriated his client's money and was thus guilty of professional misconduct. He has been sufficiently punished for that. He has mended his character thoroughly as observed by very respectable persons. So he may be re-admitted into the profession.

Advocate-General (*Sir A. Krishnaswami Ayyar*) for the Crown was not called upon.

ORDER.

LEACH C.J.

LEACH C.J.—The name of the petitioner was struck off the roll of Advocates of this Court on 15th October 1931, as it had been shown that he had misappropriated a sum of Rs. 4,800 belonging to a client. The petitioner, who had considerable property, got into financial difficulties in 1927 and on 14th February of that year he was adjudicated an insolvent. On 25th April 1927 he was suspended from practice. The delay in the passing of the order striking the petitioner's name off the rolls was due to the fact that the Court desired to know the position disclosed by the insolvent's public examination before arriving at a decision. The justice of the order of this Court striking the petitioner's name off the roll of Advocates is not and could not be questioned. It is said, however, that during the twelve years that have elapsed since the petitioner was first suspended he has worked hard to rehabilitate himself and has succeeded in establishing an honourable reputation. The petitioner rendered all assistance that he could to the Official Assignee and secured his discharge on 8th December 1930. After his suspension from practice he obtained a clerkship in the office of Mr. Shamanna, a well-known solicitor of Madras, and retained this post until 1934 when he obtained a clerkship with Messrs. King and Partridge, also well-known solicitors of the city. He

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LEACH C.J.

has continued in their service ever since. Mr. Shamanna and Messrs. H. Maitland Jones and Leslie D. Miller of Messrs. King and Partridge have given the petitioner certificates of character. Mr. Shamanna says that while he was employed by him the petitioner was dealing with his cases and with his clients and that he found his conduct and dealings both with his clients and the other members of his establishment to be satisfactory, and guided by a high sense of probity. Mr. Maitland Jones says that while in the employment of his firm the petitioner has been entrusted with important work. Mr. Maitland Jones had many opportunities of observing his conduct which he says was excellent and in addition his probity was above suspicion. Mr. Miller says: "From my knowledge of him, in spite of what happened in the past, I personally would place every confidence in his integrity." The petitioner has also filed a certificate given to him by Mr. Nugent Grant in April of this year. Mr. Grant says that the petitioner has throughout the period of his exclusion from the profession exhibited a consciousness of the injury he has done to himself and the profession of which he was once an honourable member. Mr. Grant believes that he had made every endeavour to atone for his lapse from morality.

The act of professional misconduct committed by the petitioner was a very grave one and it was not possible to allow him to continue practising in an honourable profession. But that does not mean that the Court is precluded from reinstating him when adequate punishment has been imposed and he has shown that he has rehabilitated himself in such a manner that he is fitted to be admitted into his profession again. I consider that there is here ground

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for the Court holding that the petitioner has been fully punished and that he has regained his character to an extent that justifies his re-admission as an Advocate of this Court. For these reasons I would allow the petition.

MOCKETT J.—I agree.

KRISHNASWAMI AYYANGAR J.—I agree.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

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

1939, August 21.

IN RE AN ADVOCATE, PETITIONER.*

Advocate—Struck off the rolls for misappropriation—Reinstatement—Circumstances held not sufficient.

Before the Court can re-admit an Advocate who has been struck off the rolls for misappropriation it must be fully satisfied that he has fully regained his character and is fitted for re-admission into the ranks of an honourable profession. Mere opinion expressed by gentlemen in the shape of certificates of character is not sufficient. The re-admission of the Advocate does not depend on the fact that he has been suspended or struck off the rolls for several years. He can only be re-admitted if he can show that there is no likelihood of his committing the same offence again and that he has become worthy to act as an Advocate.

PETITION praying that in the circumstances stated therein the High Court may be pleased to reconsider the orders of the High Court, dated 9th February 1931, 29th September 1933, 3rd May 1937 and 21st October 1938 and re-admit him to the roll of Advocates.

Petitioner appeared in person.

Advocate-General (Sir A. Krishnaswami Ayyar) for the Crown.

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* Civil Miscellaneous Petition No. 3207 of 1939.

AN ADVOCATE, *In re.*

LEACH C.J.

ORDER.

LEACH C.J.—The petitioner applies to be re-admitted as an Advocate of this Court. In August 1930 he was suspended from practice for misappropriation of moneys belonging to a client. On 9th February 1931 his name was struck off the rolls as the result of further misappropriation of client's money. He was adjudicated an insolvent on 29th October 1925. His liabilities were Rs. 90,000 and he had no assets. On 11th April 1938 my learned brother, MOCKETT J. granted him his discharge on the ground that he would be condemned to insolvency for life if it were not granted. The petitioner had no prospects of being able to pay anything to his creditors and the discharge was unopposed. In 1933 the petitioner applied to the Court to review its order striking his name off the roll of Advocates, but the application was dismissed on 29th September 1933 by a Full Bench composed of BEASLEY C.J., SUNDARAM CHETTI and STONE JJ. In support of that application the petitioner filed three certificates of character, two of them being signed by individual members of the Bar and the third being a joint certificate signed by forty-six members of the Bar. The Bench refused the petition for two reasons. The first was that the Court required, before re-admitting a person to the profession, solid facts and cogent reasons, not merely the opinions expressed by gentlemen who had given the petitioner certificates. It was not enough to say that the petitioner was a fit and proper person for re-admission without stating the grounds on which the opinion was based. The second reason was that the petitioner was still an insolvent.

The petitioner has now obtained his discharge, but the first ground of the Full Bench for refusing to re-admit the petitioner still exists. The petitioner

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LEACH C.J.

has filed three further certificates, but these do not carry the matter further. Since he was suspended from practice in 1930 the petitioner has had no employment. According to his statement in Court, he has throughout been supported by his daughter. Before the Court could re-admit an Advocate who has been struck off the rolls for misappropriation, the Court must be fully satisfied that the petitioner has fully regained his character and is fitted for re-admission into the ranks of an honourable profession. Mere opinion is not sufficient.

Here there are no cogent reasons for the Court holding that the petitioner has become fitted to be re-admitted as an Advocate. He has not attempted to obtain any employment. In fact he has stated that he refused two offers of employment made to him. One offer was employment as a manager of an estate and the other was employment in an insurance company. The re-admission of an Advocate who has been struck off the rolls for misappropriation does not depend on the fact that he has been suspended or struck off the rolls for several years. He can only be re-admitted if he can show that he has become worthy to act as an Advocate. In deciding such matters the Court has a duty to the public and, where an Advocate has been guilty of misappropriation, it must be shown that there is no likelihood of such an offence being committed again. In view of the previous decision and the fact that the position is now the same as it was then, except that the petitioner has obtained his discharge, I consider that the Court would not be justified in allowing this petition.

MOCKETT J.—I agree.

KRISHNASWAMI AYYANGAR J.—I agree.

V.V.C.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Somayya.

RATHNAMMAL *alias* RAJAMANI AMMAL (NIL), APPELLANT,

1939, May 1.

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL BY THE COLLECTOR OF COIMBATORE (DEFENDANT), RESPONDENT.*

Madras Irrigation Cess Act (VII of 1865), *sec.* 1, *pro.* 2—*Effect of—"Single crop wet" land—Land classified as—Source authorized for irrigation of one crop in respect of—Water taken without permission from, during second crop season for irrigating such land—Imposition of penalty in case of—Legality of—Rules framed by Government under sec.* 1 *of Irrigation Cess Act empowering Government to impose penalty in such a case—Validity of.*

The Revenue authorities of the Province have no power to impose a penalty under the Madras Irrigation Cess Act, 1865, when water is taken without permission during the second crop season for the purpose of irrigating land classified as "single crop wet" and the source from which the water is taken is the source authorized for the irrigation of one crop.

The effect of the second proviso to section 1 of the Madras Irrigation Cess Act is this. No cess shall be leviable under the Act in respect of land held under ryotwari settlement which is classified and assessed as wet, unless the land be irrigated by using without due authority water from a source mentioned in the first part of the section *and* the source is different from or in addition to that which has been assigned by the Revenue authorities or adjudged by a competent Civil Court as the source of irrigation of the land. The word "and" which follows the words "from any source hereinbefore mentioned" in the proviso ought not to be read as meaning "or". To enable the revenue authorities to impose a penalty in respect

* Letters Patent Appeal No. 26 of 1937.

RATHNAMMAL v. SECRETARY OF STATE FOR INDIA.

of land held under ryotwari settlement and classified and assessed as wet, there must, therefore, be unauthorized use of water from a source other than the authorized source. The mere taking of extra water from the authorized source does not come within the exception to the proviso.

The rules framed by the Government under section 1 of the Madras Irrigation Cess Act and set out at page 136 of Volume I of the Standing Orders of the Board of Revenue (Fourth Edition), in so far as they provide for the imposition of a penalty in such a case, go beyond the Act.

Kanakamma v. *The Secretary of State for India*(1) disapproved.

Kanniappa Mudaliar v. *Secretary of State for India*(2) distinguished.

Krishna Row v. *The Collector of Kistna*(3) considered.

APPEAL under clause 15 of the Letters Patent against the judgment of KING J., dated 18th December 1936, and passed in Second Appeal No. 146 of 1933 preferred to the High Court against the decree of the Court of the Subordinate Judge of Coimbatore in Appeal Suit No. 7 of 1932 preferred against the decree of the Court of the District Munsif of Tiruppur in Original Suit No. 637 of 1930.

K. S. Sankara Ayyar for appellant.

Advocate-General (*Sir A. Krishnaswami Ayyar*) and *Government Pleader* (*B. Sitarama Rao*) for respondent.

Cur. adv. vult.

JUDGMENT.

LEACH C.J.

LEACH C.J.—This appeal raises the question whether the Revenue authorities of the Province have the power to impose a penalty under the Madras Irrigation Cess Act, 1865, when water is taken without permission during the second crop season for the purpose of irrigating land classified as "single crop

(1) (1927) 54 M.L.J. 230. (2) (1935) I.L.R. 59 Mad. 107.
(3) (1914) 26 M.L.J. 210.

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wet" and the source from which the water is taken is the source authorized for the irrigation of one crop. One Krishnammal was the pattadar of lands in the village of Sulur, Coimbatore District. The lands, which are registered as Survey Nos. 182 and 269, are single crop wet lands. For many years betel leaves have been grown on Survey No. 182 and cocoanut trees on Survey No. 269. The surrounding lands are all registered as double crop wet lands. On 1st February 1928 Krishnammal applied to the Collector for permission to convert her lands into double crop wet lands, but she died before her application could be considered. Her daughter Venkatalakshmi Ammal then made a similar application, but she was told to present it again after the patta had been registered in her name. The lands were irrigated by water flowing through a channel constructed by the Government from a tank known as the Sulur tank. In the year 1925–26 permission had been given to Krishnammal to take water from the channel during the second crop season, but in the following year she took extra water without permission, which resulted in the Revenue authorities charging her twice the water cess ordinarily payable for a first irrigated crop under the rules framed by the Government in purported exercise of the powers conferred by the Madras Irrigation Cess Act. For the year 1927–28 water was again taken without permission by Krishnammal and on this occasion a penalty of five times the ordinary water cess was imposed. In the year 1928–29 her daughter Venkatalakshmi Ammal took water without permission during the second crop season and on this occasion the penalty imposed was ten times the ordinary water cess, amounting to Rs. 257–10–0. This resulted in Venkatalakshmi Ammal filing a suit in the Court

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of the District Munsif of Tiruppur for the recovery of the amount on the ground that the infliction of the penalty was unlawful. The District Munsif dismissed the suit and his decision was upheld by the Subordinate Judge of Coimbatore. Venkatalakshmi Ammal had died in the meantime and the appeal was preferred by her daughter as her legal representative. Having lost before the Subordinate Judge the appellant appealed to this Court. The appeal was heard by KING J., who concurred in the decisions of the District Munsif and the Subordinate Judge, but granted a certificate permitting the present appeal under Clause 15 of the Letters Patent.

The decision of the appeal depends upon the interpretation to be placed upon the second proviso to section 1 of the Madras Irrigation Cess Act. This section, omitting the first proviso which has no bearing here, reads as follows:

"1. (*a*) Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to, or constructed by, Government, and also,

(*b*) whenever water by direct or indirect flow or by percolation or drainage from any such river, stream, channel, tank or work from or through adjoining land irrigates any land under cultivation or flows into a reservoir and is thereafter used for irrigating any land under cultivation, and, in the opinion of the revenue officer empowered to charge water cess, subject to the control of the Collector, the Board of Revenue and the Government, such irrigation is beneficial to, and sufficient for, the requirements of the crop on such land, it shall be lawful for the Government before the end of the revenue year succeeding that in which the irrigation takes place to levy at pleasure on the land so irrigated a separate cess for such water, and the Government may prescribe the rules under which, and the rates at which, such water cess as aforesaid shall be levied: and alter or amend the same from time to time: . . .

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Provided also that no cess shall be leviable under this Act in respect of land held under ryotwari settlement which is classified and assessed as wet, unless the same be irrigated by using without due authority water from any source hereinbefore mentioned and such source is different from or in addition to that which has been assigned by the Revenue authorities or adjudged by a competent Civil Court as the source of irrigation of such land."

The appellant's case is that inasmuch as her mother had the right to take water for one crop from the channel from the Sulur tank, no penalty could be imposed upon her for taking water during the second crop season. It is said that the Government's power to impose a penalty is limited by the proviso to a case where water is taken from a different source or a source in addition to that assigned. On behalf of the respondent it is said that if a source has been assigned for a single crop and the same source is used during the second crop season, it must be deemed to be a different source within the meaning of the proviso. It is also urged that the rules framed by the Government under section 1 govern the interpretation of the section, as there is, it is said, ambiguity in the wording. It is further contended that the Court should read the word "and" which follows the words "from any source hereinbefore mentioned" in the proviso as meaning "or".

The present rules were promulgated in 1917 and are set out at page 136 of Volume 1 of the Standing Orders of the Board of Revenue, Fourth Edition. Rule I says:

"Water from a Government source or work is said to be irregularly taken to or used for the irrigation of any land—

(*a*) when it is taken to or used for such land without the permission of any officer authorized by Government to grant such permission, or

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(*b*) when it is taken or used, contrary to the orders of any authority authorized to give such orders, or

(*c*) when it is taken or used in breach of any rule or regulation directing from what source or under what conditions water may be taken to or used for such land."

Rule II provides for the imposition of twice the water cess ordinarily payable for the first infringement of the rules. Rule III says that for the second infringement five times the ordinary cess shall be imposed, and rule IV provides for a penalty of ten times the ordinary cess for an infringement on the third or any subsequent occasion. If the appellant's contention is correct these rules cannot be applied in a case like the present one, as they go beyond the section. It has been impressed upon us by the learned Advocate-General that the rules have been in force for many years and a decision adverse to the respondent would mean the discontinuation of a course of practice which has been followed in the Presidency for a long time. It has not been suggested, nor could it be, that the appellant is not entitled to raise the question now, and the Court must decide it without regard to the bearing which the decision will have in other cases.

I consider that the wording of the proviso is free from ambiguity and that its effect is this. No cess shall be leviable under the Act in respect of land held under ryotwari settlement which is classified and assessed as wet, unless the land be irrigated by using without due authority water from a source mentioned in the first part of the section *and* the source is different from or in addition to that which has been assigned by the Revenue authorities or adjudged by a competent Civil Court as the source of irrigation of the land. A source which is in addition to the assigned source must necessarily be a different source. To enable the

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Revenue authorities to impose a penalty in respect of land held under ryotwari settlement and classified and assessed as wet there must be unauthorized use of water from a source other than the authorized source. The mere taking of extra water from the authorized source does not come within the exception to the proviso. The authorized source of irrigation in this case is the Sulur tank and the channel leading from it. The application of Krishnammal for the transfer of her holdings from dry to wet classification has been put in evidence. The source of irrigation is stated therein to be the Sulur tank and the Revenue Inspector recommended that the application be granted. The application was granted by the Collector, whose order is in these words: "The transfer of the fields to single crop wet under the Sulur supply channel and tank is sanctioned." The words "from any source hereinbefore mentioned" which appear in the proviso can therefore only be read in this case as meaning the Sulur tank and the channel connected therewith. To prevent any misconception I will here say that I do not suggest that if water were taken from an unauthorized channel connected with the Sulur tank this would not be a different source within the meaning of the proviso. I think that it would be a different source, but that question does not arise. The extra water taken by the appellant's mother was taken from the authorized channel. This being the case the appellant is clearly outside the mischief of the section if the words used are to be given their ordinary meaning.

In support of his contention the learned Advocate-General has referred to a statement in Craies on Statute Law, Fourth Edition, page 146, where it is said that where the language of an Act is ambiguous and difficult to construe, the Court may, for assistance in its construction, refer to rules made under the provisions of the

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Act, especially where such rules are by the statute authorizing them directed to be read as part of the Act. This statement is based on the observation of MELLISH L.J. in *Ex parte Wier. In re Wier*(1) where he said :

"We do not think that any other section of the Act throws any material light upon the proper construction of this section, and if the question had depended upon the Act alone we should have had great doubt what the proper construction was ; but we are of opinion that, where the construction of the Act is ambiguous and doubtful on any point, recourse may be had to the rules which have been made by the Lord Chancellor under the authority of the Act, and, if we find that in the rules any particular construction has been put on the Act, that it is our duty to adopt and follow that construction."

In this case the rules are not made part of the Act and the knowledge of the person who framed them is not a factor. What is important is that there is no ambiguity in the wording of the proviso. Therefore the Court does not need to call in aid the rules in the matter of interpretation. In fact it is clear that the rules go beyond the Act in a case where the facts are as they are here.

Neither can I see any justification for the Court changing the word "and" into the word "or". It is pointed out in Maxwell on the Interpretation of Statutes, Eighth Edition, page 209, that to carry out the intention of the Legislature, it is occasionally found necessary to read the conjunctions "or" and "and" one for the other, and several instances are given. I will not pause to examine them because the law is clearly stated by Lord HALSBURY L.C. in *Mersey Docks and Harbour Board* v. *Henderson Brothers*(2). In that case the Court was called upon to construe the following words in a statute :

(1) (1871) 6 Ch. App. 875. (2) (1888) 13 App. Cas. 595, 603.

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"Vessels arriving in ballast, but trading outwards, and also vessels built within the port of Liverpool, or trading outwards, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards, and vessels built within the said port on first trading outwards shall be liable to one moiety only of such rates, but shall thereafter pay full rates."

The Court of Appeal had read "or" as "and" and in expressing his dissent Lord HALSBURY L.C. said :

"In the first place I know no authority for such a proceeding unless the context makes the necessary meaning of 'or' 'and', as in some instances it does ; but I believe it is wholly unexampled so to read it when doing so will upon one construction entirely alter the meaning of the sentence, unless some other part of the same statute or the clear intention of it requires that to be done, as in the case of *Fowler* v. *Padget*(1), where the Act of Jac. 1 ; c. 15, made it an act of bankruptcy for a trader to leave his dwelling-house to the intent *or* whereby his creditors might be defeated or delayed. These words if construed literally would have made every trader commit an act of bankruptcy if he casually left his dwelling-house and some creditor called for payment during his absence. It may indeed be doubted whether some of the cases of turning 'or' into 'and' and *vice versa* have not gone to the extreme limit of interpretation, but I think none of them would cover this case."

If the word "and" is read as "or" in the proviso to section 1 of the Madras Irrigation Cess Act, it would entirely alter the effect of the proviso, and there is nothing in the Act which justifies such a reading. Moreover, to give the proviso the meaning which the words used justify would not mean that the Government would be without remedy. It would still have the rights open to all persons whose proprietary rights are infringed.

In the course of his argument the learned Advocate-General quoted three decisions of this Court on questions arising under the Act. The first decision is

(1) (1798) 7 T.R. 509 ; 101 E.R. 1103.

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that in *Krishna Row* v. *The Collector of Kistna*(1). There a ryot had irrigated his land from two pipes instead of the one which was authorized and it was held that he was liable to a penalty under the rules. AYLING and TYABJI JJ. regarded the additional pipe as being an unauthorized source of supply, but the judgments which they delivered do not discuss the proviso or the rules. The decision of the learned Judges does not apply to this case because here the extra water came entirely from the authorized source of supply. In *Kanniappa Mudaliar* v. *Secretary of State for India*(2) a sluice was erected to allow two and a half inches of water to pass through. The sluice was forced open with the result that water two feet deep passed into the distributary channel and irrigated the plaintiff's lands. RAMESAM and VENKATASUBBA RAO JJ. held that this was water from a different source from, or in addition to, that which had been assigned by the Revenue authorities as the source of irrigation. We are not called upon to decide whether a sluice is a source within the meaning of the Act, because in the present case the Government has declared the source to be the Sulur tank and the channel connected therewith. The third case is *Kanakamma* v. *The Secretary of State for India*(3) which was decided by DEVADOSS J. sitting alone. The case has been cited because in the course of his judgment DEVADOSS J. observed:

"In order to bring the ryotwari tenant in possession of lands classified and assessed as wet within the meaning of the section, he must do something in order to let water into his lands or must raise or attempt to raise a crop with the help of the water from a source to which he is not entitled or at a time when he is not entitled to get water from his legitimate source."

(1) (1914) 26 M.L.J. 210. (2) (1935) I.L.R. 59 Mad. 107.
(3) (1927) 54 M.L.J. 230.

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Emphasis has been laid on the words "at a time when he is not entitled to get water from his legitimate source". There is nothing in the proviso which makes the time of the taking of the water a factor. The proviso has merely regard to the source and DEVADOSS J. read into the section something which was not there.

The statute being one entailing penal consequences, the Court ought not to do violence to its language to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language; *London County Council* v. *Aylesbury Dairy Company*(1). I consider that it would be doing violence to the wording of the proviso to hold that this case falls within the exception. The plaintiff did nothing to justify the imposition of a penalty under the Act and consequently I hold that the suit was rightly instituted.

The appeal should be allowed and a decree passed in favour of the appellant with costs here and below. From the amount claimed, Rs. 20-5-6 will be deducted as the appellant is admittedly liable for this by way of land revenue.

SOMAYYA J.—I agree.

A.S.V.

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

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Patanjali Sastri.

1939, April 17.

SAMINATHA IYER (DIED) AND ANOTHER (DEFENDANTS 1 AND 2), APPELLANTS,

v.

VAGEESAN, MINOR BY GUARDIAN SIVAKAMI AMMAL (PLAINTIFF), RESPONDENT.*

*Hindu law—Adoption—*Datta homam *ceremony—Necessity of, in case of adoption by Brahmin of his daughter's son.*

The ceremony of *datta homam* is not essential to the validity of an adoption by a Brahmin of his daughter's son.

Texts and case-law reviewed.

APPEAL against the decree of the Court of the Subordinate Judge of Kumbakonam, dated 29th November 1933 and passed in Appeal Suit No. 28 of 1932, preferred against the decree of the Court of the District Munsif of Kumbakonam in Original Suit No. 31 of 1930.

K. S. Desikan for appellants.

K. Rajah Ayyar and *R. Viswanathan* for respondent.

Cur. adv. vult.

JUDGMENT.

LEACH C.J.

LEACH C.J.—The question which falls for decision in this case is whether the performance of the *datta homam* ceremony is essential when a Brahmin adopts the son of his daughter. Natesa Ayyar, the brother of the first appellant, adopted the respondent, the son of his only daughter. Natesa Ayyar was joint

* Second Appeal No. 404 of 1934.

with his brother and his brother's son, the second appellant. Natesa Ayyar died on 23rd September 1929 and the respondent filed the suit out of which this appeal arises on 22nd January 1930 for partition of the family properties. The appellants denied the factum of adoption and advanced the alternative plea that if the respondent had been adopted, the adoption was invalid as the *datta homam* ceremony had not been performed. They also averred that if the respondent's adoption was valid, the partition of the family estate was not for his benefit. The District Munsif of Kumbakonam, who tried the suit, held that the adoption had taken place, but the *datta homam* ceremony had not been performed. As the District Munsif considered that the ceremony was not necessary for a valid adoption and was of the opinion that the suit was for the benefit of the respondent, he granted the decree prayed for. The appellants appealed to the Subordinate Judge, who concurred in all the findings of the District Munsif. The appeal to the Subordinate Judge having failed, the appellants have appealed to this Court. The findings of fact of the Subordinate Judge are conclusive and the only question which we have to decide is whether the performance of the *datta homam* ceremony was essential in this case, the family being of the Brahmin caste.

By the decision of the Privy Council in *Bal Gangadhar Tilak* v. *Shrinivas Pandit*(1) it has now been finally settled that the *datta homam* ceremony is not necessary when the adoption is of a Brahmin boy of the same *gotra*. I shall return to the judgment in that case presently; but before doing so I desire to trace the course of decisions in this Province. In *Singamma* v. *Ramanuja Charlu*(2) it was held that,

(1) (1915) I.L.R. 39 Bom. 441 (P.C.). (2) (1868) 4 M.H.C.R. 165.

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in order to establish a valid adoption in a Brahmin family, proof of the performance of *datta homam* was not essential; proof of the giving and taking was sufficient. In that case it was not known whether the adopted boy was or was not of the same *gotra* and the decision must, therefore, be taken to apply to the adoption of a boy of a different *gotra*. This decision was followed by KINDERSLEY and MUTTUSWAMI AYYAR JJ. in *Chandramala* v. *Muktamala*(1), which related to an adoption by a Kshatriya. MUTTUSWAMI AYYAR J., however, observed that, if the question whether religious ceremonies were essential to adoption were *res integra*, he would have felt considerable difficulty in holding that the ceremony of *datta homam* was not of the essence of a valid adoption among the three higher classes. The same doubt was expressed in the judgment of TURNER C.J. and MUTTUSWAMI AYYAR J. in *Venkata* v. *Subhadra*(2). In *Govindayyar* v. *Dorasami*(3) a Full Bench, consisting of COLLINS C.J. and KERNAN, MUTTUSWAMI AYYAR, BRANDT and PARKER JJ., held that the ceremony of *datta homam* was not essential to a valid adoption among Brahmins in Southern India when the adoptive father and son belonged to the same *gotra*. To that extent the Court felt it might adhere safely to the decision in *Singamma* v. *Ramanuja Charlu*(4). It did not expressly say that that decision went too far and, therefore, it cannot be said that the decision was overruled, but the doubts apparently still existed.

The case of *Bal Gangadhar Tilak* v. *Shrinivas Pandit*(5) related to an adoption from the same *gotra*

(1) (1882) I.L.R. 6 Mad. 20. (2) (1884) I.L.R. 7 Mad. 548.
(3) (1887) I.L.R. 11 Mad. 5 (F.B.). (4) (1868) 4 M.H.C.R. 165.
(5) (1915) I.L.R. 39 Bom. 441 (P.C.).

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and, in delivering the judgment of the Judicial Committee, Lord SHAW observed:

"The question whether the *datta homam* is a legal requisite in Bombay for adoption among the three twice-born classes does not, however, in the view of their Lordships, broadly arise in the present case. It is in no way necessary to canvass or call in question any dicta upon that general point, nor does the question arise, whether, for instance, the principle extends to India at large of the decision of the Madras Full Bench in *Govindayyar* v. *Dorasami*(1) or of the Madras High Court in *Singamma* v. *Ramanuja Charlu*(2), both decisions being of value as containing a careful study of the authorities, and affirming that the ceremony of *datta homam* is not essential to a valid adoption among Brahmins in Southern India, for, in the opinion of the Board, the necessity does not arise where the child to be adopted belongs to the same gotra as that of the adoptive father."

In view of this statement and bearing in mind that in *Govindayyar* v. *Dorasami*(1) there was no express limitation of the decision in *Singamma* v. *Ramanuja Charlu*(2), it is certainly arguable that the latter decision still stands. If it stands, it is binding on us and provides a short answer to the appellants' case. It is, however, not necessary to come to a definite decision on the question whether it binds us or to inquire into the question whether the judgment went too far, because the appeal may be disposed of on another ground.

There is ancient authority for the proposition that the *datta homam* ceremony is not essential in the case of an adoption by a father of his daughter's son and the authority is the Yama text. The text is set out in the judgment of Sir ASUTOSH MOOKERJEE in *Retki* v. *Lak Pati Pujari*(3) and reads as follows:

"The *homa* or the like ceremony is not necessary in the case of adoption of the daughter's or the brother's son;

(1) (1887) I.L.R. 11 Mad. 5 (F.B.). (2) (1868) 4 M.H.C.R. 165.
(3) (1914) 20 C.W.N. 19.

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by the verbal gift and acceptance alone, that is accomplished; this is declared by the Lord Yama."

Little is known of Yama but his name appears in the list of law givers set forth in the Smriti of Yajnavalkya. Sir ASUTOSH MOOKERJEE accepted the text as of unquestionable genuineness and authority and set forth his reasons in detail. The text was accepted by the Bombay High Court in *Valubai* v. *Govind Kashinath*(1) and was accepted as authority for the proposition that the *datta homam* ceremony was not required in the case of adoption of a daughter's son in the course of the arguments in *Bal Gangadhar Tilak* v. *Shrinivas Pandit*(2). In *Bhagwan Singh* v. *Bhagwan Singh*(3) BANERJI J. did cast doubt on the authenticity of the text, but I do not consider that his criticism should outweigh its acceptance in *Retki* v. *Lak Pati Pujari*(4), *Valubai* v. *Govind Kashinath*(1) and *Bal Gangadhar Tilak* v. *Shrinivas Pandit*(2). Moreover, the case of *Bhagwan Singh* v. *Bhagwan Singh*(3) was carried to the Privy Council, *Bhagwan Singh* v. *Bhagwan Singh*(5), and there is no indication in the judgment of the Board of the acceptance of the criticism of BANERJI J. On the other hand, Lord HOBHOUSE in delivering the judgment referred to the fact that

"one ancient sage called the holy Yama expressly asserts the right to adopt a sister's son".

It is true that the Yama text is in conflict with the Dattaka Chandrika in that the latter does not recognize the validity of the adoption of a daughter's son. The prohibition has, however, not been observed in Southern India, where a custom exists of adopting

(1) (1899) I.L.R. 24 Bom. 218. (2) (1915) I.L.R. 39 Bom. 441 (P.C.).
(3) (1895) I.L.R. 17 All. 294 (F.B.). (4) (1914) 20 C.W.N. 19.
(5) (1898) I.L.R. 21 All. 412 (P.C.).

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a sister's or a daughter's son; vide *Vayidinada* v. *Appu*(1). It does not, of course, follow from the fact that there is this custom that the *datta homam* ceremony is not essential in the case of the adoption of a daughter's son, and there is no evidence that it is customary to dispense with the *datta homam* ceremony in such a case, but if the Yama text is accepted it must be held that the ceremony is not essential to a valid adoption. I see no reason why it should not be accepted and consequently I hold that the adoption in this case was valid despite the fact that the *datta homam* ceremony was not performed.

Mr. Rajah Ayyar on behalf of the respondent advanced the argument that the reason why the *datta homam* ceremony is not essential in the case of the adoption of a daughter's son is because the Hindu law regards a daughter's son as being in the same position as a son's son in regard to the performance of the obsequies and other ceremonies following the death of the grandfather. He referred in this connexion to the judgment of VENKATARAMANA RAO J. in *Panchapakesa Iyer* v. *Gopalan*(2) where the learned Judge quoted these words of Vishnu:

"In regard to the obsequies of ancestors, daughter's sons are considered son's sons."

and the following words of Manu:

"Between a son's son and the son of a daughter there exists in this world no difference; for even the son of a daughter saves him (who has no sons) in the next world like the son's son."

This may be the reason why Yama declared that the *datta homam* ceremony was not essential in the case of the adoption of a daughter's son, but the validity of the text does not depend on the discovery of the reason for the rule.

(1) (1885) I.L.R. 9 Mad. 44 (F.B.). (2) (1938) 48 L.W. 887.

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For the appellants it has been argued that the Yama text refers to the son of a daughter born after the daughter's appointment by the father to continue his line. The wording of the text does not support this argument and the argument is obviously fallacious because adoption is not necessary when the appointed daughter bears a son. The son is regarded from the moment of his birth as the son of the daughter's father and not as the son of her husband.

I consider that the case was rightly decided below and as my learned brother shares this opinion the appeal will be dismissed with costs.

PATANJALI SASTRI J.

PATANJALI SASTRI J.—This second appeal raises the question of Hindu law whether *datta homa* is essential to the validity of the adoption of a daughter's son by a Brahmin. The general question whether that ceremony is an essential requisite for a valid adoption among Brahmins and other twice-born classes was also raised, but it is not necessary in this case to decide it, as I am clearly of opinion that no *datta homa* is necessary even among Brahmins for the adoption of a daughter's son.

As there is no decided case on this precise question, the discussion before us had to turn to some extent on the Hindu law texts and text-books. The learned Advocate for the appellants urged that Dattaka Chandrika and Dattaka Mimamsa are works of great and unquestionable authority on Hindu law in matters relating to adoption and that both of them clearly laid down that *datta homa* is essential among the twice-born classes to the establishment of the filial relationship of the person adopted. This is no doubt the general rule according to these authorities, but an exception based on a text of Yama in the case of a brother's son's adoption has been recognised in decided

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cases. If the authority of this text is to be acted upon, it concludes the question in favour of the respondent, as it excepts the adoption of a daughter's son also from the rule requiring *datta homa*. The appellants' learned Advocate therefore directed his attack against the genuineness and authority of this text, and drew our attention to the observations of BANERJI J. in *Bhagwan Singh* v. *Bhagwan Singh*(1) where that learned Judge throws doubt on the authenticity thereof. It is no doubt true that this text does not appear in Yama Smriti and Yama Dharma Sastra as they are now extant. But the authenticity and the authority of the text have been accepted in a long course of decisions in this country beginning with *Huebut Rao Mankur* v. *Govindrao Bulwant Rao Mankur*(2) of the year 1821 and Mr. Mandlik has also regarded its authenticity as beyond question. In *Retki* v. *Lak Pati Pujari*(3) MOOKERJEE J. after an elaborate examination of the authorities bearing on the point definitely accepted its authenticity and relied upon its authority in the case of the adoption of a brother's son which was there in question. It was also accepted as genuine and acted upon by the Allahabad High Court in *Atma Ram* v. *Madho Rao*(4) and by the Bombay High Court in *Valubai* v. *Govind Kashinath*(5), both cases relating to the adoption of a brother's son. In view of these decisions it seems to me that the authenticity as well as the authority of the text of Yama is no longer open to question.

The learned Advocate for the appellants further contended that even if the text is accepted as genuine, it must, on its true construction, be taken to apply

(1) (1895) I.L.R. 17 All. 294, 325 (F.B.). (2) (1821) 2 Borr. 83.
(3) (1914) 20 C.W.N. 19. (4) (1884) I.L.R. 6 All. 276 (F.B.).
(5) (1899) I.L.R 24 Bom. 218.

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only to the cases of a *putrika putra* and a *dwayamushyayana* adoption and not to a *dattaka* adoption. The text runs thus :

दौहित्रे भ्रातृपुत्रे च होमादिनियमो न हि ।
वाग्दानादेव तत्सिद्धिरित्याह भगवान् यमः ॥

" Dauhitre bhratru putre cha homadiniyamo nahi ।
Vagdanadeva tatsiddih ityaha Bhagavan Yamah ॥ "

which may be translated as follows :

" Homa or the like is not prescribed in the case of a daughter's son or a brother's son ; by verbal gift alone that is accomplished. So declared holy Yama."

The argument is that the expression " vagdanadeva " (by verbal gift alone) cannot apply to a *dattaka* form of adoption as corporeal delivery and acceptance of the child is universally treated as the essential part of an adoption in the *dattaka* form. It seems to me that this argument proceeds on a misconception. The context makes it clear that the expression " vagdanadeva " (by mere verbal gift) is used in contradistinction to " homadiniyama " (prescription of homa or the like) to convey the meaning that no gift accompanied by the burning of the sacrificial fire and *vyahritis*, etc., is necessary, but a mere gift with a verbal declaration of intention to give is sufficient. " Dana " or gift ordinarily imports corporeal delivery and " vagdana " is used merely to make it clear that the delivery is to be made with appropriate words showing an intention to give. Moreover, in the case of a *putrika putra*, there was no adoption by the maternal grandfather at all. The daughter's son when born automatically became the son of the maternal grandfather if the latter had no male issue. He was recognised as one of the subsidiary sons in the Hindu law

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not by virtue of any adoption but by mere intention on the part of the maternal grandfather and without any consent asked for or obtained (*see* Mayne's Hindu Law, Tenth Edition, page 113). The reference in the text to " vagdana " being sufficient would therefore be devoid of any meaning as applied to a *putrika putra*. Nor has the reference to a brother's son ever been understood to relate only to a *dwayamushyayana* adoption. This contention of the appellants' learned Advocate must therefore be rejected.

Apart from the text of Yama referred to above, it has been contended by the learned Advocate for the respondent that the reason of the now well-established rule, that no *datta homa* is necessary in cases where the adopted son and the adoptive father belong to the same *gotra*, would apply equally to the adoption of a daughter's son. In the Full Bench decision in *Govindayyar* v. *Dorasami*(1), which laid down this rule for this Province, it is said at page 9 :

" Both Manu and Caunakha declared that one who is eligible for adoption should be the reflection or have the resemblance of a son and the commentators apparently thought that as adoption is made partly to secure spiritual benefit arising from the performance of obsequies, the prescribed ceremony was necessary to ensure to the adopted son competency to perform those obsequies with efficacy."

If, thus, the object of the *homa* is to bring about an effective transfer of the person from his own *gotra* prior to the adoption to the *gotra* of the adopter so as to clothe him with ceremonial competency, it would seem that such a ceremony is not necessary in the case of a daughter's son who, though belonging to a different *gotra*, has always been recognised as competent to perform obsequial rites for the maternal grandfather. *See* the texts cited in *Panchapakesa*

(1) (1887) I.L.R. 11 Mad. 5 (F.B.).

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Iyer v. *Gopalan*(1) and *Narsingh Rao* v. *Maha Lakshmi Bai*(2) where their Lordships of the Privy Council point out that, according to Hindu religious ideas, a daughter's son stands in the place of a son and like a son is a liberator from *put*. The respondent's learned Advocate suggested that the special position of a daughter's son in relation to his maternal grandfather might indeed be the reason for Yama's text excepting his adoption from the rule prescribing *datta homa* and other formalities. The suggestion certainly seems plausible but it can only be a speculation, as the text itself does not give the reasons on which it is based. But, however that may be, as the Full Bench decision holding that no *datta homa* is necessary where the adopter and the person adopted belong to the same *gotra* seems to proceed upon the view that the *homa* would be necessary only to ensure the ceremonial competence of the person adopted, it would not be unreasonable to hold that such ceremony is not necessary in the case of the adoption of a daughter's son who according to the Hindu Dharma Sastras is already endowed with such ceremonial competence. On this ground also, the respondent's adoption can be upheld.

It is a matter of satisfaction that our conclusion, which is in consonance with modern ideas which tend more and more to favour the disentanglement of civil rights and obligations from the meshes of Hindu ceremonial law, could be supported on the authority of an ancient text.

I agree with my Lord that this appeal fails and should be dismissed with costs.

A.S.V.

(1) (1938) 48 L.W. 887, 891. (2) (1928) I.L.R. 50 All. 375, 390 (P.C.).

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Patanjali Sastri.

KRISHNA MUDALIAR (FIRST RESPONDENT), APPELLANT,

1939, April 17.

v.

MARIMUTHU MUDALIAR AND THREE OTHERS (APPELLANTS 2 TO 4 AND SECOND RESPONDENT), RESPONDENTS.*

Hindu law—Sudra woman—Prostitute—Sons of—Paternity unknown—If agnates.

A Sudra woman who was a prostitute died leaving two sons. It was not known whether they were born of the same father. A question arose as to whether the sons were agnates.

Held that they were not agnates.

Viswanatha Mudali v. *Doraiswami Mudali*(1) explained.

APPEAL under clause 15 of the Letters Patent against the judgment and decree of VARADACHARIAR J., dated 24th November 1936, in Second Appeal No. 1332 of 1932 preferred to the High Court against the decree of the District Court of Salem in Appeal Suit No. 7 of 1924 preferred against the decree of the Court of the District Munsif (Additional) of Salem in Original Suit No. 373 of 1922 (Original Suit No. 852 of 1919) on the file of the Court of the District Munsif (Principal) of Salem.

S. S. Ramachandran for appellant.

S. Ranganadha Ayyar for respondents 1 to 3.

Fourth respondent was not represented.

Cur. adv. vult.

* Letters Patent Appeal No. 41 of 1937.

(1) (1925) I.L.R. 48 Mad. 944.

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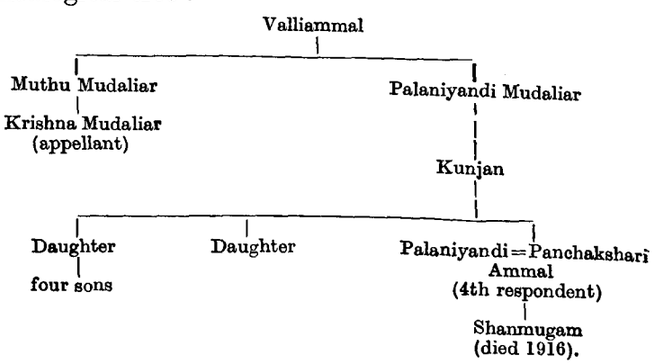
JUDGMENT.

LEACH C.J.—The appellant filed a suit in the Court of the Additional District Munsif of Salem for a declaration that an alienation made on 4th February 1918 by the fourth respondent, the mother of one Shanmugam, in favour of the father of the first, second and third respondents was not binding on the reversion. Shanmugam died in 1916, and the appellant claimed to be the nearest reversioner. The common ancestor was a Sudra woman, named Valliammal, who was a prostitute. She had two sons, Muthu Mudaliar and Palaniyandi Mudaliar, but it is not known whether they were born of the same father. There is no evidence at all with regard to their paternity. The connexion between the appellant and Shanmugam will be gathered from the following genealogical tree :



It has been accepted for the purposes of this appeal that all the descendants of Muthu and Palaniyandi are legitimate. The appeal turns on the answer to the question whether Muthu, the father of the appellant, is to be regarded under the Hindu law as an agnate of Palaniyandi, the great-grandfather of Shanmugam. If he is to be so regarded, it is accepted that he will be the nearest reversioner. The alienee-respondents deny

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that in law there was agnatic relationship between Muthu and Palaniyandi and say that the nearest reversioners are the four sons of the elder daughter of Kunjan, the son of Palaniyandi, they being the direct descendants of Palaniyandi. The District Munsif dismissed the suit. He rejected the appellant's claim to be the nearest reversioner, but, as pointed out in the judgment now under appeal, it is not clear whether he thought that the appellant was not an heir at all or whether he thought that the appellant must in any event be postponed to Kunjan's daughter's sons. He also held that there was no consideration for the alienation. On appeal to the District Judge of Salem it was held that the appellant was the nearest reversioner. The District Judge placed reliance on the decision in *Viswanatha Mudali* v. *Doraiswami Mudali*(1). He interpreted that decision as meaning that the legitimate descendants of Muthu and Palaniyandi could claim the same rights as if the two brothers had been born of a lawful marriage. On this interpretation of the law and being of the opinion that no necessity had been proved for the alienation, the District Judge decreed the suit.

The alienee-respondents appealed to this Court. The appeal was heard by VARADACHARIAR J. who allowed it and restored the decree of the trial Court. The learned Judge did not accept the decision in *Viswanatha Mudali* v. *Doraiswami Mudali*(1) as laying down the proposition that the sons of a prostitute are to be deemed to be in agnatic relationship, but merely declared that there was a heritable relationship between them. He pointed out that to constitute sagotra sapindaship, there must be descent in an unbroken male line from a common male ancestor. In the case

(1) (1925) I.L.R. 48 Mad. 944.

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of the sons of a prostitute, where the father is unknown, it was impossible to trace the descent from a common male ancestor. VARADACHARIAR J. regarded Muthu and Palaniyandi as being cognates and consequently the four sons of the elder daughter of Kunjan were nearer in kin to Shanmugam than the appellant.

In *Viswanatha Mudali* v. *Doraiswami Mudali*(1) it was held that the legitimate descendants of two sons of a Hindu dancing woman were under the Hindu law entitled to succeed to each other. I agree with VARADACHARIAR J. that when the judgment is read in the light of the record it is clear, in spite of the general terms used, that all that the Court decided was that there was heritable blood between the two sons. It is true that in their written statement the defendants in the case pleaded that there was a nearer reversioner, but this plea was not persisted in, and the Court had merely to decide whether one son could under Hindu law succeed to the property of the other. The finding that there was heritable blood was sufficient to decide the case. There also the paternity was unknown.

The decision in *Viswanatha Mudali* v. *Doraiswami Mudali*(1) was based on the judgment of this Court in *Mayna Bai* v. *Uttaram*(2) following a remand by the Privy Council in *Myna Boyee* v. *Ootaram*(3). In *Mayna Bai's* case(2) the Court had to decide what rules of inheritance should be applied to the illegitimate sons of an Englishman by two Hindu women. One of the women was a Brahmin who had married but had separated from her husband. By her he had two sons and by the other woman he had three sons. The five sons were brought up as Hindus and lived together as a joint family. By his will the father devised his

(1) (1925) I.L.R. 48 Mad. 944. (2) (1864) 2 M.H.C.R. 196.
(3) (1861) 8 M.I.A. 400.

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estate to them in equal shares. A suit was instituted by one of the sons of the Brahmin woman against his step brothers for partition of the estate and for recovery of the share of his full brother who had died. It was necessary in the first instance to decide whether the brothers were to be deemed to be Hindus, and, when the case was under trial, the following question was submitted to the Pandit of the Court of Sudder Adawlut:

"You are requested to state whether, upon the death of one of two illegitimate sons of a Hindu woman, the estate of the deceased by law devolves upon the surviving brother?"

The answer given was:

"If the illegitimate sons referred to in the question were undivided, the estate of one of them would, after his death, devolve upon his surviving brother. If divided, it would go to him only on failure of the deceased's widow, daughter or her son, or of the deceased's mother."

The Privy Council considered that the question had not been properly framed as it did not embrace all the important facts proved or admitted in the suit which might affect the conclusion. The result of the appeal before the Privy Council was that the brothers were deemed to be Hindus, but the Board left the question of their rights to be solved by the determination of the class of Hindus to which they belonged and the rules of inheritance which existed in that class.

When the case came before this Court on remand, it was held that the sons were to be regarded as Sudras, or as a class still lower, and that in the absence of preferable heirs they inherited the property of their mother and of one another. The Court recognized relationship merely through the mother, as the following passage from page 201 of the judgment shows:

"Certainly there are many passages of the text-writers which recognized the relationship of the son, irregularly

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begotten, to his mother's family. Yajnavalkya quoted in the Vivada Chintamani (page 823). 'A damsel's child is one born of an unmarried woman; he is considered as the son of his maternal grandsire.' This passage clearly recognizes the mother and her son irregularly begotten, as cognate, and the Mitakshara quoting Manu (Cap. 1, Sec. XI, Cl. 7) points out that, if the girl is married, the child, although not begotten, by the husband, becomes his son. The authorities already referred to, as to the son of concealed origin, also bear upon this point, and seem to show clearly that the Hindu law, although for obvious reasons not recognizing as the husband's son one got by a man of unequal class, nevertheless gives no ground whatever for supposing, that the circumstances of birth from illicit connection severes the union between the mother and her son, so as not to admit of heritable blood between them."

This opinion is emphasized in the following passage to be found at page 203 of the report:

"Our reasoning, therefore, is that there is no authority against the existence of heritable blood between the woman and her illegitimate offspring. Taukuram and his brother (the sons of the Brahman mistress) are decided to be Hindus. They are the Hindu sons of a woman, who was either a woman of a class lower than the fourth of Manu's classes, and in this case the sons are cognate to her and to one another, as the children of a class not twice-born born out of wedlock, and entitled to inherit to their mother, and only not capable of inheriting to their father because he is not a Hindu at all. If not so, she is a mere prostitute, and of the cognation between her and her offspring there exists no doubt whatever."

The decision was that the sons of a Hindu prostitute by a non-Hindu father are cognate to the mother and to one another and therefore possess heritable blood. In the case of *Viswanatha Mudali* v. *Doraiswami Mudali*(1) the father was unknown and the decision did not go beyond the question whether there was heritable blood.

(1) (1925) I.L.R. 48 Mad. 944.

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In the present case, the Court is not concerned with the question whether the illegitimate sons of a Sudra father are to be regarded as agnates, and the decision must be confined to the case where a Hindu prostitute has sons but their paternity is not known. Valliammal was not a permanent concubine but a prostitute and there can be no presumption in such circumstances that the same man was the father of her two sons. As a person cannot be regarded as a sagotra sapinda unless he can trace his descent in an unbroken male line from a common male ancestor it is impossible to regard the appellant as a sagotra sapinda of Shanmugam. As the result of the decisions in *Mayna Bai* v. *Uttaram*(1) and *Viswanatha Mudali* v. *Doraiswami Mudali*(2) the appellant can claim to be a cognate of Shanmugam, but this does not help him. Not being an agnate, he would only be able to maintain the suit if he were the nearest male relation of Shanmugam possessing heritable blood. He is clearly not in that position. The grandsons of Kunjan stand between him and Shanmugam.

It has been contended on behalf of the appellant that it would be in accordance with justice, equity and good conscience to regard him as an agnate. This argument completely ignores essential factors. There is here the fundamental principle that a person cannot be regarded as a sagotra sapinda unless he can trace his descent in an unbroken male line from a common male ancestor, which the appellant cannot do. All that he can establish is relationship through a female and there are nearer relations than the appellant. To prefer him to the nearer relations would be to ignore justice, equity and good conscience.

(1) (1864) 2 M.H.C.R. 196. (2) (1925) I.L.R. 48 Mad. 944

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The appellant has asked us to hold that he should in any event be allowed to maintain the suit for the benefit of the reversion. He could only be allowed to do so on the footing that there was collusion between Kunjan's grandsons and the alienor or that the grandsons had precluded themselves from interfering; *Rani Anand Kunwar* v. *The Court of Wards*(1). This was not the appellant's case and he cannot be allowed at this stage to alter the character of the suit.

It follows that I consider that the case was rightly decided by VARADACHARIAR J. and that the appeal should be dismissed with costs in favour of the contesting respondents.

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PATANJALI SASTRI J.—This appeal raises a somewhat novel and interesting question of Hindu law, namely, whether the son of one of two brothers born to an unmarried prostitute can claim to be the nearest presumptive reversioner of the other's great-grandson in preference to the latter's paternal aunt's sons who are atmabandhus according to Mitakshara. The appellant's learned Advocate contends that sapinda relationship and a consequent right to collateral succession between the sons of a Hindu prostitute and their descendants having been recognized by the Courts on the analogy of descent from a common male ancestor, the appellant must be regarded as a gotraja of the propositus and therefore a nearer presumptive reversioner than his paternal aunt's son.

In applying the general rule of succession, that the nearest sapinda takes the heritage, to cases not covered by any texts, the Courts have no doubt extended the concept of sapindaship to relations outside marriage and legitimate descent relying upon the definition of a

(1) (1880) I.L.R. 6 Cal. 764 (P.C.).

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sapinda in the Mitakshara as one connected by particles of the same body; see *Mayna Bai* v. *Uttaram*(1), *Narayan Pundlik* v. *Laxman Daji*(2), *Viswanatha Mudali* v. *Doraiswami Mudali*(3) and *Dattatraya Tatya* v. *Matha Bala*(4). But there are also other cases which have now established that even among Sudras illegitimate sons or their legitimate sons or descendants of the putative father, as no sapinda relationship as contemplated by the Hindu law texts can exist in such cases; see *Krishnayyan* v. *Muttusami*(5), *Ranoji* v. *Kandoji*(6), *Parvathi* v. *Thirumalai*(7), *Shome Shankar Rajendra Varere* v. *Rajesar Swami Jangam*(8), *Dharma Lakshman* v. *Sakharam Ramjirao*(9) and *Zipru* v. *Bomtya*(10). It would seem somewhat illogical that, while the illegitimate son of a Sudra by a permanently kept concubine is denied sapinda relationship to the legitimate descendants of the putative father, two illegitimate sons of a prostitute or their descendants should be recognized as having such relationship between them. The texts of Hindu law laying down the rules as to inheritance undoubtedly refer only to relationships based upon marriage and legitimate descent, and the recognition of the right of inheritance of the illegitimate son of a Sudra to his putative father is based upon special texts relating to that class of sons and does not necessarily imply the existence of sapinda relationship between them. Indeed, even within the sphere of marriage and legitimate descent the Mitakshara has limited sapinda relationship to specified degrees from the common

(1) (1864) 2 M.H.C.R. 196.
(2) (1927) I.L.R. 51 Bom. 784.
(3) (1925) I.L.R. 48 Mad. 944.
(4) (1933) I.L.R. 58 Bom. 119.
(5) (1883) I.L.R. 7 Mad. 407.
(6) (1885) I.L.R. 8 Mad. 557.
(7) (1887) I.L.R. 10 Mad. 334.
(8) (1898) I.L.R. 21 All. 99.
(9) (1919) I.L.R. 44 Bom. 185.
(10) (1921) I.L.R. 46 Bom. 424

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ancestor, prohibiting its indefinite extension on mere etymological grounds which its definition of a sapinda might all too readily suggest; see *Ramachandra Martand Waikar* v. *Vinayek Venkatesh Kothekar*(1). It is however unnecessary in this case to examine how far these two lines of cases are reconcilable for, assuming that sapinda relationship can be postulated outside marriage, the question remains whether the appellant is also a gotraja within the meaning of the well known text of Yagnavalkya providing for a succession to a sonless Hindu, for, it is conceded that unless the appellant can bring himself within that category he cannot claim precedence over bandhus who are mentioned as the next category in the text.

Their Lordships of the Privy Council had to consider the import of "gotraja sapinda" in *Jadunath Kuar* v. *Bisheshar Bakhsh Singh*(2) where, after referring to an exposition of the term in *Bhyah Ram Singh* v. *Bhyah Ugur Singh*(3), they observed as follows:

"From this it is clear that in order to qualify as a male agnate, or gotraja sapinda of the propositus the plaintiff must satisfy two conditions, viz., (*a*) that he is of the same gotra, or, as it may be expressed, of a common patriarchal stock and (*b*) that he is a sapinda of the deceased, that is, connected by blood through a common ancestor, the connection being traced through males."

Again, in their judgment in the same case at a later stage reported as *Lal Harihar Pratap Bakhsh Singh* v. *Thakur Bajrang Bahadur Singh*(4), their Lordships observed:

"Blood relations or sapindas may be related either through males or through females. *Prima facie*, sapindas who are related through an unbroken line of male descent are gotraja sapindas, for by virtue of such unbroken relationship

(1) (1914) I.L.R. 42 Cal, 384 (P.C.). (2) (1932) L.R. 59 I.A. 173, 189, 190.
(3) (1870) 13 M.I.A. 373. (4) (1937) 2 M.L.J. 711, 713 (P.C.).

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they must be of the same gotra. It will thus be seen that the two conditions which, as stated in the previous judgment of the Board in *Jadunath Kuar* v. *Bisheshar Bakhsh Singh*(1), must be satisfied by a person claiming to be a gotroja sapinda of the propositus are not really independent but inter-related, for the first condition will ordinarily be included in the second."

It is thus quite clear that, unless the appellant can show that himself and Shanmuga the last male owner are descendants of a common male ancestor, he cannot claim to succeed in preference to Shanmuga's paternal aunt's sons who as his atmabandus will exclude any other class of bandhus.

The appellant's learned Advocate placed reliance upon the decision in *Mayna Bai* v. *Uttaram*(2) in support of his contention. In that case it was held by this Court after a remand by the Privy Council that one of two sons born to a married woman living in adultery with an Englishman was entitled to succeed to the separate property of the other son on the ground that there was heritable blood between them. This decision however does not assist the appellant, for assuming that it is in consonance with the texts and principles of Hindu law, it did not hold that there was gotraja sapindaship between the brothers in that case. The learned Judges observed at page 203:

"They are the Hindu sons of a woman who was either a woman of a class lower than the fourth of Manu's classes, and in this case the sons are cognate to her and to one another, as the children of a class not twice-born born out of wedlock and entitled to inherit to their mother, and only not capable of inheriting to their father because he is not a Hindu at all. If not so, she is a mere prostitute, and of the cognation between her and her offspring there exists no doubt whatever."

This clearly shows the decision was based upon the existence of only cognate relationship between the two sons of the prostitute. The appellant's

(1) (1932) L.R. 59 I.A. 173, 189, 190. (2) (1864) 2 M.H.C.R. 196.

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learned Advocate further relied upon the decision in *Viswanatha Mudali* v. *Doraiswami Mudali*(1). But this decision too does not in my opinion lend any support to this contention. It merely extended the principle of *Mayna Bai's* case(2) to the legitimate descendants also of the illegitimate sons of a prostitute. In support of this extension the learned Judges invoked the principle of representation as laid down in *Ramalinga Muppan* v. *Pavadai Goundan*(3) and reasoned thus at page 957 :

"If it is once granted that Muthuswamy's son represents him and Muniappa's represents him, then it is difficult to understand how their sons could not represent Muthuswamy and Muniappa, respectively. If that is so, then there is heritable blood between them and one line can succeed to the other line according to the principle of collateral succession."

It will thus be seen that the only question decided there was whether the plaintiffs were heirs at all under the Hindu law to the last male owner. No doubt, as pointed out in the judgment under appeal, it appears on a reference to the printed records of that case that the defendants, besides denying that the plaintiffs were heirs at all to the last male owner, pleaded also the existence of a nearer bandhu who would be entitled to succeed in the absence of gotraja sapindas. But the suit was dismissed by the trial Court apparently on the preliminary ground that the plaintiffs were no heirs at all under the Hindu law. On appeal, however, the appellate Court took the view that the plaintiffs were in the line of heirs and remanded the case to the trial Court for disposal on the other points raised. There was an appeal to this Court against this order of remand and this was the subject matter of the decision in *Viswanatha Mudali* v. *Doraiswami*

(1) (1925) I.L.R. 48 Mad. 944. (2) (1864) 2 M.H.C.R. 196.
(3) (1901) I.L.R. 25 Mad. 519.

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Mudali(1). It is thus clear that the question whether the plaintiffs could succeed as gotraja sapindas of the propositus in preference to persons who were his bandhus did not arise at that stage of the case and was not considered by this Court.

The appellant's learned Advocate finally placed strong reliance upon the observations in Mayne's Hindu law, Tenth Edition, page 691, where the decision under appeal which is reported as *Ratna Mudaliar* v. *Krishna Mudaliar*(2) is noticed and criticized as follows :

"The ground of decision was that the (plaintiff) could not be regarded as a sagotra sapinda of the last male owner as to be preferred to an atmabandhu. But, when once it is admitted that two illegitimate brothers have heritable blood as between them and are entitled to inherit as brothers, their legitimate descendants will be governed by the ordinary rules of succession either on the grounds of analogy or on principles of justice and equity. The two illegitimate brothers cannot be said to be cognates of one another. They are therefore to be regarded as if they are agnate sapindas for the purpose of Hindu law as between themselves, their legitimate male descendants being, of course, their gotraja sapindas."

This opinion is, no doubt, entitled to great weight as proceeding from so eminent a lawyer, but, with all due respect, I find it difficult to follow the reasoning. Almost the earliest case which decided that two illegitimate sons of a prostitute have heritable blood as between them and are entitled to inherit as brothers, i.e., *Mayna Bai's* case(3), was expressly based, as pointed out above, upon the cognate relationship existing between them. Neither this nor any later decision based upon it is, therefore, authority for the proposition that two illegitimate brothers cannot be said to be cognates of each other and that they are

(1) (1925) I.L.R. 48 Mad. 944. (2) (1937) 1 M.L.J. 390.
(3) (1864) 2 M.H.C.R. 196.

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therefore to be regarded as if they are agnate sapindas as between themselves. As for the suggestion that grounds of analogy or the principles of justice and equity may be invoked to support the proposition, I can see no warrant for the application of the analogy of gotraja sapindaship to a case of this kind. Courts have no doubt applied analogies in deducing rules of succession in some cases, but their application can, in my opinion, be justified only where no provision is made either in the Smrithis or their recognized commentaries. It is a familiar rule of interpretation in Mimamsa that, when a particular object is named as an eligible substitute for another which is not available, you cannot, on grounds of analogy, use other objects which might even better fulfil the purpose in view, for the use of the named substitute is deemed to be specifically enjoined. Here, the text of Yajnavalkya declares that in the absence of gotrajas the next class of persons to take the heritage shall be the bandhus of the propositus. After enumerating the several classes of heirs, it prescribes:

"Of these, on failure of the preceding the next following shall take the estate of one who dies sonless. This is the rule for all classes." (Yajnavalkya 11. 136).

The specific provisions of this text cannot, in my opinion, be outweighed by analogical reasoning. In the present case, there are in existence the paternal aunt's sons of the last male owner who as atmabandhus would take the estate according to the text, there being admittedly no gotrajas in the strict sense of the term. No use of analogy can therefore be permitted so as to affect this result. Nor am I able to see how it is in consonance with the principles of justice and equity to displace an atmabandhu from his prescribed rank in the scheme of inheritance, in favour of one

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like the appellant who, except by a fanciful extension of the term, cannot be described as a gotraja sapinda of the propositus.

I agree with my Lord that this appeal fails and should be dismissed with costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Pandrang Row and Mr. Justice Abdur Rahman.

1939, March 30.

LAKSHMADU (SECOND PLAINTIFF), APPELLANT,

v.

RAMUDU AND FOUR OTHERS (PLAINTIFFS 1 AND 3 AND DEFENDANTS 1, 3 AND 4), RESPONDENTS.*

Hindu law—Joint family—Father—Mortgage of joint family property by—Preliminary decree against father on foot of—Death of father—Sons brought on record as his legal representatives—Final decree passed in suit after—Sale of mortgaged property in execution of—Sons' suit to recover their share of property sold on ground of mortgage not being supported by consideration and of decree and execution sale not being binding on their shares—Maintainability of—Sec. 47, Civil Procedure Code (Act V of 1908), if a bar to—Art. 12 of Indian Limitation Act (IX of 1908)—Applicable to suit, if—Consideration for mortgage—Absence of—Sons' right to set up, in such suit—Sec. 53 of Code of Civil Procedure—Applicability and effect of—Service inam—Dasabandham inam—Alienation of—Validity of.

In 1915 the plaintiffs' father, A, and their cousin, the first defendant, executed a mortgage deed in favour of the second defendant mortgaging a dasabandham inam granted to A's ancestors and other ancestral properties. The second

* Appeal No. 81 of 1935.

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defendant instituted a suit, Original Suit No. 101 of 1922, for sale on the basis of his mortgage and obtained an *ex parte* preliminary decree against A and the first defendant. A died shortly after and the plaintiffs were brought on the record as his legal representatives. They tried to attack the mortgage deed and question the alienability of the inam in those proceedings but were not permitted to do so. A final decree was consequently passed in terms of the preliminary decree and the properties covered by the mortgage deed were brought to sale in execution in 1927 and purchased by the second defendant himself who obtained possession of the same in September 1929. In 1932 the plaintiffs sued for the recovery of possession of those properties, alleging that their alienation by way of mortgage in 1915 and their subsequent sale in execution were void and inoperative and that the mortgage deed of 1915 was invalid for want of consideration. It was found on the evidence in the case that there was absolutely no consideration for the mortgage deed of 1915.

Held: (i) An alienation of a dasabandham inam is against public policy and void. The mortgage of the dasabandham inam by the deed of 1915 and its sale in execution of the decree obtained on that deed were therefore nullities.

(ii) The decree against their father in the suit on the mortgage deed of 1915 did not preclude the plaintiffs from raising the plea that there was no consideration for that mortgage deed.

The contention, that a Hindu father represents his sons even when they have not been impleaded so far as the factum of the debt is concerned and that they cannot dispute the existence of the debt after a decree had been passed against their father, is unsound and unsustainable. There is no reason why the father should be held to have represented his sons in any greater degree in regard to the factum of the debt than he could have done in case the debt had been attacked as immoral or illegal. In the absence of an express declaration that the father was being sued in a representative capacity, this can only be established by proving that a debt existed in point of fact. It is only after the debt has been proved to exist and found not to have been immoral or illegal that the father could be said to have been sued in a representative capacity.

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Case-law on the point reviewed.

Section 53 of the Code of Civil Procedure assumes the existence of a debt. There is nothing either in that section or in any other provision of the Code to justify the view that the descendants' right to contest the existence of the debt or the illegality and immorality of its character has been taken away even when they were not impleaded in the suit and had no occasion to challenge the debt or alienation contracted or made by their ancestor and to show that he had not represented them in the suit.

(iii) The suit was not barred under the provisions of section 47 of the Code of Civil Procedure.

The grounds raised by the plaintiffs in the suit did not fall within the ambit of section 47 and could not have been enquired into by the executing Court.

Sheik Karoo v. *Rameshwar Sao*(1), which took the view that a separate suit for the determination of the liability of the sons for the debt covered by the decree passed against their father would be barred by section 47, disapproved.

(iv) The suit was not barred under article 12 of the Indian Limitation Act.

The execution sale was void against the plaintiffs and it was unnecessary for them to sue for setting it aside. Further, their cause of action arose on their dispossession of the property in 1929. Had they not been dispossessed it would not have been necessary for them to institute the suit. The sale did not affect their title and they could have ignored it.

Narayana Naicken v. *Venkataswami Naicken*(2) disapproved.

(v) The property (other than the dasabandham inam) mortgaged by the deed of 1915 being ancestral property and the debt in respect of which it was mortgaged being non-existent and in any case not binding on the plaintiffs, the mortgage and the sale in execution did not pass their interests in the property.

APPEAL against the decree of the Court of the Subordinate Judge of Salem in Original Suit No. 40 of 1932.

N. Sivaramakrishna Ayyar for appellant.

(1) A.I.R. 1923 Pat. 143. (2) (1926) 51 M.L.J. 845.

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K. P. Ramakrishna Ayyar for fourth and fifth respondents.

Respondents 1 to 3 were not represented.

Cur. adv. vult.

ABDUR RAHMAN J.

The JUDGMENT of the Court was delivered by ABDUR RAHMAN J.—This is a plaintiff's appeal. It arises out of a suit for recovery of possession of several items of property sold in execution of a decree passed on the basis of a mortgage deed executed by the plaintiffs' father, Appanna, and their cousin, the first defendant, in favour of the second defendant.

The facts which have contributed to the present litigation may be briefly stated. It appears that the second defendant claimed to have purchased the Jaghir of Mugalapalli in a court-auction and to have obtained possession of the same in 1904. Relying on his purchase he called upon Appanna and the first defendant to maintain the Mugalapalli tank in good condition and to effect necessary repairs, a service which they were bound to render in terms of a dasabandham inam granted to their ancestors. This, according to the second defendant, they had failed to perform and the inam was consequently resumed by the second defendant in 1907 and a ryotwari patta issued. Having done this, the second defendant instituted several suits for the recovery of rent in revenue Courts and obtained decrees. In consideration of these decrees, which amounted to Rs. 600 in 1915, and of a further sum of Rs. 200 stated to have been advanced to Appanna and the first defendant, a mortgage deed comprising lands granted to Appanna's ancestors by way of dasabandham inam and some other ancestral properties was executed by them in favour of the second defendant. This was followed by a suit (Original Suit No. 38 of 1916; Original Suit No. 21 of

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1919) instituted by Appanna and the first defendant praying for a declaration to the effect that the dasabandham inam lands were held by them free of rent and their resumption by the second defendant was ineffectual. They had also asked for a declaration that the decrees for rent passed by the revenue Courts were invalid on account of fraud. The Subordinate Judge of Salem who tried the suit decreed the claim on 20th December 1920 (Exhibit C) to a large extent. He held that the second defendant was not a jaghirdar and was not entitled to resume the dasabandham inam granted to the plaintiffs' ancestors. The decrees of the revenue Courts were, however, not found to have been obtained by fraud and were not declared to be invalid. Ignoring the decree passed by the Subordinate Judge of Salem, the second defendant instituted a suit for sale on the basis of his mortgage (Original Suit No. 101 of 1922) against Appanna and the first defendant but they failed to appear and contest it. An *ex parte* preliminary decree was therefore passed. Appanna died shortly after and his sons, the present plaintiffs, were brought on the record as his legal representatives. They tried to attack the mortgage deed and question the alienability of the inam lands in those proceedings but were not permitted so to do. A final decree was consequently passed in terms of the preliminary decree and the properties covered by the mortgage deed were brought to sale in execution in 1927 and purchased by the second defendant himself. He succeeded in obtaining possession of the same in September 1929.

Having been thus dispossessed, the plaintiffs instituted the present suit. Two schedules were attached to the plaint. Schedule A comprised properties which were claimed to have been granted as dasabandham

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inam and schedule B contained properties which were alleged to be ancestral. The alienation of these properties effected by their father and cousin, the first defendant, by way of mortgage in 1915 and their subsequent sale were challenged in the plaint as void and inoperative. The mortgage deed executed by Appanna and the first defendant was also attacked as invalid for want of consideration. The validity of the mortgage deed was also impugned on the ground of coercion as it was alleged to have been secured at the time when Appanna and the first defendant were under arrest in consequence of a warrant issued at the instance of the second defendant in execution of his decree passed by the revenue Court. The second defendant denied these allegations and contended that the mortgage deed was for consideration, valid and binding and that the plaintiffs, who were represented by their father and impleaded in the mortgage suit, were not entitled to raise the question of its validity or that of the sale. It was also alleged that the suit was barred by limitation.

The Subordinate Judge, in a judgment which is very perfunctory and has been of no use to us in deciding this appeal, held the mortgage to be for consideration and the decree in Original Suit No. 101 of 1922 to be binding on the present plaintiffs. The alienation of the inam lands comprised in schedule A was not held to be void and that of the properties described in schedule B, although found to be ancestral, was held to be justified and binding. The suit was also found to be barred by article 12 of the Limitation Act. It was therefore dismissed. The second plaintiff appeals.

The first question which has to be determined in this appeal is whether the mortgage of 1915 and the

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sale in execution are binding on the plaintiffs, being in respect of properties which were alienable in character and for a valid consideration. As stated above, the mortgaged properties consisted of inam lands and ancestral property. So far as the inam lands are concerned, the question depends on the nature of the grant under which they were granted to the plaintiffs' ancestors. If the grant were made for public service or for purposes of public utility, it could not have been assigned for the simple reason that its assignment would defeat the object for which it was granted. The lands comprised in schedule A were, as the certified copy of the inam title deed (Exhibit A) would show, granted to the plaintiffs' ancestors by way of dasabandham inam and the burden of keeping the tank, apparently an irrigation source, in repair was transferred to the inamdar. That an alienation of such an inam is against public policy and void admits of no doubt and is concluded by authority; see *Ramakrishnamma* v. *Venkatasubbiah*(1), *Ramanathan Chettiar* v. *Kalidasa Kavandan*(2), *Anjaneyalu* v. *Sri Venugopala Rice Mill, Ltd.*(3) and *Swami* v. *Satheyya*(4).

The learned Subordinate Judge has overruled the plaintiffs' contention in a few words by saying that, since the alienation of a village inam was valid during the lifetime of the alienors, it could not be set aside at the plaintiffs' instance. How he could have held it to be so, when he had admitted in the preceding sentence of his judgment that an inam of this kind is inalienable, is incomprehensible. Moreover, he lost sight of the fact that the mortgage was created by the plaintiffs' father who had died and not by the plaintiffs themselves.

(1) (1934) I.L.R. 58 Mad. 389. (2) (1936) 71 M.L.J. 398.
(3) (1922) I.L.R. 45 Mad. 620. (4) (1935) I.L.R. 59 Mad. 354 (F.B.).

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In view of the decided cases Mr. Ramakrishna Ayyar, learned Counsel for the respondents, was unable to support the lower Court's judgment in this respect. We must therefore hold that both the mortgage of the properties described in schedule A and their sale in execution of the decree were nullities and must be disregarded.

This was not however the only objection raised against the alienations. The binding character of the mortgage deed was also questioned on behalf of the plaintiffs on the ground that it was not supported by any legal consideration. It might have been unnecessary to go into this question if all the properties comprised in the mortgage deed were service tenure lands. But the decision of this question has become necessary as the properties mentioned in the "B" schedule were claimed by the plaintiffs and have been found by the lower Court to be ancestral. This finding was not challenged before us by the learned Counsel for the respondents. We must therefore now consider the question whether there was a legal consideration for the mortgage deed executed by the plaintiffs' father and the first defendant. The consideration for this mortgage was said to consist of a sum of Rs. 600 which was alleged to have been due to the second defendant on account of certain rents due to him after the inam rights were attempted to be resumed by him. It is true that the second defendant had secured decrees in revenue Courts for this amount but, in view of the finding in Original Suit No. 38 of 1916 that the lands were held by the plaintiffs' father and the first defendant as rent-free and the second defendant was not legally entitled to resume them or charge any rent therefor, it must be held that the same could not have formed a valid consideration for

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the mortgage deed. Let us now examine if the balance of Rs. 200 was paid to the mortgagors at the time when this mortgage deed was executed. The statement made by D.W. 1, who happens to be a grandson of the second defendant, makes it clear that this sum of Rs. 200 was not advanced to Appanna and the first defendant in cash but was taken into account, to quote his words, "for effecting repairs to the tank and for expenses of the criminal case". There is no evidence on the record that any money was spent by or on behalf of the second defendant in effecting repairs to the tank or that he was entitled to do so on behalf of the mortgagors. Nor do the mortgagors appear to be liable for the expenses of any criminal case filed against them by the second defendant. The only criminal case in regard to which a copy has been produced on behalf of the second defendant (Exhibit II) was filed in 1907. The suggestion apparently is that the expenses incurred by the second defendant in filing and prosecuting this complaint were recovered in this manner from the mortgagors. But were they liable to pay them ? Even if the facts were otherwise, the second defendant, although he might have been held entitled to recover the value of fifty coconuts, which were alleged to have been stolen by the first defendant, in tort from him, could not be justified in recovering the costs incurred for filing the complaint and conducting the prosecution which resulted in the first defendant's conviction. But, when the facts of this case as disclosed by the judgment (Exhibit II) were looked into, it transpired that these coconuts were growing on the inam land which the second defendant was trying to resume and which Appanna and the first defendant were trying to resist. It was found, as stated above, in Original Suit No. 38

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of 1916 that the second defendant's action was wholly unjustified. In view of that finding it is impossible to hold that these expenses could have been either legally or justly recovered from Appanna who was no party to the complaint or from the first defendant who was.

It is impossible for us to overlook the circumstance that shortly before the execution of the mortgage deed a warrant for the first defendant's arrest was issued by the Sub-Collector, Hosur, in execution of the decree for rent passed in second defendant's favour (Exhibit B). Looking at the variety of ways in which Appanna and the first defendant were being harassed by the second defendant, who was apparently a man of influence and means, it is not surprising to find that he did succeed in getting the mortgage deed executed in his favour from these helpless persons. In the circumstances it is unnecessary to give a finding whether the mortgage deed was vitiated by coercion; but we cannot but hold that there was absolutely no consideration for the mortgage deed executed by Appanna and the first defendant and the same must be held to be not binding on the present plaintiffs.

The question then is whether the decree passed on the basis of the mortgage is binding on the plaintiffs. They were not impleaded when the suit was instituted and were brought on the record as legal representatives of their father after the preliminary decree had been passed against him. They tried to raise the questions regarding the alienability of the property mortgaged and the binding nature of the debt but were not permitted to do so. This course was adopted by the Court on account of the provisions contained in Order XXII, rule 4 (2), Civil Procedure Code. It may be that for certain purposes the suit might be deemed to

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have been pending and not disposed of until a final decree was passed but there is no doubt that the whole of the trial had come to an end and the points which the present plaintiffs wished to raise then could not have been gone into at that stage. Moreover, the defences which they wished to raise were not such as to be called appropriate to their character as Appanna's legal representatives. They could not have assailed the decree which had been passed against their father during his lifetime. It would therefore follow that the decree cannot be held to be binding on them in their individual capacity in which the present suit was brought.

It has been contended, however, that, although it might have been possible for the plaintiffs to institute a suit on account of the transaction being immoral or illegal (a proposition which the learned Counsel for the respondents appeared to contest later and which will have to be examined subsequently), the mortgage cannot be impugned by the plaintiffs for want of consideration particularly when they had been impleaded before the final decree was passed. We have already tried to show that the fact of the plaintiffs having been impleaded after the preliminary decree had been passed could not have debarred them from raising it in a separate suit. But the argument is that, although the father might have been debarred from raising the question of his immorality or illegality, yet he was not debarred from raising the question of the want of consideration and, as a decree, either *ex parte* or otherwise, was passed against Appanna, it was no longer open to his sons to contend that there was no consideration for the mortgage deed. Had the decree not been passed against the father who occupied a special position as

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the kartha of a joint Hindu family with regard to his sons, the answer would have been simple enough. But the contention is that a Hindu father represents his sons even when they have not been impleaded so far as the factum of the debt is concerned and that they cannot dispute the existence of the debt after the decree had been passed against their father. The contention is in our opinion unsound and must be repelled. It assumes in the first instance that the father was sued in a representative capacity. We do not see any reason why the father should be held to have represented his sons in any greater degree in regard to the factum of the debt than he could have done in case the debt had been attacked as immoral or illegal. We are not concerned here with what the father could or could not have done, but with how far the sons are to be bound by his action or inaction. The question is not how far was the father liable for the debts which he might have incurred or acknowledged, but the question is how far are his sons liable? They cannot be held to be so unless it is shown that the father was being sued in a representative capacity. In the absence of an express declaration that he was being sued in that capacity, their liability can only be established by proving that a debt existed in point of fact. The sons, it must be remembered, were no parties to the action. If the sons are not allowed to question the existence of the debt in a subsequent suit how and when would it be possible for them to contend that the debt was never actually incurred by their father? We are not concerned here with the question of onus of proof but with the question whether a plea denying the existence of a debt is available to the sons. It is only after the debt has been proved to exist and found not to

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have been immoral or illegal that the father could be said to have been sued in a representative capacity. As long as these questions remain undecided, in spite of the challenge by the sons, it cannot be said that the father had been sued in a representative capacity. It must not be forgotten that the sons are not being proceeded against as heirs of their father but their own share of the property which belonged to them even when their father was alive is also in danger of being lost. In view of section 53 of the Code of Civil Procedure they may not be able to contend that their father's share is not liable or that it devolved on them on his death as survivors, but by what rule of law, one may well ask, are they debarred from contending that the decree was not passed against their father in a representative capacity and did not bind them? Is the case to be decided against them without giving them even one opportunity of questioning the transaction if they wished to contest it? The pious duty of a son which makes him liable to pay his father's debt assumes the existence of certain debts which have to be paid. The question of illegality or immorality would only arise when the debts were in fact incurred. If the debts were found not to be due, it would be impossible to contend that the sons were liable to discharge what was not really a liability of their father. The power of a Hindu father is limited when he is dealing with ancestral property or when he is doing something by which the son's rights in the ancestral property may be affected. If a father mortgages ancestral property to another person in consideration of a debt which does not exist, the mortgage would be more or less in the nature of a gift. It cannot be contested that the father is incapable of making gifts of ancestral property except in very

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special circumstances and to a very limited extent. If a decree is subsequently passed against the father on the basis of such a mortgage and the property sold in execution of that decree and the sons have no right to show, in what must in the nature of things be a separate suit, that they had rights in the property which could not have been alienated by their father, the rights must be held to have been extinguished on the ground that their father was competent to make a gift of their share in the property as well. We hope this is not the law and we are convinced that it is not so.

This question has been considered in a number of cases. The first case to which reference may be made is that of *Ramasamayyan* v. *Virasami Ayyar*(1) where SHEPHERD J. observed as follows:

"It is argued on behalf of the appellant that the only question which the son of a Hindu debtor can raise is as to the nature of the debt, and that he cannot question the existence of a debt which forms the foundation of a decree against his father. According to this contention it would be open to the father by confessing judgment to procure by indirect means the sale of the entire estate when he could not lawfully alienate it by a voluntary conveyance. The limitation which is imposed by Hindu law on the father's power of alienation would become illusory.

But this is clearly not the law. Whether the sale is a voluntary or an enforced sale, its validity depends upon the existence of a just debt in satisfaction of which the sale is effected."

Similar observations are to be found in the judgments written by no less eminent Judges than SUBRAMANIA AYYAR J. and BENSON J., at pages 66 and 67 of the report in *Ramasami Nadan* v. *Ulaganatha Goundan*(2). The same view was taken in *Thiruvenkata*

(1) (1898) I.L.R. 21 Mad. 222. (2) (1898) I.L.R. 22 Mad. 49 (F.B.).

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Mudaliar v. *Muthu Aiyar*(1), *Malayandi* v. *Subbaraya*(2), *Bhagwant* v. *Tursi Ram*(3), *Kasturi Mal* v. *Lajja Ram*(4) and *Beni Parshad* v. *Puran Chand*(5). An observation made by their Lordships of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun*(6) also shows that a plea of this nature is available to the sons. It would have been unnecessary to discuss this point in such detail had it not been for an observation in the tenth edition of Mayne's Hindu Law and Usage (in the note at page 431) where it has been observed by the learned editor that in a suit upon a debt against the father he represents the sons when they are not made parties so far as the factum of the debt is concerned and the judgment against the father itself creates the debt. A number of cases have been cited for this proposition but we have not been able to find any observation in these cases that such a plea is not open to the sons. It is true that a statement is to be found in most of them that the only defences open to the sons are those of immorality or illegality but there is no specific reference that the sons are not entitled to question the existence of the debt itself. In the absence of a clear decision we cannot hold that the learned Judges were laying down the law differently. The only decision out of the cases cited which discusses the point is the one reported as *Indar Pal* v. *The Imperial Bank*(7). This does not support the contention for which it has been cited. Indeed it contains an observation to the contrary at page 218 of the report. The dictum of that eminent Judge BHASHYAM IYENGAR J. in *Periasami Mudaliar* v. *Seetharama Chettiar*(8)

(1) (1904) 14 M.L.J. 431.
(2) (1910) 21 M.L.J. 521.
(3) (1918) 51 I.C. 130.
(4) (1921) 60 I.C. 751.
(5) (1895) I.L.R. 23 Cal. 262.
(6) (1885) I.L.R. 13 Cal. 21 (P.C.).
(7) (1915) I.L.R. 37 All. 214.
(8) (1903) I.L.R. 27 Mad. 243 (F.B.).

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to the effect that the judgment against the father creates a debt was not really necessary for the disposal of that case and does not need to be examined here, when we find section 53 added to the Code of Civil Procedure, 1908, to surmount the difficulties of a father's creditors in realising their decree out of the properties which had devolved on the sons by the rule of survivorship. We are aware that in this and other cases, like *Mohan Lal* v. *Bala Prasad*(1) and *Abdul Karim* v. *Ram Kishore*(2), it has been observed by the learned Judges that the only defences open to the sons were those of illegality or immorality. But, having gone through the judgments, we are of opinion that it was more or less assumed by them that the debts existed in point of fact and it was therefore unnecessary for them to state in view of that assumption that the sons could also challenge the factum of the debt. With great respect to the learned editor, we cannot agree with him that the sons cannot dispute their father's liability except in respect of the nature of the debt regarding which the father could not represent the sons. There appears to be no reason to hold why he should be held to be representing the sons in regard to the factum of the debt.

The next contention raised by Mr. Ramakrishna Ayyar was that after the addition of section 53 to the Code of Civil Procedure it would not be possible for a son or other descendant, whether he had been impleaded in the suit or not, to object to the sale of the property held in execution of a decree passed for debts incurred by his deceased ancestor. There is no doubt that the property in the descendant's hands would, for the purposes mentioned in the section, be deemed

(1) (1922) I.L.R. 44 All. 649. (2) (1925) I.L.R. 47 All. 421.

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to be the property of the deceased ancestor and the son or other descendant must, in spite of the rule of survivorship, be regarded to be a legal representative; but it must not be overlooked that the section assumes the existence of a debt and declares in effect that the property which was liable under Hindu law for payment of a debt incurred by the ancestor would, despite his death, continue to remain liable in the hands of his descendant as his legal representative. The ancestor's death could not have the result of improving a creditor's position. The section was enacted to take away a possible plea by the descendant that the property held by his ancestor during his lifetime had devolved on the former by survivorship and was not liable for the payment of the latter's debts. At the same time it was not meant to deprive the descendant of his right to contest the existence of the debt where he was in danger of losing the whole of his ancestral property. There is no provision in section 53, Civil Procedure Code, that the entire property belonging to a joint family, of which the father was karta, would be necessarily liable for payment of debts incurred by him. The question would depend for its answer on the application of principles contained in Hindu law. If in a given case, the debt incurred by a father is found to have been so done for purposes and objects binding on the whole of the family of which he is the head, or even for his own personal benefit provided it was not for an immoral or illegal purpose, the entire coparcenary property in his son's or other descendant's hand would, according to those principles, be liable for payment. This is due to the fact that the debt was contracted by the father either in his capacity as manager and head of the family for family purposes, in which case the

descendants must have had its advantage or at least be assumed to have had it, or even when it was done for the father's own personal benefit, the obligation of religion and piety makes them liable to discharge the same. In these circumstances the family property would be taken to have devolved on the descendants as legal representatives and it would be useless for them to plead that the property did not belong to their ancestor or that as joint tenants they had an interest in the property which could not have been burdened or alienated by the ancestor. But if the debt did not exist in fact or it was illegal or immoral and the property had not been purchased by a stranger, they could raise these questions and, if they succeed in establishing their contentions or rather if these contentions were found in their favour, their shares in the joint family property would not be taken to have devolved on them in their capacity as legal representatives and would not be liable to be sold and could, even if sold, be recovered by them. Briefly speaking these principles have been imported into section 53, Civil Procedure Code, by the words "which is liable under Hindu law for the payment of the debt of a deceased ancestor." But we do not find any provision in this or any other section of the Code which may justify us in holding that the descendants' right to contest the existence of the debt or the illegality and immorality of its character has been taken away even when they were not impleaded in the suit and had no occasion to challenge the debt or alienation contracted or made by their ancestor and to show that he had not represented them in the suit.

The property in Appanna's hands which was mortgaged by him has been found to be ancestral property and the debt in respect of which it was mortgaged held

to be non-existent and in any case not binding on the present plaintiffs. The mortgage and the sale in execution must therefore be held not to have passed their interests in the property. Appanna's share however which he had in the properties before his death stands on a different footing. He had mortgaged the property himself and had allowed a decree for sale to be passed against himself without contesting it. So far as his share is concerned, it must be deemed to be Appanna's property and to have been held by the plaintiffs in their capacity as his legal representatives.

It was next contended by Mr. Ramakrishna Ayyar that these pleas, if available at all to the plaintiffs, should have been taken by them in execution proceedings particularly when the sons were impleaded as legal representatives of their father before the final decree had been passed, and that a separate suit was barred under the provisions of section 47, Civil Procedure Code. For this contention reliance was placed on a case reported as *Sheik Karoo* v. *Rameshwar Sao*(1). This objection was not taken in the written statement and has been taken before us for the first time. Since this is purely a question of law, we have permitted it to be argued here. A short answer to this contention is that section 47, Civil Procedure Code, applies to matters which arise after a decree has been passed and not to those which were in existence even at the time when the suit was instituted. If objections regarding the correctness or the validity of a decree are raised by a person who was a party to the suit or by one who must be deemed to have been a party, these will be barred not by section 47,

(1) A.I.R. 1923 Pat. 143.

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Civil Procedure Code, but by some other provision of law which we need not pause to consider here. If, on the other hand, these are being raised by a third party and are of a nature which go to the root of the matter and attack the decree itself, they could not be gone into in execution proceedings for the simple reason that an executing Court cannot be asked to go behind the decree. Section 47, Civil Procedure Code, provides that questions relating to execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit. If persons who were not parties to the suit and who have been already found not to be represented by their father, desire to challenge the decree or the mortgage on the basis of which the decree was passed, they could not do so in execution proceedings. In fact the plaintiffs tried to raise these contentions, which they have raised in the present suit, as soon as they were impleaded as legal representatives of their father. The Court which had passed the preliminary decree was prepared to go into these matters to a certain extent. But on an appeal preferred by the second defendant (Appeal Suit No. 61 of 1924) the District Judge of Salem set aside the order and made the following remarks:

"The mortgage money not having been paid within the time prescribed by the preliminary decree the appellant applied for a final decree: but his application was opposed not only by the first defendant but also by the sons of the deceased second defendant who had been brought on the record as his legal representatives. The lower Court has observed that the defendants 4 to 6, i.e., the legal representatives of the second defendant attacked the hypothecation bond and the preliminary decree *in toto* but that at the hearing of the application the main contention of these defendants was that out of the seven items of the property covered by the hypothecation bond and the preliminary decree, Nos. 1, 2, 3 and 4 were service inam lands and consequently inalienable. It is perfectly obvious that these defendants were not entitled to attack the hypothecation bond or the preliminary decree and the contention which the lower Court did permit them to put forward amounted substantially to a claim that they had a title independent of that of the mortgagors. Such a contention would certainly have been outside the scope of a mortgage suit at any stage. In dealing with an application under Order XXXIV, rule 5, the only question which the Court has to consider is whether the mortgage money has been paid. If it has not, the Court is bound to give the applicant a final decree in terms of the preliminary decree already passed. What the Court orders to be sold is the right, title and interest of the mortgagors in the hypothecated property; and it is not the business of the Court in a mortgage suit to enquire into the nature of the right, title and interest at the instance of any claimants or for the benefit of possible purchasers. In modification therefore of the final decree passed by the lower Court I direct that the appellant be given a final decree in the terms of the preliminary decree passed by the lower Court."

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In view of what was contended on behalf of the second defendant in the above appeal, he should be held to be precluded from taking this objection in this Court. But even if we do not rest our decision on this ground, we must hold that the grounds raised by the plaintiffs in the suit do not fall within the ambit of section 47, Civil Procedure Code, and could not have been enquired into by the executing Court.

As for the Patna decision in *Sheik Karoo* v. *Rameshwar Sao*(1) it is true that it does take the view that a separate suit for the determination of the liability of the sons for the debt covered by the decree passed against their father would be barred by section 47, Civil Procedure Code. But this decision was based on the construction placed on section 53, Civil Procedure Code, which has been considered by us to some

(1) A.I.R. 1923 Pat. 143.

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extent in an earlier portion of this judgment, and is based on the assumption that the sons had no independent rights in the property and were represented by their father in the suit. There appears to be no warrant for holding that a processual amendment in the Code of Civil Procedure was meant to deprive the Hindu sons of their rights in the property or to increase the representative capacity of the father to an extent not authorized by Hindu law. When the sons attack the decree on the ground that the debt did not exist or that it was immoral they are attacking the validity of the decree so far as they are concerned and the liability of the ancestral property to be sold in execution. Both these questions are interdependent and one cannot be decided without the other. If the debt did exist and was of a nature which could have been incurred by the father so as to make it a pious duty of the sons to discharge it, the ancestral property would be liable to be sold and not otherwise. As stated above, a person cannot be permitted to attack the validity of the decree in execution proceedings, except in cases where it has been passed against a dead person and is an absolute nullity. If the execution Court cannot be asked to go behind and question the validity of the decree, the question of the liability of the property which is mixed up with the first question cannot also be decided in execution. It was not possible for the plaintiffs to make an application under Order XXI, rule 58, firstly, because it was a mortgage decree and, secondly, because they were impugning the mortgage effected by their father and the validity of the decree passed on the basis of that mortgage. We must, therefore, although with great deference, disagree with the view expressed in the Patna decision. There are cases which have

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taken a contrary view and there is no reason why we should not follow them when they correspond with our own view; see *Tallapragada Sundarappa* v. *Boorugapalli Sreeramulu*(1) and *Ala Singh* v. *Wasawa*(2).

The last question which has to be decided here is one of limitation. It has been contended that the suit was barred under article 12 of the Limitation Act. This article would apply only if the sale is held to be binding on the plaintiffs. If the plaintiffs' interest is, on the other hand, found not to have been sold or the sale is held to be void against them, this article cannot stand in their way and they will be entitled to the relief claimed by them. The plaintiffs, as stated before, were no parties to the suit and were impleaded as Appanna's legal representatives after the preliminary decree had been passed. Were they represented then by Appanna during his lifetime? If they were so, they would not be able to get the relief unless the sale is first set aside. We have already observed that there is nothing on the record to show that the suit was brought against Appanna as a manager or karta of the family. Nor was the debt alleged by the second defendant in his plaint to be binding on the joint family. The consideration for which the mortgage was executed by Appanna has not been found to be binding even on him—although in view of the decree passed against him, it is no longer open to the plaintiffs as his legal representatives to question the decree. But this does not mean that the decree has to be held binding on the plaintiffs as well in their individual character. Is the sale then to be held binding on them in their personal capacity?

(1) (1907) I.L.R. 30 Mad. 402. (2) (1912) 15 I.C. 25.

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We are not of that opinion. When they were not represented by their father in the suit and the objections raised by them to the validity of the mortgage could not be and were not entertained by the Court, the decree and the sale could not be held to be binding on them, in the capacity in which the suit has now been brought. The sale being thus void, it was unnecessary for them to sue for setting it aside. Moreover, their cause of action arose on their dispossession of the property in 1929. Had they not been dispossessed it would not have been really necessary for them to institute the present suit. The sale did not really affect their title and it could have been safely ignored by them. It might be stated here that the sale of service tenure lands was a nullity and the plaintiffs were fully justified in not taking any notice of it. Learned Counsel for the respondents however relies on two cases, one of Patna and the other of this Court, and contends that in similar circumstances article 12 of the Limitation Act was held to be a bar. The first case on which reliance has been placed is reported as *Bhola Jha* v. *Lala Kali Prasad*(1). The facts of that case were that some properties belonging to a joint Hindu family were mortgaged by the father who was the karta of that family. The mortgagees sued the father on the basis of their mortgage, obtained a decree, brought the properties to sale and pruchased them themselves. The sons then instituted a suit for the recovery of possession of these properties and asked for a decree for redemption in the alternative. The trial Court held the plaintiffs, and this is important, to be bound to pay the debts contracted by their father but granted them a decree for redemption. When the case came up before the High Court, it was

(1) (1916) 1 P.L.J. 180.

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urged that since the plaintiffs were held bound by the mortgage and the decree, the sale of the properties had got to be set aside before they were allowed to redeem. The learned Judges accepted their contention and held that if a suit for redemption was held to be maintainable, the sale would have to be set aside before the plaintiffs were allowed to redeem. The decree for redemption was considered to be inconsistent with the sale already held and rightly so, if we may say that with respect. The suit was therefore dismissed as being barred by article 12 of the Limitation Act.

If the plaintiffs in the present suit were held bound by the mortgage effected by their father or if the decree was held to be binding on them in their individual character, they could not have been held entitled to maintain this action and their suit would have been also barred by limitation. But fortunately for them they have not been held to be so bound or represented by their father in the suit and the decision has therefore no application to the facts of this case.

The next case on which reliance is placed was decided by a Division Bench of this Court and is reported as *Narayana Naicken* v. *Venkataswami Naicken*(1). In that case it was held that the sale in execution of a decree against a father would not be void as against the sons but only voidable at their option. The question whether the debt incurred by the father was of such a nature as to be binding on his sons was not gone into. It was more or less assumed that the sale of property in pursuance of a decree passed against a Hindu father would necessarily involve the sale of the sons' rights as well. As the matter has already been discussed by us in this judgment, it is unnecessary

(1) (1926) 51 M.L.J. 845.

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to examine this proposition again. The matter in our view would have to depend on the finding whether a debt was contracted by the father as the manager of the joint Hindu family so as to be binding on the sons, which it would be their legal or pious obligation to repay. If, on the other hand, the debt is found not to have been due or to have been incurred for purposes which were immoral or illegal, a decree obtained in respect of such a transaction would not bind the sons and the sale held in execution could not be held to be binding on them so as to necessitate a prayer for setting it aside, particularly when the property was purchased by either the decree-holder himself or even by a stranger having knowledge of the circumstances in which the debt was contracted. We are, with great deference, unable to agree with this decision and must hold that the suit was not barred by article 12 of the Limitation Act.

The appeal must for the above reasons be accepted and is hereby allowed. The decree of the lower Court is set aside and the suit instituted by the plaintiffs decreed to the extent of the property comprised in the " A " schedule which they take along with the first defendant and to the extent of three-eighths share in the property covered by the " B " schedule with mesne profits at the rate found by the lower Court. The plaintiffs will get their costs here and in the Court below from the contesting respondents.

The court-fee payable on the plaint as well as on the memorandum of appeal should be paid to the Government by the fifth respondent out of the estate in his hands left by the deceased second defendant.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Krishnaswami Ayyangar and Mr. Justice Somayya.

1939, April 13.

MAHARAJA RAJA SRI RAJA SAHEB MEHARBAN DOSTAN RAJA RAVO SREE RAMAKRISHNA RANGARAO BAHADUR GARU, ZAMINDAR OF KIRLAMPUDI, DONTAMURU, &c., ESTATES (PLAINTIFF), APPELLANT,

v.

VANGURI SURYAPRAKASARAO GARU AND FIVE OTHERS (DEFENDANTS 1 TO 5 AND 7), RESPONDENTS.*

Madras Estates Land Act (I of 1908), sec. 26 —Service rendered not only on request but also on understanding that it was to be paid for in a way left undecided—"Consideration" —Grant of patta at favourable rent in consideration of such service—Supported by " consideration " within meaning of sec. 26 (1)—" Period ", meaning of—Permanent lease or lease in perpetuity—Applicability of sec. 26 (1) to.

The word " consideration " in section 26 (1) of the Madras Estates Land Act of 1908 carries with it the same legal implications as attach to it under the Indian Contract Act. Service rendered not only on request but also on the understanding that it was to be paid for in a way left undecided is consideration sufficient to support a contract or an engagement within the meaning of section 26 (1) of the Madras Estates Land Act.

Ryoti land in an estate in the occupancy of D was, by a permanent patta executed by the holder of the estate, demised to D in perpetuity at a favourable rent, one of the items of consideration recited in the patta being in effect that, down to the date thereof, D was rendering service to the holder of the estate expecting some remuneration or recompense, although what and how much it should be had been left undetermined. Corresponding to that patta, D executed a muchilika in favour of the holder of the estate.

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* Second Appeal No. 431 of 1935.

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Held that the engagement within the meaning of sub-clause 1 of section 26 of the Estates Land Act constituted by the patta and muchilika was supported by consideration within the meaning of that sub-clause.

Held further that sub-clause 1 of section 26 was not confined in its application to a term-lease, that is to say, a lease for a definite period and that it applied also to a permanent lease or a lease in perpetuity.

The word "period" in the sub-clause does not mean a section or sub-division of time. The word has reference to the period, whatever it might be, of the lease itself and regard should be had accordingly to the terms of the lease for the purpose of ascertaining the time during which the lease would be good.

Dictum to the contrary of RAMESAM J. in *Chidambaram Chettiar* v. *Chokkalingam Naicken*(1) disapproved.

APPEAL against the decree of the District Court of East Godavari at Rajahmundry in Appeal Suit No. 8 of 1934 preferred against the decree of the Court of the Deputy Collector of Peddapur Division in Land Suit No. 99 of 1931.

P. Somasundaram for appellant.

P. Satyanarayana Rao for first respondent.

Respondents 2 to 6 were not represented.

KRISHNASWAMI AYYANGAR J.

The JUDGMENT of the Court was delivered by KRISHNASWAMI AYYANGAR J.—The plaintiff is the appellant. He is the proprietor of the Kirlampudi, Dontamuru estate in the district of East Godavari. The estate originally belonged to Sri Raja Chelikani Venkayamma *alias* Vengayamma, Zamindarini of Jaggampeta. On 4th March 1938 she sold the estate to the father of the appellant. The land, about the rent of which disputes have arisen, known as Lokareddi Cheruvu Istuva, is situate in this estate. That land was even at the date of the sale part of the ryoti

(1) (1930) 61 M.L.J. 52.

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lands of the estate in the occupancy of a relation of the zamindarini, one Chelikani Dharmarayanim Garu. In the amarakam accounts of the village the land was entered as jeroyati land against this Dharmarayanim Garu. The rent that was derivable from this land during the period prior to the sale was Rs. 1,078–7–0, though it would appear that only Rs. 35 was being collected and the balance remitted on account of kindness or grace towards the ryot. On the same date when the sale deed came into existence and prior to it there were two other documents executed by and between the zamindarini and Dharmarayanim Garu. They were: (i) a permanent patta by the zamindarini by which the suit land was demised in perpetuity at a favourable rent of Rs. 374 only; (ii) corresponding to this patta, Dharmarayanim Garu also executed a muchilika in favour of the zamindarini. The execution of these documents is expressly referred to in the sale deed, Exhibit I, executed in favour of the appellant's father and the muchilika taken from Dharmarayanim Garu was actually handed over to the purchaser. There can be no doubt therefore that this transaction between the zamindarini and Dharmarayanim Garu was a genuine arrangement intended to bind not only the zamindarini who was a party to it but also the purchaser from her, namely, the appellant's father. There is no reason whatever to regard this transaction as suspicious or for thinking that it was a hole and corner affair.

If the matter had stood there and a dispute had subsequently arisen between the purchaser and Dharmarayanim Garu, we have no doubt that the terms settled between the parties as aforesaid would have been held binding upon the parties. This is not contested by the appellant's learned Advocate. The

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whole of his case here and in the Courts below was based on the contention that under section 26 of the Madras Estates Land Act this arrangement by which a remission of rent was granted could be held valid only during the lifetime of the zamindarini and could not bind either her successor in interest or a purchaser from her except during the period of her lifetime.

Section 26 of the Madras Estates Land Act is as follows :—

"(1) Where for the purpose of clearing and bringing waste land in the estate into cultivation or for the purpose of making any permanent improvement or for planting trees on the holding or where under a contract made prior to the commencement of this Act for any premium, loan or other valuable consideration, a ryot has accepted a patta from, or has entered into an engagement with, his landholder at a rate of rent lower than the lawful rate previously payable upon the land or than the rate lawfully payable upon land of similar description and with similar advantages in the neighbourhood, such rent shall not be liable to enhancement during the period for which such lower rate is payable by contract or custom, so long as the ryot shall substantially fulfil the terms upon which and the purposes for which such lower rate was allowed.

(2) After the expiry of the period for which such lower rate or rent is payable or if the terms upon which and the purposes for which such lower rate was allowed have not been substantially fulfilled, the landholder shall be entitled to the full rate.

(3) Except as provided by sub-section (1) no rate of rent at which land may have been granted by a landholder shall be binding upon the person entitled to the rent after the lifetime of the landholder if such rate is lower than the lawful rate payable by the ryot before the date of the grant upon the land or upon land of similar description and with similar advantages in the neighbourhood."

This section occurs in Chapter III of the Act headed "General provisions relating to the rates of rent payable by ryots". By clause(1) and subject to the conditions contained therein, an engagement entered

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into between a landholder and a ryot by which the rent lawfully payable in respect of the land is reduced is not interfered with and such rent is not liable to enhancement during the period for which the lower rate is fixed. There is no doubt that in the present case the patta and the muchilika, Exhibits II and II-*a*, do constitute an engagement within the meaning of the clause. Two objections are raised to its applicability to the case on hand. Firstly, it is said that an engagement within the sub-section must be supported by valuable consideration and that the engagement in question does not satisfy this requirement. Secondly, it is said that the clause is applicable only to a term lease, that is to say, a lease for a definite period, and not to a permanent lease or a lease in perpetuity which, it is urged, falls outside it. The learned Deputy Collector who tried the suit was of opinion that the patta was not supported by valuable consideration, and also that a permanent lease such as is evidenced by Exhibits II and II-*a* is outside the provisions of section 26, clause 1 of the Act. On this view he decreed the suit. An appeal was taken to the District Court. The learned District Judge apparently agreed with the Deputy Collector on this point, though he has expressed himself in a somewhat indefinite way. He has observed :

"In Exhibit II Vengayamma Bahadur Garu purported to grant a remission of the major portion of the rent for five different reasons. None of these obviously amounted to cash consideration. The learned Deputy Collector held that valuable consideration, as that term is used in section 26 (1) must be akin to the other words used in the section itself, i.e., loan or premium. He also held, construing that term 'consideration' with reference to the definition in the Contract Act, there was no consideration at all for the grant of Exhibit II. The respondent's Vakil contended that past services and provision for maintenance would certainly amount to consideration, which would validate an alienation or a contract.

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I agree that under certain circumstances a contract based on past services as consideration can certainly be enforced. But all the items set forth in Exhibit II, though they may amount to consideration, which would validate a gift or an ordinary contract, will not amount to a valuable consideration as that term is used in section 26 (1) of the Estates Land Act."

It is unnecessary to enter upon a criticism of this statement as we think it serves no purpose. We are however clearly of the opinion that the word "consideration" used in section 26 carries with it the same legal implications as attach to it under the Indian Contract Act and it is upon this footing that the question must be considered. The learned District Judge is also of the opinion that Exhibit II must be held to be really of the nature of an alienation not of land, but only of the right to receive a certain sum as rent. As no land was in fact granted at the time of the execution of Exhibit II, section 26 (3) would not, according to him, apply to the facts of the case. In other words, section 26 (3) is rendered inapplicable, and accordingly Venkayamma Bahadur Garu was bound by Exhibit II and could not impeach the alienation. Neither could a purchaser from her do so even after her lifetime. The learned Judge accordingly allowed the appeal and dismissed the suit.

The burden of proving the validity of Exhibit II by which a remission in part of the rent lawfully payable on the land was granted is upon the ryot in view of the provisions of section 26. The Deputy Collector has held that the defendants, who claim under Dharmarayanim Garu and who are the respondents here, have not proved that Exhibit II was supported by consideration. Neither he nor the learned District Judge has taken note of the fact that the recitals of consideration in the document are at all times, *prima facie* at any rate, binding not only upon the executant but also

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on the purchaser from her and his son, the present appellant. There was some evidence adduced on the part of the respondents to prove the truth of some of the recitals in the document, but that evidence has not been accepted. The failure on the part of the respondents to affirmatively make out the consideration recited cannot take away the value of the admissions made by the appellant's predecessor-in-title in the document itself. However that may be, that evidence was confined only to one of the recitals in the document and we may perhaps pass it by. Among the five items of consideration mentioned, it appears to us to be clear that one of them, if true,—and we may say it has to be accepted as true because there is no evidence *contra*—is sufficient to support the document. It is this:

"As you have been obliging and rendering help to us both in regard to all the important matters relating to the estate and also in matters relating to our household looking to us for help. . . ."

This recital means that down to the date of the document, Dharmarayanim Garu was rendering service to the zamindarini expecting some remuneration or recompense, although what and how much it should be had been left undetermined. It is perfectly legitimate to infer from this recital that service was being rendered not only on request but also on the understanding that it was to be paid for in a way left undecided. If this is so, it appears to us that the requirement of consideration in order to support a contract or an engagement is satisfied in the present case. The first contention must accordingly be negatived.

The second point taken is that section 26 (1) is wholly inapplicable to a permanent lease. The argument is that the word "period" occurring in the clause,

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"such rent shall not be liable to enhancement during the period for which such lower rate is payable by contract", means a section or sub-division of time and cannot mean perpetuity or all time to come. We are unable to put such a limited construction upon this word taken in the context in which it occurs. The section seems to lay emphasis upon the validity of a contract or engagement if it is supported by consideration. The intention behind the clause undoubtedly was that, if there was valuable consideration given for a favourable lease and if the contract had been entered into prior to the Act, it should not be disturbed during its currency. It is difficult for us to accept an argument which will make a lease for nine hundred and ninety-nine years or any larger number of years valid and enforceable under the statute but a lease in perpetuity null and void. We prefer to hold that the word "period" has reference to the period during which by contract a lease is made to run, and to our mind it appears that during that period, whatever its duration, the favourable rate would be maintained. The duration of a lease may vary, and may even be for all time to come. If it is a lease in perpetuity, then the period of the lease should be regarded as indefinite and for ever and the favourable rate could not at any time be disturbed. So that the word "period" has reference to the period, whatever it might be, of the lease itself and regard should be had accordingly to the terms of the lease for the purpose of ascertaining the time during which the lease would be good. Our attention was drawn to a dictum of RAMESAM J. in *Chidambaram Chettiar* v. *Chokkalingam Naicken*(1)

(1) (1930) 61 M.L.J. 52, 57.

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where the learned Judge has expressed the opinion that the word "period" refers to a section of time and cannot cover a case of perpetuity. In fact it was on this decision the learned Deputy Collector relied in support of his judgment. With utmost respect to RAMESAM J. we are unable to agree with this interpretation of the word. We do not see, as we have already said, any warrant for taking a perpetual lease out of the operation of section 26 (1) for no better reason than that it is possible to regard the word "period" as meaning a section or a sub-division of time. In the Oxford Dictionary, among the meanings given to the word, we find the following "the time during which anything runs its course; time of duration". Quite independently of it, however, we think that in the context the word "period" should not be understood in the limited sense attributed to it by RAMESAM J.

It therefore seems to us that the patta, Exhibit II in the case, comes within section 26 (1) and must accordingly be held binding on the appellant. In this view it is unnecessary to discuss the effect of clause 3 of the section as in terms clause 1 is expressly saved by it. For the reasons explained above the appeal has to be dismissed and it is accordingly dismissed with costs of the first respondent.

A.S.V.

APPELLATE CRIMINAL—FULL BENCH.

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

1939, December 1. December 4.

IN RE GURUSWAMI TEVAR AND OTHERS (ACCUSED 1 TO 5), APPELLANTS.*

Indian Evidence Act (I of 1872), sec. 32 (1)—Dying declaration—Sufficiency of, for supporting a conviction—Corroboration by other circumstances, if necessary.

On a question whether statements made by a person who is dead, uncorroborated by any other evidence, can support a conviction,

held: It is not possible to lay down any hard and fast rule when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the surrounding circumstances; but if the Court, after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. The Court must, of course, be fully convinced of the truth of the statement and naturally it could not be fully convinced if there were anything in the other evidence or in the surrounding circumstances to raise suspicion as to its credibility.

TRIAL referred by the Court of Sessions of the Tinnevelly Division for confirmation of the sentences of death passed upon accused 1, 2 and 4 and appeal by all the appellants against the sentences passed upon them by the Court of Sessions of the Tinnevelly Division in Calendar Case No. 60 of 1939.

The case came on for hearing in the first instance before BURN and MOCKETT JJ. who made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The appellants have been convicted of murder by the learned Sessions Judge of Tinnevelly and the first, second and fourth appellants have been sentenced to death. The third

* Referred Trial No. 119 of 1939 and Criminal Appeal No. 508 of 1939.

and fifth appellants have been sentenced to transportation for life.

The case is one of a simple nature but there is an important question of law involved. There is no doubt about the fact that, on the early morning of 31st of March 1939, Nammalwar Naickar, a resident of the village of Kalugachalapuram, was attacked while he was on his way to the village of Mannagopalanaickenpatti. He was stabbed in thirty-eight places and he died soon after midnight. The Sub-Assistant Surgeon (P.W. 1) who was in charge of the hospital at Ettiyapuram saw him at 1 p.m. and found thirty two injuries on him, of which seven were penetrating wounds into the abdomen, and one was a penetrating wound in the chest. This Sub-Assistant Surgeon was not able to do anything for the man beyond rendering first aid and then he sent him on to the headquarters hospital at Palamcottah. Another Sub-Assistant Surgeon (P.W. 2) made a post-mortem examination on the 1st of April and then he found that there were in all thirty eight injuries. P.W. 1 expressed an opinion that the abdominal injuries inflicted upon Nammalwar Naickar would only prove fatal in the absence of medical or surgical treatment but that, if treated properly, there was "every chance" of the injured man escaping death. This is a very remarkable opinion and in our opinion, it is worthless. The post-mortem certificate shows that two of the stabs not only penetrated the abdomen but punctured the intestines, so that fæces escaped into the peritoneal cavity. It is quite clear that Nammalwar Naickar was fatally wounded by persons who meant to kill him, and that he never had any chance of recovery.

There are no eye-witnesses in the case, the assassins having been careful to choose a time when there was nobody in sight. The case against the appellants rests almost entirely on statements said to have been made by Nammalwar Naickar himself before he died. Three witnesses, P.Ws. 6, 7 and 8, say that they were in the vicinity and that they were attracted to the spot by the cries of Nammalwar Naickar but they do not corroborate him any further than by saying that the number of persons whom they saw running away was five. As the learned Sessions Judge has said, there are four statements of Nammalwar Naickar to be considered. In the first place, P.Ws. 6, 7 and 8 say that as soon as they reached him he told

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them the names and fathers' names of the five persons who had attacked him. Those are the names of the present five accused persons. P.W. 6 ran to the village and informed P.W. 12 the brother-in-law of the deceased. P.Ws. 12, 13 and others went to the place where Nammalwar Naickar was lying stabbed. Nammalwar Naickar is said to have told those witnesses also the names and fathers' names of these five appellants. P.W. 12 went and fetched the village munsif, P.W. 21. He reached the scene of the murder at about 8 o'clock in the morning and he took down a statement from Nammalwar Naickar which is Exhibit K. In that also the names and the fathers' names of the five appellants are found. Finally at about 2-30 p.m. on the same day in the hospital at Ettiyapuram a dying declaration (Exhibit A) was recorded by a Special Magistrate (P.W. 4). In that again the deceased has stated that these five persons attacked him and stabbed him.

The Learned Counsel for the appellants has attempted to show that the statement (Exhibit K) recorded by the village munsif was a concoction but he has not adduced any convincing arguments in support of that proposition. It was proved that there was enmity between Nammalwar Naickar and the accused, but the accused were not the only members of the Marava caste with whom the deceased was at enmity. P.Ws. 6, 7 and 8 belong to a different village, Mannagopalanaickenpatti, and no enmity whatever was even suggested between them and any of the accused. There is therefore no reason why these witnesses should say falsely that Nammalwar Naickar named these five persons as his assailants. We can see no reason to believe that Exhibit K was concocted.

The next contention of the learned Counsel for the appellants is that Exhibit K and Exhibit A are widely discrepant. This contention is based upon the fact that in Exhibit K Nammalwar Naickar is recorded as having said that, when the five appellants approched him, the first appellant came and gave him a stab with a *soori* (dagger) in the abdomen and afterwards the four persons joined together and stabbed him in the body. In Exhibit A, however, he has given a much more detailed account in which he says that Guruswami Tevar (the first accused) stabbed him not only in the abdomen but in several other places before any of the other accused stabbed him at all. He also says that the third and fifth accused held his

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legs while the other three accused 1, 2 and 4 were stabbing him. We are not able to see that there is any discrepancy in these statements. In Exhibit K the wounded man has stated that all the five persons joined together and stabbed him. This cannot be said to be an inaccurate description of the occurrence. If five persons jointly attack a man and two of them hold him while the others stab him, he cannot be considered to be an untruthful person if he says that they all five stabbed him. The only real inconsistency that is apparent between Exhibit K and Exhibit A is with regard to a knife. In Exhibit K, Nammalwar Naickar said, "When I warded off the *soori* which Kandiah Thevan had, it fell down." In Exhibit A he said: "When they stabbed me I wrested the soori from Krishna Thevan." Now, Krishna Thevan is the name of the second accused and Kandiah Thevan is the name of the fourth accused. In Exhibit K, Nammalwar Naickar does not mention that he wrested a knife from the second accused and in Exhibit A he does not mention that, while he was warding off a blow aimed at him by the fourth accused, the fourth accused's knife fell down. These however cannot be considered as contradictions. The learned Public Prosecutor points out that at the scene of offence two knives were actually found, one in a sheath and one bare. Apart from this, there is no discrepancy, and both these statements show that Nammalwar Naickar charged these five persons with the attack upon him. We cannot find also, as already stated, any reason to disbelieve P.Ws. 6, 7 and 8 and P.Ws. 12 and 13, and their evidence makes it clear that from the very beginning, within a few seconds after he was attacked, Nammalwar Naickar has been alleging that these five appellants are responsible for his death.

We agree with the learned Sessions Judge therefore that the statements of Nammalwar Naickar have been truthfully described by the witnesses and in the documents Exhibits K and A. The next question, as the learned Sessions Judge has pointed out, is whether Nammalwar Naickar's statements are true. As to this, the plea of the accused was that the whole case was a concoction against them by P.W. 12 and the village munsif on account of the enmity due to faction between the Thevars (Maravars) and the Naickars. The third accused alleged that he had been sick for the last eight months and therefore confined to his house. He repeats this

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statement in his appeal petition from jail. None of the accused offered any explanation beyond this bare denial and the allegation that the case was concocted on account of faction and none of them cited any witnesses. As already observed, there was enmity between the deceased and the Maravars of Kalugachalapuram, but there was no special enmity between the deceased and these five appellants and, as the learned Sessions Judge has observed, there was not the slightest reason shown why Nammalwar Naickar, within a few seconds of being stabbed, should have made up his mind to exculpate the persons who really attacked him, and to accuse falsely five persons who had nothing whatever to do with the matter. It was sunrise when this attack on Nammalwar Naickar took place. He was stabbed in thirty-eight places, which must have taken some time, so that he had ample opportunity to see who were the persons who were stabbing him. We can find no reason for doubting the truth of the statements made by Nammalwar Naickar. If they are believed, the appellants are clearly guilty of his murder.

The point of law which arises is whether, on the statements of a deceased person such as these, uncorroborated (except as to the number of the assailants), the appellants can be convicted of murder. The weight of authority appears to be in favour of the view that a conviction based wholly upon the statements of a deceased person is not illegal. This was assumed in the case of *Sanjappa* (Referred Trial No. 112 of 1937) in which the judgment was pronounced by one of us, but in that case the judgment in Criminal Appeals 653 of 1935 and 148 of 1936 was not brought to our notice. Those appeals were heard by BEASLEY C.J. and GENTLE J. and the judgment contains passages indicating that a dying declaration uncorroborated by other evidence could not justify a conviction. The learned Judge GENTLE J. says:

"Whilst the contents of a dying declaration can be relied upon as evidence for the prosecution, in the absence of any corroboration of its contents, it is clear from the authorities and the text books that it is dangerous, imprudent and opposed to practice to do so, even when no justifiable criticisms can be levelled against the declaration."

In the case in question the learned Judge showed that the dying declaration upon which the prosecution relied

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was unreliable; but the observations are of a general nature. And in another place the learned Judge has said:

"Apart from the dangerous practice of relying upon the uncorroborated contents of a dying declaration alone . . . ." Referring to these passages, MOCKETT and HORWILL JJ. have stated in Referred Trial No. 5 of 1937: "Even a dying declaration, as had been held by this High Court, is very dangerous material by itself on which to found a conviction." These dicta are clearly at variance with the principle on which Referred Trial No. 112 of 1937 was decided. The learned Public Prosecutor has stated that, so far as he is aware, there has not been any case in which it has been held that a dying declaration, proved to have been made and with no reason shown for distrusting its truth, was insufficient to warrant a conviction. Such a case as *Gula Ella Reddi* v. *Emperor* (1) is no exception to this rule, for there the dying declaration was found to be unsatisfactory in itself. On the other hand there are many cases in which dying declarations alone have been relied upon as justifying conviction. The learned Public Prosecutor brought to our notice the views expressed in the cases of *Emperor* v. *Akbarali Karimbhai*(2), *Nai Muddin Biswas* v. *Emperor*(3) and *The King* v. *Maung Po Thi*(4).

It is clear that by the provisions of section 32 (1) of the Evidence Act the statements made by Nammalwar Naickar in this case are evidence. There are very good reasons for believing them to be true, and none for disbelieving them. With respect, we do not think we should be acting dangerously or imprudently, if relying on these statements we confirmed the convictions of the appellants in this case.

As however there is a conflict between the decision in Referred Trial No. 112 of 1937 and the observations in Criminal Appeals Nos. 653 of 1935 and 148 of 1936 with regard to the question whether statements made by a person who is dead, uncorroborated by any other evidence, can support a conviction, we order, under Rule 2 of the Appellate Side Rules, that this matter be referred to a Full Bench.

The records will be laid before his Lordship the CHIEF JUSTICE.

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(1) 1935 M.W.N. (Cr.) 193. (2) (1933) I.L.R. 58 Bom. 31.
(3) I.L.R. [1937] 1 Cal. 475. (4) A.I.R. 1938 Ran. 282.

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The case then came on for hearing in pursuance of the above order of reference before the Full Bench constituted as above.

ON THE REFERENCE.

E. R. Balakrishnan for appellants.—[After reading the Order of Reference, Counsel proceeded :] Mere dying declaration is not sufficient to warrant a conviction. It is not made on oath. The accused has no opportunity to cross-examine the deceased as to the truth of his statement. [*In re Dabbukota*(1), *Emperor* v. *Akbarali Karimbhai*(2) and *Gula Ella Reddi* v. *Emperor*(3) were referred to.] No doubt under section 32 of the Indian Evidence Act a dying declaration is admissible, but a conviction should not be based on that alone.

[LEACH C.J.—In this case, the deceased made three earlier statements. They are admissible in evidence. Exhibit A, the dying declaration, receives corroboration from the earlier statements. Then why do you say we should not base a conviction on such a dying declaration ?]

The corroboration must be from independent circumstances and not from the statements of the deceased. [Taylor on Evidence, Twelfth Edition, page 462, was referred to.]

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.—Whether a conviction can be based only on a dying declaration is a question of fact and depends on the circumstances of each case. If, on a consideration of the facts of a case, the Court believes a dying declaration to be true, a conviction can be based on that alone. A dying declaration is regular and good evidence. [Sections 157 and 158 of the Indian Evidence Act were referred to.] The other circumstances can be considered before the Judge accepts the dying declaration as true. It is not analogous to the evidence of an accomplice which is presumed to be tainted (*vide* illustration (*b*) to section 114 of the Indian Evidence Act), and so requires corroboration. Even though there is no expectation of death, a dying declaration is proper evidence according to the Indian Evidence Act. In this respect it differs from the English law of evidence.

[LEACH C.J.—What we have to consider here is not the rule of law, but whether, as a matter of prudence, corroboration is necessary in respect of a dying declaration.]

(1) (1885) 2 Weir 753. (2) (1933) I.L.R. 58 Bom. 31.
(3) 1935 M.W.N. (Cr.) 193.

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The surrounding circumstances may be considered in accepting the truth of a dying declaration.

[LAKSHMANA RAO J.—Whether for a conviction a dying declaration should be corroborated by independent circumstances is the question here.]

The surrounding circumstances may be considered to find out whether a dying declaration is true or not. But, once the Court believes the dying declaration to be true, no corroboration is necessary to base a conviction. [Counsel referred to *Emperor* v. *Akbarali Karimbhai*(1), *Nai Muddin Biswas* v. *Emperor*(2) and *The King* v. *Maung Po Thi*(3).] Whether corroboration is necessary to accept a dying declaration as true depends on the facts of each case. In law, a dying declaration does not require corroboration. If it is believed a conviction can be based on that alone.

Cur. adv. vult.

JUDGMENT.

LEACH C.J.

LEACH C.J.—In order to appreciate the question which has been referred it is necessary to state certain of the facts. The appellants have been convicted of murder. The first, second and fourth appellants have been sentenced to death and the third and fifth appellants to transportation for life. Between five and six o'clock on the morning of 31st March 1939 one Nammalwar Naickar was attacked by a band of men and received thirty-eight injuries from which he died shortly after midnight. As the result of his cries three persons who were in the vicinity were attracted to the spot, where the deceased was lying. They had not seen the assault, but they said that they had seen five persons running away. When these witnesses reached the deceased, he told them that he had been attacked by five men and gave their names and the names of their fathers. The names given were the names of the five appellants. One of these

(1) (1933) I.L.R. 58 Bom. 31.
(2) I.L.R. [1937] 1 Cal. 475. (3) A.I.R. 1938 Ran. 282.

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witnesses went and called the deceased's brother-in-law and another person, both of whom also gave evidence. These two witnesses went to the spot and the deceased informed them that the appellants were his assailants. The village munsif was called to the scene of the crime at about 8 a.m. and recorded a statement made by the deceased. In that statement also the deceased implicated the appellants. The deceased was removed to the hospital at Ettiyapuram and at about 2-30 p.m. his dying declaration was recorded by a Magistrate. In that statement the deceased again said that his assailants were the appellants. It was proved that there was enmity between the deceased and the appellants, who are of the Marava caste, but they were not the only members of that caste with whom he was at enmity. The question of law which arises is whether on the statements of a deceased person of the nature of those indicated without other testimony, except as to the number of the assailants, the appellants can be convicted of murder. The question has been referred to a Full Bench because the judgments of two Division Benches of this Court are in conflict. Neither of these judgments has been reported.

The first of the two cases which have given rise to this reference is Criminal Appeal No. 653 of 1935, which was decided by BEASLEY C.J. and GENTLE J. The judgment was delivered by GENTLE J. who, after quoting from Taylor on Evidence and referring to *Emperor* v. *Akbarali Karimbhai*(1), *In re Dabbukota*(2) and *Gula Ella Reddi* v. *Emperor*(3), observed :

"Whilst the contents of a dying declaration can be relied upon as evidence for the prosecution in the absence

(1) (1933) I.L.R. 58 Bom. 31. (2) (1885) 2 Weir 753.
(3) 1935 M.W.N. (Cr.) 193.

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of any corroboration of its contents, it is clear from the authorities and text books that it is dangerous, imprudent and opposed to practice to do so, even when no justifiable criticisms can be levelled against the declaration."

The judgment which is in conflict is the judgment in Referred Trial No. 112 of 1937, which was delivered by BURN J. and in which I concurred. In that case, there was no corroboration of a dying declaration, but the facts were such that my learned brother and I had no hesitation in accepting it as reliable evidence and we upheld the conviction of the accused. The question at issue has been fully argued before this Full Bench and I am unable to accept the observations which I have just quoted from the judgment of GENTLE J. as correctly stating the position. With great respect I regard the statement as being far too wide.

Section 32 of the Indian Evidence Act says that statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in certain specified cases. The first case specified is when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, where the cause of death comes into question. The section declares that such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. Therefore a statement made by a person who is dead as to the cause of his death is

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evidence notwithstanding that he was not under expectation of death when he made it.

There are two other sections of the Evidence Act which may have important bearing in a case of this nature, namely, sections 157 and 158.

Section 157 says:

"In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

Section 158 is in these words:

"Whenever any statement, relevant under section 32 or 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested."

There may not be corroboration of the nature contemplated by section 157, or matters provable under section 158, and the only direct evidence may be a statement by the deceased made admissible by section 32. It does not, however, necessarily follow that this evidence is insufficient to support a conviction. In such a case the surrounding circumstances will have an important bearing. The evidence of an accomplice is tainted, and section 114 of the Evidence Act, illustration (*b*), says that the Court may presume that he is unworthy of credit unless corroborated; but a dying declaration is on a much higher plane and the Act places no such restriction on its acceptance.

The reference which GENTLE J. made to Taylor on Evidence consisted of a quotation from section 722 of the Eleventh Edition. This section deals with dying declarations and the quotation was as follows:—

"It should always be recollected that the accused has not the power of cross-examination—a power quite as

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essential to the eliciting of the truth as the obligation of an oath can be—and that where a witness has not a deep sense of accountability to his Maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the accuracy of his statements, and give a false colouring to the whole transaction."

This, of course, may be the case, but I should regard a statement by a person who has received a mortal wound, made immediately after the injury was caused, as being of high probative value when it relates to the cause of the injury, unless there is some reason shown to doubt its truth. The probative value of a statement of a person who has been mortally injured, but made after a considerable interval, during which time he has been surrounded by his relatives and friends, is certainly much less; but here again it seems to me it may be accepted if it fits in with earlier statements made when he could not have been influenced and they were otherwise unimpeachable.

In *Emperor* v. *Akbarali Karimbhai*(1) BEAUMONT C.J. observed:

"Generally speaking, and as a rule of prudence, I am of opinion that a declaration, relevant under section 32, but not made by one in immediate expectation of death, and not made in the presence of the accused, ought not to be acted upon unless there is some reliable corroboration."

The learned CHIEF JUSTICE, however, agreed that there is no rule which requires that a dying declaration should not be acted upon unless it is corroborated and he pointed out that the evidential value of a declaration relevant under section 32 varies very much in accordance with the circumstances in which it is made. Here I respectfully agree, but I am not prepared to go so far as to say that a declaration relevant under section 32, though not made in immediate expectation of death and not made in the

(1) (1933) I.L.R. 58 Bom. 31.

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presence of the accused, necessarily requires corroboration.

In *In re Dabbukota*(1) it was said :

"It is to be remembered that though dying declarations are in some respects deserving of a degree of consideration and credence to which ordinary statements are not, they are not subject to the test of cross-examination, and, if not substantially borne out by independent evidence and the probabilities of the case, or admitted facts, are worth little or nothing."

By this I presume is meant there must be corroboration before a dying declaration can be accepted. I have said sufficient to indicate that this statement is far too sweeping and it is open to the further objection that it offends against the law of evidence in India.

With regard to the case of *Gula Ella Reddi* v. *Emperor*(2) all that need be said is that the circumstances showed that it was unsafe to convict the accused on the bare dying declaration put in evidence in that case and naturally it was not accepted as being sufficient to prove the case for the Crown.

In my judgment it is not possible to lay down any hard and fast rule when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the surrounding circumstances, but if the Court, after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. The Court must, of course, be fully convinced of the truth of the statement and, naturally, it could not be fully convinced if there were anything in the other evidence or in the surrounding circumstances to raise suspicion as to its credibility.

I would answer the reference in this sense.

(1) (1885) 2 Weir 753. (2) 1935 M.W.N. (Cr.) 193.

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LAKSHMANA RAO J.—I agree.

KRISHNASWAMI AYYANGAR J.—I agree.

The case came on for final hearing after the expression of the opinion of the Full Bench, and the Court (BURN and MOCKETT JJ.) delivered the following

JUDGMENT :—

In view of the decision of the Full Bench, we confirm the conviction of the appellants for murder. Since the evidence is that the third and fifth accused took part in the murder by holding the legs of the victim while the others stabbed him, they are directly responsible for the murder. There was no reason to invoke section 149, Indian Penal Code, and we do not quite understand what the learned Sessions Judge means by saying: "The public prosecutor preferred to frame a charge against them under section 302 read with 149." The duty of framing the proper charge is thrown on the Court.

The sentences of death passed upon the first, second and fourth accused are the only possible sentences in this case, where five assassins have attacked a single man and killed him by stabbing him in thirty-eight places. We confirm the sentences of death passed on the first, second and fourth accused. The third and fifth accused have been fortunate to escape the extreme sentence on the ground that they did not actually stab Nammalwar Naickar, but only held his legs. We confirm the sentences of transportation for life passed upon the third and fifth accused. All the appeals are dismissed.

V.V.C.

PRIVY COUNCIL.

J.C.*
1939,
October 31.

A. RANGANATHAM CHETTI AND OTHERS, APPELLANTS,

v.

M. ETHIRAJULU NAYUDU, RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Madras City Tenants' Protection Act (III of 1922), *ss.* 1 (3), 2 (4), 19 (1) *and* 12—*Applicability of—Fresh lease after passing of the Act—Tenancy, whether new or in continuation of the old—Tenant, if entitled to benefit of the Act.*

The latter part of the definition of "tenant" in section 2 (4) of the Madras City Tenants' Protection Act (III of 1922) refers to persons who, without a tenancy title, continue in possession after the termination of the tenancy.

To obtain the benefit of the remaining sections of the Act, including section 12, a tenant must show that his tenancy was created before the commencement of the Act.

A tenant whose lease expired on September 30, 1922, and who continued in possession and on February 1, 1923, obtained a new lease for ten years from October 1, 1922, is not, therefore, entitled, on the termination of his tenancy, to the benefit of the provisions of the Act, for, though his physical possession was continuous, his possession after October 1, 1922, is attributable to the new tenancy formally embodied in the lease executed on February 1, 1923.

APPEAL (No. 61 of 1938) from a decree of the High Court in its appellate jurisdiction (March 31, 1937) which affirmed a decree in its original civil jurisdiction (October 8, 1936).

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

Rewcastle K.C. and *Subba Rao* for appellants.—The second tenancy by the second lease was nothing more than giving effect to the agreement arrived at prior to the expiration of the first lease. The appellants were in occupation

* *Present*: LORD THANKERTON, LORD ROMER and SIR GEORGE RANKIN.

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under the agreement. Their holding was by leave of the landlord under the agreement which was crystallised by the new lease. If the second lease affects their rights under the first it is a contracting out of the Act, which is prohibited; *Thayarammal* v. *Junus Chettiar*(1) was referred to.

Subba Rao followed.—In *Thayarammal* v. *Junus Chettiar*(1) the learned Judge took the view that the new agreement was a continuation of the old tenancy and the Act applied. In this, I submit, he was right, though I cannot support his findings on other points. In my submission, a tenant who was in possession before the Act and remains in possession under a new lease thereafter is a tenant to whom the Act applies as a "tenant in possession." A tenant who continues in possession after the expiry of his lease, is a tenant under the Act and he cannot, therefore, contract himself out of the Act by a new lease.

W. W. K. Page for respondent was not called on to reply.

LORD THANKERTON.

The JUDGMENT of the Judicial Committee was delivered by LORD THANKERTON.—This is an appeal from a judgment and decree of the High Court of Judicature at Madras, in its civil appellate jurisdiction, dated 31st March 1937, which affirmed a judgment and decree of that Court, in its ordinary original civil jurisdiction, dated 8th October 1936.

In the suit, which was filed on 25th January 1933, the respondent, as plaintiff, seeks delivery of possession by the appellants of a plot of land in Muthiappan Street, George Town, Madras, and the superstructure thereon, mesne profits, and a declaration as to the amount payable to the appellants as the market value of the superstructure, in terms of a lease by the respondent to the appellants' father and predecessor-in-title for a term of ten years, which expired on 30th September 1932.

(1) A.I.R. 1936 Mad. 844 (since reversed on appeal; see *Thayarammal* v. *Junus Chettiar*, I.L.R. [1939] Mad. 909).

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The only question in the appeal is whether the appellants' claim that the Madras City Tenants' Protection Act, 1922 (Act III of 1922), is applicable in the present case is well-founded. Both the Courts below have rejected this contention.

The respondent and his undivided brother, by lease dated 18th October 1912, leased the plot of land in suit to the appellants' father, for a period of ten years from 1st October 1912, the tenant being at liberty to erect a superstructure on the land. In fact there was already a superstructure thereon, erected by the previous lessee, from whom the appellants' father had bought it shortly before obtaining his own lease. The appellants' father improved the superstructure during his tenancy, and shortly before its expiry on 30th September 1922, there were negotiations which resulted in an agreement by the respondent, who had become sole owner under a partition with his brother in 1917, to give a fresh lease at an increased rent, in order that further building operations should go on.

On 1st February 1923, the formal lease was executed, under which the plot of land was leased to the appellants' father for a term of ten years from 1st October 1922, at an increased rent of Rs. 100 per month, on the following recital:

"Whereas some time prior to the expiry of the said lease the lessor agreed to grant the lessee a new lease of the said plot of land for a period of ten years commencing from 1st October 1922, upon terms and conditions hereinafter appearing and whereas the lessee has built on the said plot of land a substantial superstructure on the strength of the said agreement . . ."

It was provided that the lessee should always and in any event be entitled to be paid the price of the

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superstructure built on the said plot of land before he surrendered possession of the land, either on the expiry of the lease thereby granted or any other future lease or at any time, and that the price should be fixed according to the market value of the buildings as at the time of ascertainment and payment. It appears that, on the strength of this agreement, the appellants' father had demolished the existing building and erected a substantial structure.

The appellants' father died in 1930, and the appellants became the tenants under the lease, which expired according to its terms on 30th September 1932. On 9th October 1932 the respondent sent a notice to the appellants claiming surrender of possession and offering the present value of the superstructure as it existed at the commencement of the lease, which was put by him at Rs. 3,000. On 7th November the appellants replied claiming the benefit of the Madras City Tenants' Protection Act, and disputing the valuation and the claim, and the present suit was thereafter filed by the respondent. It may be mentioned that the trial Judge held, against the respondent, that under the lease the respondent was bound to pay the value of the superstructure as it existed at the expiry of the lease, and that the respondent accepted that decision.

The Madras City Tenants' Protection Act came into force on 21st February 1922, and by section 1 (3) it is provided that the Act shall apply only to tenancies created before the commencement of the Act. Under section 2 (4) "tenant" is defined as meaning a tenant of land liable to pay rent on it, every other person deriving title from him, and includes persons who continue in possession after the termination

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of the tenancy. The leading provision of the Act is to be found in section 3, which provides :

"Every tenant shall on ejectment be entitled to be paid as compensation the value of any building, which may have been erected by him, by any of his predecessors in interest, or by any person not in occupation at the time of the ejectment who derived title from either of them, and for which compensation has not already been paid. A tenant who is entitled to compensation for the value of any building shall also be paid the value of trees which may have been planted by him on the land."

Under section 9 (1) a tenant who is entitled to compensation under section 3 and against whom a suit in ejectment has been instituted, may apply to the Court for an order that the landlord shall be directed to sell the land for a price to be fixed by the Court. The appellants made an application under this section. By section 12 it is provided that nothing in any contract made by a tenant shall take away or limit his rights under this Act, provided that nothing contained in the Act should affect any stipulations made by the tenant in writing registered as to the erection of buildings, in so far as they related to buildings erected after the date of the contract.

Their Lordships are of opinion that the latter part of the definition of "tenant" in section 2 (4) refers to persons who without a tenancy title continue in possession after the termination of the tenancy, and that the benefit of the remaining sections including section 12, on which the appellants sought to rely, cannot be of avail to the appellants unless and until they have shown that the tenancy here in question was created before the commencement of the Act within the meaning of section 1 (3).

The appellants maintain that the tenancy which terminated on 30th September 1932 was created

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by the lease of 1912, the lease of 1923 being merely a continuation of the earlier lease, and they refer to the verbal agreement made before the expiry of the 1912 lease in support of this argument. But their Lordships are clearly of opinion that, though the physical possession was continuous, the possession from 1st October 1922 was attributable to a new tenancy, which was formally embodied in the lease, dated 1st February 1923, the increased rent thereby provided having been paid by them from 1st October 1922, in terms of the verbal agreement for a lease. Their Lordships, accordingly, concur in the view of both the Courts below, that the tenancy here in question was not created before the commencement of the Act, and that the Act does not apply.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs, and that the judgments appealed from should be affirmed.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondent : *Lambert & White.*

C.S.S.

INCOME-TAX REFERENCE.

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

1939, October 23.

THE COMMISSIONER OF INCOME-TAX, MADRAS, PETITIONER,

v.

MESSRS. BOSOTTO BROTHERS, LIMITED, MADRAS, RESPONDENTS.*

Indian-Income Tax Act (XI of 1922), *ss.* 9 *and* 10 (2) (*vi*)—*Assessee closed its hotel business in* 1934—*Subsequently it let its premises and furniture and fittings to another firm for "running a hotel"—Assessee entitled in* 1937–38 *for deduction from income, depreciation on building and furniture, under section* 10 (2) (vi).

An assessee, a limited liability company, was carrying on a hotel business in Madras. It also carried on a hotel business in Ootacamund until 1934 when it closed the business there since it was found to be unprofitable. Afterwards it leased the premises and its furniture and fittings in Ootacamund to another firm for the purpose "of running a hotel". For the year of assessment, 1937–38, the assessee claimed a deduction from its income a certain sum as a depreciation on the building and furniture at the Ootacamund hotel under section 10 (2) (vi) of the Indian Income-Tax Act, 1922. The Income-tax Officer refused to allow the deduction on the ground that the Ootacamund hotel must be regarded as property and as such assessable only under section 9 of the Act.

Held by the Court (KRISHNASWAMI AYYANGAR J. *dubitante*) that the assessee was entitled to an allowance for depreciation under section 10 (2) (vi) of the Act.

Commissioner of Income-tax, Madras v. *Gin and Rice Factory, Guntur*(1) followed.

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

The material facts and arguments appear sufficiently from the judgment.

* Original Petition No. 301 of 1939.

(1) (1926) I.L.R. 50 Mad. 529 (S.B.).

K. V. Sesha Ayyangar for petitioner.

M. Subbaraya Ayyar for respondents.

JUDGMENT.

LEACH C.J.

LEACH C.J.—The assessee is a company carrying on a hotel business. It was formed in 1928 and took over a hotel in Madras. Subsequently, the assessee built a hotel in Ootacamund and carried on a hotel business there until 1934. These facts do not appear in the statement of the case, but they have been mentioned in argument, and they are not in dispute. The assessee found that its business in Ootacamund was not profitable, and in 1934 leased the premises and its furniture and fittings to a firm named Davis and Company for the purpose, to quote from the order of the Income-tax Officer, "of running a hotel". Messrs. Davis and Company have since then carried on this hotel business. For the assessment year, 1937–38, the assessee desired to deduct from its income the sum of Rs. 2,450 as a depreciation on the building and furniture at the Ootacamund hotel, the assessee-company's contention being that it was entitled to this deduction under the provisions of section 10 (2) (vi) of the Indian Income Tax Act, 1922. The Income-tax Officer refused to allow the deduction and held that the hotel in Ootacamund must be regarded as property and as such, was assessable only under section 9 of the Act. His decision was in turn concurred in by the Assistant Commissioner and the Commissioner. The assessee being dissatisfied asked the Commissioner to refer the matter to this Court as it involved a point of law and the Commissioner has in consequence framed this question :

"Whether in this case the petitioner is entitled to an allowance for depreciation under section 10 (2) (vi) of the Act

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in respect of their Ootacamund building let out to Messrs. Davis and Company."

Mr. Sesha Ayyangar has very properly conceded that when the assessee was running the hotel it was entitled to be assessed under section 10 of the Act, and therefore entitled to the deduction allowed by sub-section 2, clause (vi); but he says inasmuch as the assessee has ceased to utilize the building itself for the purpose of a hotel business the building must be regarded as property and not part of the assessee's business. In this connection, I would point out that clause 3 (*j*) of its memorandum of association gives the assessee power to let on rent the undertaking or any part of it, and therefore the letting of the Ootacamund hotel was part of the company's business. In my opinion the case is governed by the Full Bench decision of this Court in *Commissioner of Income-tax, Madras* v. *Gin and Rice Factory, Guntur*(1) which was followed by the Calcutta High Court in *In re Sadhucharan Ray Chaudhuri*(2). In *Commissioner of Income-tax, Madras* v. *Gin and Rice Factory Guntur*(1) COUTTS TROTTER C.J. and KRISHNAN and BEASLEY JJ. had to consider the case of a company incorporated for the purpose of milling rice. The company's articles of association gave it power to lease out its buildings and there was a clause which stated that

"if it was deemed beneficial to the company with reference to circumstances it might lease or give its factory for contract".

Therefore, the powers of the company were powers which the assessee in the present case possesses. The company let its mill, and the question was whether it was entitled to the deductions allowed by section

(1) (1926) I.L.R. 50 Mad. 529 (S.B.). (2) (1935) I.L.R. 62 Cal. 804.

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10 (2) (vi). It was held that it was. In his judgment BEASLEY J. observed:

"The company could either work the mill itself or could let it out to others to do so. One is the business of milling and the other is the business of letting out the mill for others to do so. Both, in my view, are equally a business, and my answer, therefore, to the reference would be that the company is entitled to a deduction for depreciation of the buildings, machinery and plant."

I can see no difference in principle between the letting out of a rice mill and its machinery and the letting out of a building built and fitted for the purposes of a hotel business. As I have indicated, the assessee here has the power to carry on the hotel business or lease the whole or part of its undertaking. It has leased a part of its undertaking and if it had leased its two hotels, there would have been no difference between the present case and the two cases which I have mentioned. I do not consider that the fact that it has only let out one of the hotels and not the two can make any difference, the assessee having full power to let out the whole or a part of its undertaking. As I regard the case as being governed by *Commissioner of Income-tax, Madras* v. *Gin and Rice Factory, Guntur*(1) I would answer the reference in the affirmative. The assessee, having succeeded in the reference, is entitled to its costs, Rs. 250, and the refund of its deposit of Rs. 100.

MOCKETT J.

MOCKETT J.—I entirely agree. In my view, the decision of the Income-tax authorities was based on the information that what was let in this particular case was "a building". In the decision, *Commissioner of Income-tax, Madras* v. *Gin and Rice Factory, Guntur*(1), it will be seen that the company in that case had

(1) (1926) I.L.R. 50 Mad. 529 (S.B.).

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their powers separately divided with regard to their properties. They were empowered to lease out buildings and vacant sites of lands and by a separate provision they were empowered to lease or give their factory for contract. In this case, that power is contained in the memorandum of association, clause 3 (j), not separately as in the above case. Now, what did Davis and Company get in this case? In my view, they received a lease of the undertaking of a hotel known as a hotel business. In the case to which reference has been made, it was a rice mill business. Now, the equipment of a rice mill is naturally different to the equipment of a hotel. The kitchen, lounges, bars, public rooms, sleeping rooms, bath rooms and lavatories of a hotel naturally find no place in a rice mill any more than the machinery of a rice mill finds a place in a hotel. But none the less, one is just as much a business as the other. It seems to me that, when that view is borne in mind, the difficulties which the Income-tax authorities found in this case largely disappear, because what Bosotto Brothers, Limited, leased was this hotel business in Ootacamund, and if that is so, the position is exactly covered by the decision in *Commissioner of Income-tax, Madras* v. *Gin and Rice Factory, Guntur*(1). I have only to add that I cannot for a moment accept the position that, if an assessee has one undertaking, be it a rice mill or be it a hotel, and if he leases that undertaking it comes under section 10, but if he owns two undertakings and leases only one of them, it comes under section 9. The reasoning for the position that the latter position comes under section 9 seems to me to be without any foundation whatever. For these reasons and for the reasons given by my Lord the CHIEF

(1) (1926) I.L.R. 50 Mad. 529 (S.B.).

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KRISHNASWAMI AYYANGAR J.

JUSTICE, I consider that the answer to the reference should be in the affirmative.

KRISHNASWAMI AYYANGAR J.—It is not without some hesitation that I subscribe to the opinions just now expressed by my Lord and my brother, MOCKETT J. I take the facts to be that the building which has formed the subject-matter of the contest was built and fitted up by the assessee to be utilised for the running of a hotel business, that the assessee actually ran such a business there for some years until he closed it in 1934. After the business was discontinued, the assessee let the building on a monthly rent of Rs.120 to Messrs. Davis and Company who have been running a hotel of their own in it since then. I also take it that it was for the purpose of running a hotel that the building was leased. In spite of the fact that the building was not used by the assessee for purposes of *his* business during the year of account, he claims that an allowance should be made out of his gross business income for the depreciation of his building during the year of account. It is claimed on his behalf, that he is entitled to the allowance under section 10 (2) (vi).

The question is whether the proper section to be applied to the case is section 9, as claimed by the department, or section 10 of the Indian Income Tax Act, 1922, as claimed by the assessee. On behalf of the department a suggestion was made, but not persisted in, that section 9 must first be resorted to before considering the applicability of section 10. It seems to me that, if a case properly comes within section 10, there is no question of having to choose between that section and some other section in the Act. Being a taxing statute, the Income Tax Act should receive a strict construction, that is, a construction in favour of the subject, and not in favour of the Crown. If a

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case appears to be governed by either of two provisions, it is clearly the right of the assessee to claim that he should be taxed under that one which leaves him with a lighter burden.

Section 10 lays down the method to be adopted for arriving at the tax payable by an assessee under the head "business" and says that the tax should be payable in respect of the profits or gains of any business carried on *by him*. In computing such profits and gains certain allowances have necessarily to be made as directed by the various clauses of sub-section 2. These allowances are peculiar to the case where income from a business is assessed, other rules being made for the computation of income from other sources.

It will be advantageous to set out the relevant portions of the section which throw light on the question at issue.

"10. (1) The tax shall be payable by an assessee under the head 'business' in respect of the profits or gains of any business carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely :—

(i) any rent paid for the premises in which *such business* is carried on . . .

(ii) in respect of repairs, where the assessee is the tenant only of the premises and has undertaken the cost of such repairs . . .

(iii) in respect of capital borrowed for the purposes of *the business* . . .

(iv) in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores, *used for the purposes of the business* . . .

(v) in respect of current repairs to *such* buildings, machinery, plant or furniture . . .

(vi) in respect of depreciation of *such* buildings, machinery, plant or furniture being the property of the assessee . . ."

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I have italicized the words which have a material bearing on the point under consideration. The meaning of the word "such" in clause (vi) is to be got by going back to clause (iv), and it is clear that a depreciation is to be allowed only if the buildings, machinery, etc., were used for the purposes of *the* business. Two conditions have to be satisfied by the assessee before he can claim depreciation: (1) the buildings, machinery, plant or furniture should be the property of the assessee and (2) they must be used for the purposes of *the* business.

The use of the definite article "the" and of the word "such" in these clauses makes it clear to my mind that the business contemplated in clause (vi) of the section is the business carried on by the assessee and not by any person or persons other than the assessee, and that it is in respect of a building belonging to the assessee, and used for *his* business, that he can claim a depreciation allowance.

Can it be said in the present case that the Ootacamund building was used in the year of account for the purposes of "the business", that is, the business of the assessee? *Prima facie*, I should be inclined to take the view that the business carried on by Messrs. Davis and Company is not the business of the assessee, but is really the business of Messrs. Davis and Company only. The position, I concede, may be different if instead of the building, fitted up as this building has been fitted up, being leased, the business itself had been leased as a running concern. The Act, it seems to me, contemplates the business as being something different from the buildings, the plant, machinery or furniture which may be used for the purpose of the business. It is as different from any of these things,

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as for instance the capital embarked in it, or the establishment with which it is carried on. The term "business" as used in the section denotes, I think, an abstract and intangible thing, quite apart from any of these physical adjuncts, and quite apart also from such other elements as the goodwill, the business connections, the business reputation and so on. In my judgment it is an entity different from any of these things, and has to be so understood in the Act. A running business can be leased, as it can be sold, as such, together with the buildings where it is carried on. If the lessee carries on the business leased to him, using the same premises together with the fittings and furniture, though for the purposes of his own business, there may be some ground—even of this I am by no means sure—for saying that the assessee is still carrying on the business, through the agency of the lessee, so as to attract the provisions of section 10 (2) (vi).

But the position here is different. In the premises leased, it is not denied that the lessees, Messrs. Davis and Company, are carrying on their own business, and it is not claimed that the assessee leased the business as a running concern either. The business in question cannot be regarded even in a theoretical and legal sense as the business of the assessee and must in my opinion be held to be the business of the lessees. Can it then be said that section 10 (2) (vi) applies to such a case? It is this point which created a considerable amount of difficulty in my mind and I should have, if it were open to me to do so, been inclined to answer this question in the negative. But I agree that the decision of the Full Bench in *Commissioner of Income-tax, Madras* v. *Gin and Rice Factory, Guntur*(1) binds me and leaves me no option. There, the company which

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owned a rice mill leased it to a lessee and the latter carried on his own business in the premises and with the plant and machinery of the lessors. There is nothing in the report of the case to show that the lease was of the business as a running concern and there was therefore no warrant for regarding the business that was run by the lessee as the business of the assessee. Still the Court held that section 10 (2) (vi) applied for reasons, which are, if I may say with great respect, clearly stated in the judgment of BEASLEY J. as he then was. The learned Judge pointed out:

> "The company could either work the mill itself or could let it out to others to do so. One is the business of milling and the other is the business of letting out the mill for others to do so. Both, in my view, are equally a business, . . ."

In the present case also, it would appear from clause 3 (j) of the memorandum of association that the assessee is empowered to let on rent the undertaking or all or any of the property for the time being belonging to the assessee. The letting of the property in this case must be held, according to the decision in the case cited, as part of the business of the assessee. Bound as I am by this decision, I am constrained to answer the question referred to us in the affirmative. According to the Full Bench decision the question in each case will be whether the leasing of the property can be regarded as coming within the scope of the objects clause of the memorandum of association of the assessee company. In that case, as in this, the assessee was a limited company.

I may perhaps add that there is no objection under the Act either to an individual or a company carrying on business and also owning property. The income from each of these sources will then be separately assessed under different provisions. In the first case, the

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section to be applied will be section 10 (2) (vi) and in the second case the proper section applicable will be section 9. The assessee will have to pay the aggregate of the taxes under both heads.

G.R.

ORIGINAL JURISDICTION.

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

1939, September 27.

JONNALAGADDA RAMASWAMY CHETTY (RESPONDENT), PETITIONER,

v.

T. K. RAMACHANDRA RAO (PETITIONER), RESPONDENT *.

*Madras Debt Conciliation Act (XI of 1936), sec. 4—Debtor's application under, for settlement of his debts—Maintainability—Sole creditor not agreeing to settlement—Sec. 17 of Act—Effect—Madras Agriculturists Relief Act (IV of 1938)—Power of Board to scale down debts under—*Certiorari, *writ of.*

Where on an application by a debtor under section 4 of the Madras Debt Conciliation Act, 1936, "for the settlement of his debts", the creditors representing more than fifty per cent of the applicant's debts do not agree to an amicable settlement with him, the Debt Conciliation Board is bound under section 17 of the Act to dismiss his application.

Where there is only one creditor and he does not agree to a settlement of his debt, the proper and only course for the Board to follow is to dismiss the debtor's application under section 4 of the Act. The Board has no power to scale down debts under the Madras Agriculturists Relief Act, 1938.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court may be

* Civil Miscellaneous Petition No. 2543 of 1939.

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pleased to issue a writ of *certiorari* calling for the records in Debt Conciliation Board Case No. 1 of 1939, Dhone, and to quash the order passed by the said Board on 28th May 1939.

Kasturi Seshagiri Rao for *Ramanujam* and *Venkata-seshayya* for petitioner.

D. R. Krishna Rao for respondent.

LEACH C.J.

The ORDER of the Court was delivered by LEACH C.J.—The petitioner filed the application before us for the issue of a writ of *certiorari* against the Debt Conciliation Board of Dhone, Kurnool District, and for the quashing of an order of the Board dated 28th May 1939. A rule *nisi* was issued, and we have heard the arguments. It is clear that the rule must be made absolute. The facts are these. On 6th February 1939 the respondent, who claims to be an agriculturist, filed an application purporting to be an application to the Debt Conciliation Board under section 4 (1) of the Madras Debt Conciliation Act, 1936. In this petition the respondent set out three debts all of which were shown to be due to the petitioner. The respondent apparently had only one creditor. Having set out the debts payable to the petitioner, the respondent's petition proceeded as follows:

"I hereby declare that I am an agriculturist and the debts shown above are liable to be scaled down under the provisions of the Madras Agriculturists Relief Act, 1938."

The Board entertained the petition and served notice on the petitioner in these proceedings. In due course the Board went into the question whether the respondent was in fact an agriculturist, and came to the conclusion that he was. The petitioner contended that as the debts were secured on house property, they were excluded from the scaling down

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sections of the Madras Agriculturists Relief Act, 1938, by virtue of section 4 (*d*) of that Act. The Board decided against the petitioner and held that the respondent's debts should be scaled down under the provisions of the Madras Agriculturists Relief Act. It is this order which the petitioner asks the Court to quash.

Although the petition which the respondent filed on 6th February 1939 purported to be a petition under section 4 of the Madras Debt Conciliation Act, 1936, what he was in effect asking the Board to do was to scale down his debts under the provisions of the Madras Agriculturists Relief Act which the Board had no power to do. But treating the respondent's application to the Board as an application under the Madras Debt Conciliation Act, 1936, it is manifest from the provisions of that Act that the petition should have been dismissed. Section 4 provides that a debtor may make an application "for the settlement of his debts". Section 14 (1) says that if the creditors to whom more than fifty per cent of the total amount of the debtor's debts is owing come to an amicable settlement with the debtor, such settlement shall be reduced to writing in the form of an agreement recording the amounts payable to such creditors and the manner in which, the assets from which, and the times at which they are to be paid. But if the creditors representing more than fifty per cent of the applicant's debts do not agree the Board is bound under section 17 of the Act to dismiss his application. As I have already pointed out, there is here only one creditor and he has not agreed to a settlement of his debts. There having been no settlement, the proper and only course for the Board to follow was to dismiss the application filed by the respondent.

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The respondent has entirely misconceived the object of the Madras Debt Conciliation Act and has misread its provisions. If he is an agriculturist and the debts which he owes to the petitioner are debts which do not fall within the provisions of section 4 (*d*) of the Madras Agriculturists Relief Act, 1938, he is entitled to have the debts scaled down in accordance with the provisions of that Act, and if the petitioner asks a Court to enforce the payment of a larger sum than is allowed by the Act, the Court will have no power to do so.

The Board having acted without jurisdiction in passing the order of 28th May 1939, that order must be quashed, and there will be an order accordingly. The petitioner having succeeded is entitled to his costs which we fix at Rs. 50.

A.S.V.

APPELLATE CIVIL.

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

1939, August 4.

THE COIMBATORE VENKATARAMANA VILAS CO., LTD., BY ITS SECRETARY C. V. RAMASESHA AYYANGAR (PETITIONER), PETITIONER,

v.

THE OFFICIAL RECEIVER, COIMBATORE, AND ANOTHER (RESPONDENTS), RESPONDENTS.*

Hindu law—Father's debt—Son asking for and obtaining time for payment of—Son, if personally liable for debt.

The mere fact that the son of a deceased Hindu, when pressed for payment of his father's debts, asks for and obtains

* Civil Revision Petition No. 761 of 1937.

COIMBATORE VENKATA-RAMANA VILAS CO., LTD. v. OFFICIAL RECEIVER, COIMBATORE.

time for payment will not make him personally liable for such debts.

PETITION under section 75 (I) of Act V of 1920 praying the High Court to revise the order of the District Court of Coimbatore, dated 24th June 1937, and made in Civil Miscellaneous Appeal No. 104 of 1932, preferred against the order of the Court of the Subordinate Judge of Coimbatore (Additional), dated 19th August 1932, and made in Interlocutory Appeal No. 383 of 1932 in Interlocutory Petition No. 43 of 1924 (District Court, Coimbatore).

K. S. Desikan for petitioner.

P. Govinda Menon for respondents.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.— One Kandaswami Pillai died in 1923 leaving a considerable amount of property, but large debts. He was survived by two widows and seven sons of whom only two were majors. The eldest son was Sivagurunatha. On 16th January 1924 the second son, Chidambaram, and the widows purporting to act as the guardians of their respective sons granted a power of attorney to Sivagurunatha to administer the estate of the deceased. Why it was necessary to execute this power of attorney is not apparent. Sivagurunatha was under Hindu law the manager of the family and lawful guardian of the minors. On 18th January 1924 Sivagurunatha sold certain immovable property belonging to the estate and five days later sold other estate property. On 22nd February 1924 a creditor applied for his adjudication in insolvency on the ground that the two transfers which he had effected in the previous month constituted fraudulent preferences under the insolvency law. The application was filed in the

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District Court of Coimbatore and the District Judge dismissed it. An appeal followed to this Court and this Court being of the opinion that the case had not been properly dealt with on the merits set aside the order of dismissal and remanded the case for further enquiry. When the case came before the District Judge on remand, Sivagurunatha consented to an order of adjudication being passed against him and to an order vesting in the Official Receiver the properties which his father had left. Accordingly orders to that effect were passed on 11th August 1926. The Official Receiver took possession of the estate and has to a very large extent carried out the task of administration. Nearly all the properties have been sold and the creditors have been paid eight annas in the rupee.

The present petitioner is admittedly a creditor of the estate. He also claims to be a secured creditor under two bonds executed respectively on 30th January 1924 and 21st February 1924, but the validity of these documents is being challenged by the Official Receiver. On 18th March 1932 the petitioner, as a counter-blast, filed an application for an order annulling the adjudication. This application was heard by the Subordinate Judge of Coimbatore and was dismissed. The petitioner appealed to the District Judge, who concurred in the order dismissing the petition and consequently dismissed his appeal. He then filed a petition asking this Court in the exercise of its revisional powers to set aside the adjudication.

When the case was before the District Judge the petitioner contended that the order was bad because Sivagurunatha had no personal liability in the matter and that in any event the Court had no power to

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LEACH C.J.

order the vesting of the entire estate properties in the official receiver. On the first point the District Judge held that there was personal liability because, when pressed for payment by a creditor, Sivagurunatha had asked and obtained time to collect the outstandings. On the second point he held that the petitioner could have appealed against the vesting order, but as he had not done so it was too late to attack it. The petition now before us came in the first instance before VARADACHARIAR J. who referred it to a Bench because he was unable to accept as correct the opinion of the District Judge that the mere asking for and the obtaining of time to collect the outstandings was sufficient to make Sivagurunatha personally liable for his father's debts. The learned Judge also considered that the language used in the judgment of this Court in *Muthu Veerappa Chettiar* v. *Sivagurunatha Pillai*(1) in setting aside the order dismissing the application for adjudication and remanding that application for inquiry was too general in character.

We are in entire agreement with VARADACHARIAR J. that the mere asking for and obtaining of time for payment would not make Sivagurunatha personally liable and if he was not personally liable he could not be adjudicated for his father's debts. But the question of what is the effect of time being asked for and granted, really does not arise in this case. The position here is that Sivagurunatha accepted in the insolvency proceedings the contention that he was personally liable and had committed acts of insolvency. What was operating in his mind it is not necessary to inquire. It is far too late in the

(1) (1925) I.L.R. 49 Mad. 217.

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day for the petitioner to challenge the order of adjudication, and the same remark applies to his attempt to have the vesting order set aside. For over eleven years he and the members of Sivagurunatha's family have acquiesced in the adjudication and in the administration of the estate by the Official Receiver. Had he so desired, the petitioner could have challenged on appeal both the order of adjudication and the vesting order. He accepted these orders as being proper orders and would not have come into Court to-day if the Official Receiver had not questioned his claim to rank as a secured creditor. This is certainly not a case in which the exercise of the Court's revisional powers is called for. The order of the District Judge was a proper one and the application for its revision must be dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Kunhi Raman.

AHMAD BUX ALLA JOVAYA (DEFENDANTS), APPELLANTS,

v.

FAZAL KARIM (PLAINTIFF), RESPONDENT.*

Contract—Offer sent by letter or telegram from one place and received in another place—Place of offer, which—Place of despatch—If a material factor in deciding where cause of action arose.

The posting of an offer or the despatch by telegram of an offer from a particular place cannot be regarded as part of a

* Original Side Appeal No. 48 of 1938.

AHMAD BUX v. FAZAL KARIM.

cause of action. The making of an offer has to be proved in order to entitle a plaintiff to succeed in a suit for damages for breach of contract; but an offer is made at the place where it is received, and, if it is made by post or telegram, the place of despatch is not a material factor.

Engineering Supplies, Ltd. v. *Dhandhania & Co.*(1) not followed.

Clarke Brothers v. *Knowles*(2) and *The National Insurance Co., Ltd., Calcutta* v. *Seethammal*(3) followed.

APPEAL from the judgment and order of GENTLE J., dated 22nd April 1938, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 219 of 1937.

V. Radhakrishnayya for *B. Pocker* for appellants.

K. Narasimha Ayyar for *K. N. Visvanathan* for respondents.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The question raised in this appeal is whether a cause of action arose in part within the original civil jurisdiction of this Court. The appellants are a firm of hide merchants carrying on business in Hyderabad, Sind. On 21st April 1937 the appellants telegraphed to the respondent, who is a merchant carrying on business at Madras and at Madhavaram, offering to sell him 5,000 sheep hides of a certain quality at the price of Rs. 128 per 100 skins, delivery to be given at the railway station in Hyderabad. The respondent by a telegram of the same date made a counter-offer. He informed the appellants that he was prepared to accept the hides at the price of Rs. 125 per 100 skins. This counter-offer was accepted by the appellants by telegram the next day. On 4th May 1937 the appellants made an offer to the respondent in respect of another parcel of hides

(1) (1930) I.L.R. 58 Cal. 539. (2) [1918] 1 K.B. 128
(3) (1933) 65 M.L.J. 455.

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but of a different quality at the price of Rs. 80 per 100 skins. Here again, the respondent made a counter-offer. On 5th May he telegraphed saying that he was prepared to buy at the price of Rs. 75 per 100 skins. This counter-offer was accepted by the appellants by a telegram despatched from Hyderabad on 7th May. The prices given were for Hyderabad railway station and therefore the respondent under the terms of the contract was bound to take delivery at Hyderabad. This was not convenient and at the respondent's request the goods were forwarded to Madras *via* Karachi through a firm of forwarding agents. The arrangements in this connection must be taken to be the arrangements of the respondent. Both consignments duly arrived in Madras and were taken by the respondent to his tannery at Madhavaram, where they were unpacked and inspected. The respondent considered that the goods were of inferior quality and he decided to reject them, which he did by a letter posted from Madras. The appellants denied that the goods were of inferior quality and refused to take them back. The result was that a suit was filed on the Original Side of this Court by the respondent for damages for breach of contract.

In the plaint the respondent averred that part of the cause of action arose in Madras

> "where the offers were made, wherefrom the sum of Rs. 7,500 was remitted to the defendants and the breach of the condition of the goods was ascertained and the goods were rejected".

Under clause 12 of the Letters Patent the Court has jurisdiction to try a suit in which the cause of action partly arises within the local limits of the ordinary civil jurisdiction of the Court, provided leave is first obtained. The respondent applied for and

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obtained leave to file the suit. The appellants, having been served with the summons, asked for the revocation of the order granting leave. The application was heard by GENTLE J. who rejected it. The appeal now before us is from that order. The learned Judge held that the case fell within the decision of the Calcutta High Court in *Engineering Supplies, Ltd.* v. *Dhandhania & Co.*(1) which he considered was not in conflict with the decisions of this Court in *The National Insurance Co., Ltd., Calcutta* v. *Seethammal*(2) and *Kamisetti Subbiah* v. *Katha Venkatasawmy*(3). As I do not share the opinion that the decisions of the two Courts are in harmony it will be necessary to examine these cases, but before doing so I consider it desirable to refer to two English decisions which have bearing on the appeal.

The first of these cases is *Read* v. *Brown*(4) in which the Court of appeal (Lord ESHER and FRY and LOPES L. JJ.) defined "cause of action" as comprising every fact, which if traversed, it is necessary for a plaintiff to prove to entitle him to succeed. This definition has found general acceptance. The second case is *Clarke Brothers* v. *Knowles*(5) in which it was held that where a contract is made by an offer and acceptance sent through the post between parties residing in different County Court districts the posting of the offer is not part of the cause of action within the meaning of section 74 of the County Courts Act. That section corresponds with clause 12 of the Letters Patent of this Court. Under it an action or matter may be commenced by leave of the Judge or Registrar in the Court in the district of which the action or claim

(1) (1930) I.L.R. 58 Cal. 539. (2) (1933) 65 M.L.J. 455.
(3) (1903) I.L.R. 27 Mad. 355. (4) (1889) 58 L.J.Q. B. 12[illegible].
(5) [1918] 1 K.B. 128.

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"wholly or in part arose". In that case the plaintiffs, who carried on business at West Hartlepool, bought from the defendant, who carried on business at Croydon, a quantity of glass and scrap wire. The contract was made entirely by correspondence through the post. The defendant failed to deliver the goods and the plaintiffs instituted a suit in the West Hartlepool County Court, having first obtained leave under section 74 of the County Courts Act. It was contended by the plaintiffs that inasmuch as their offer which the defendant accepted was made in a letter posted in West Hartlepool part of the cause of action arose there. LAWRENCE and LUSH JJ. were emphatic in their opinion that the posting of the offer was no part of the cause of action. LAWRENCE J. said:

> "The making of an offer is part of the cause of action, but an offer is made where it is received, and that in this case was at Croydon."

The words of LUSH J. were:

> "The material question is not where the offer was sent from but where it was made, and the making of the offer is proved by showing that it was received."

I will now turn to the decisions of this Court referred to by GENTLE J. In *The National Insurance Co., Ltd., Calcutta* v. *Seethammal*(1) the question for decision was whether a contract of insurance had been effected in Madras or in Calcutta. The proposal for a policy was made in Madras through a local agent who had no power to accept it. It could only be accepted at the office of the insurance company in Calcutta. The proposal for the policy was posted from Madras and it was contended that the contract must therefore be deemed to have been

(1) (1933) 65 M.L.J. 455.

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made here. The Court negatived this contention and relying on *Clarke Brothers* v. *Knowles*(1) held that an offer made through post is made in the place where the offer is received.

The case of *Kamisetti Subbiah* v. *Katha Venkatasawmy*(2) was one under the Code of Civil Procedure, 1882, and is not really in point. Under that Code a suit had to be filed in the Court within whose jurisdiction the cause of action arose; or, all the defendants at the time of the commencement of the suit, actually and voluntarily resided, or carried on business, or personally worked for gain; or any of the defendants, at the time of the commencement of the suit, actually and voluntarily resided, or carried on business, or personally worked for gain: provided that in the last case the leave of the Court was given, or the defendants who did not reside, or carry on business or personally work for gain, acquiesced in the institution of the suit. There were three explanations to the section. The third explanation stated that in suits arising out of contract, the cause of action arose within the meaning of the section at the place where the contract was made, or the place where the contract was to be performed or performance thereof completed, or the place where in performance of the contract any money to which the suit related was expressly or impliedly payable. The corresponding section in the present Code, section 20, follows the lines of the Letters Patent and says that a suit shall be instituted in a Court within the local limits of whose jurisdiction the cause of action, wholly or in part arises. It was held in *Kamisetti Subbiah* v. *Katha Venkatasawmy*(2) that the contract was made in Madras, where the plaintiff's proposal

(1) [1918] 1 K.B. 128. (2) (1903) I.L.R. 27 Mad. 355.

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—sent by post—came to the knowledge of the defendants and where the defendants' acceptance was posted. What the Court had to decide was where the cause of action arose, not whether it arose partly in one place and partly in the other, and on the facts of the case it came to the conclusion that it must be deemed to have arisen in Madras.

The question in *Engineering Supplies, Ltd.* v. *Dhandhania & Co.*(1) was whether the Calcutta High Court had jurisdiction to try a suit for breach of a contract made between a Calcutta merchant and an English company for the supply of goods. The offer was made by cablegram to London from Calcutta and accepted by cablegram from London. In accordance with the terms of the contract the goods were sent to Calcutta, but they were rejected because they were said not to be of the specified quality. It was held by RANKIN C.J. and GHOSE J. that the Calcutta High Court had jurisdiction to try the suit as part of the cause of action arose therein. The respondent in the present case has laid great stress on the following passage in the judgment of RANKIN C.J.:

"There remain two matters on which the plaintiff can rely in contending that a part of the cause of action took place in Calcutta. One is that his offer was sent from Calcutta by a cable to London, and the other is that he rejected the goods which he did by sending the defendants a communication from Calcutta or by informing their representative in Calcutta."

The learned CHIEF JUSTICE did regard the making of the offer by cable from Calcutta as part of the cause of action and the rejection of the goods in Calcutta as also a part of the cause of action. There is only one common factor in that case and the case now before us and that is that the suit was instituted in the place

(1) (1930) I.L.R. 58 Cal. 539.

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from which the accepted offer was sent. The other facts are very different. The contract in the Calcutta case was a C.I.F. contract under which the goods had to be delivered in Calcutta. In the present case the contract is a F.O.R. contract under which the sellers were bound to deliver only at the Hyderabad railway station. I may say in passing that in the present case we have only been asked to hold that the Court has jurisdiction because the offers were made from here and the goods were rejected from here. No point has been made of the fact that money was remitted from here to Hyderabad in payment of the goods.

With the greatest respect for what was said in *Engineering Supplies, Ltd.* v. *Dhandhania & Co.*(1) I am unable to agree that the posting of an offer or the despatch by telegram of an offer from a particular place can be regarded as part of the cause of action. The making of the offer has to be proved in order to entitle a plaintiff to succeed in such a case as this, but the offer is made at the place where it is received and if it is made by post or telegram the place of despatch is not a material factor. The case of *Clarke Brothers* v. *Knowles*(2) apparently was not considered in *Engineering Supplies, Ltd.* v. *Dhandhania & Co.*(1). As I have indicated, it was considered and accepted in *The National Insurance Co., Ltd., Calcutta* v. *Seethammal*(3) and that being a decision of a Bench of this Court is binding on us. For the reasons indicated I hold that part of the cause of action in this case did not arise in Madras by reason of the fact that the respondent sent from here his offers by telegram.

The only other point to be considered is with regard to the rejection of the goods. The rejection

(1) (1930) I.L.R. 58 Cal. 539. (2) [1918] 1 K.B. 128.
(3) (1933) 65 M.L.J. 455.

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does undoubtedly form part of the cause of action, but if the place of rejection is material it was not at Madras. It was at Madhavaram where the goods were sent for examination. The respondent had to communicate his decision to the appellants but the fact that he did so through a letter posted in Madras did not make Madras the place of rejection. The notice of rejection must on the authority of *Clarke Brothers* v. *Knowles*(1) be taken to have been given in Hyderabad where the letter was received. In my opinion the place of rejection was not material. In order to succeed the respondent has not to show where he rejected the goods, but that he was entitled to reject them because they were not of contract quality.

It follows that in my judgment the cause of action did not arise even in part in Madras and consequently the Court has no jurisdiction to try the suit. In these circumstances the appeal must be allowed and the permission to sue in this Court revoked. The plaint will accordingly be taken off the file of the Original Side. The appellants are entitled to their costs here and below.

KUNHI RAMAN J.—I agree with my Lord.

G.R.

(1) [1918] 1 K.B. 128.

ORIGINAL JURISDICTION.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Kunhi Raman.

1939, July 31.

A. R. A. N. THYAGARAJAN CHETTIAR, TRUSTEE OF SRI KOPPUDAYANAYAGI AMMAN TEMPLE, KARAIKUDI, PETITIONER,

v.

THE SECRETARY TO GOVERNMENT OF MADRAS, REVENUE DEPARTMENT, FORT ST. GEORGE, MADRAS, AND TWO OTHERS, RESPONDENTS.*

Certiorari—*Writ of—Madras District Municipalities Act (V of 1920), sec. 36—Order of Local Government under—Writ of* certiorari *against Government in respect of—High Court's jurisdiction to issue—Executive order of Government —Power of Government to cancel or vary—Government of India Act, 1935, sec. 49—Scope of.*

In front of a temple and vested in a Municipal Council was a tank measuring 266 feet by 272 feet. On the ground that the tank was in an insanitary condition and that the cost of putting it into a proper condition and of so maintaining it was too costly, the Municipal Council decided to reduce the size of the tank to 125 feet by 125 feet. The petitioner, the trustee of the temple, objected and moved the Provincial Government to interfere under the powers conferred upon it by section 36 of the Madras District Municipalities Act, 1920, and to direct the tank to be maintained at its original size. The Government, without giving the Municipal Council an opportunity of stating its case, decided that the Municipal Council should reduce the size of the tank to 218 feet by 208 feet only. The Municipal Council applied to the Government to revise its order, and the Government, by an order, dated 5th June 1939 and issued in the name of the Governor of the Province, cancelled its previous order and allowed the Municipal Council to reduce the size of the tank to 125 feet by 125 feet as it had proposed. The petitioner thereupon applied

* Civil Miscellaneous Petitions Nos. 2506 and 2507 of 1939.

to the High Court for the issue of a writ of *certiorari* against the Government for quashing its order of 5th June 1939.

Held.—(i) The High Court had no power to issue a writ of *certiorari* in the case.

The High Court has no jurisdiction to issue a writ against the Governor. The order of 5th June 1939, being an executive order lawfully passed and lawfully issued in the name of the Governor and therefore his order, the Court has no power to interfere with it. No differentiation could be made between the Governor and the Provincial Government in such a matter. Section 49 of the Government of India Act, 1935, has no bearing on the question.

Venkataratnam v. *Secretary of State for India*(1) relied upon.

(ii) The Government has power to cancel or vary its own executive order. The order of 5th June 1939 was therefore within the limits of its authority. Consequently, even if the High Court had power to issue a writ of *certiorari* in the matter, the case was not one in which it should exercise it.

PETITION praying that in the circumstances stated in the affidavit filed therewith, the High Court may be pleased to direct the issue of writ of *certiorari* calling upon the first respondent herein to submit to the High Court the proceedings relating to the order, dated 5th June 1939, made in Government Order Miscellaneous No. 1380 and to quash the said order and to restrain the second and third respondents herein by an injunction from further filling up the tank referred to in the said Government Order No. 1380 and demolishing the structure and steps therein; and petition praying that in the circumstances stated in the affidavit filed with Civil Miscellaneous Petition No. 2506 of 1939 on the file of the High Court, the High Court may be pleased to direct the issue of an injunction restraining the second and third respondents herein from further filling up the Kallukattu

(1) (1929) I.L.R. 53 Mad. 979.

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tank, Karaikudi, and from demolishing the structures and steps therein and thereabout pending Civil Miscellaneous Petition No. 2506 of 1939 on the file of the High Court.

L. S. Veeraraghava Ayyar and *N. Srinivasa Ayyangar* for petitioners.

Government Pleader (*B. Sitarama Rao*) for first respondent.

K. Bhashyam Ayyangar and *V. P. Chakravarthi* for respondents 2 and 3.

LEACH C.J.

The ORDER of the Court was delivered by LEACH C.J.—The petitioner is the trustee of the Sri Koppudayanayagi Amman temple, Karaikudi. In front of this temple and vested in the Municipal Council of Karaikudi is a tank, measuring 266 feet by 272 feet. The tank was in an insanitary condition and the cost of putting it into a proper condition and of so maintaining it was said to be too costly. Consequently, the Municipal Council decided to reduce the size of the tank to 125 feet by 125 feet. The petitioner objected and moved the Provincial Government to interfere under the powers conferred upon it by section 36 of the Madras District Municipalities Act, 1920. He asked for a direction that the tank be maintained at its original size. As the result of the petitioner's representations, the Government decided that the Municipal Council should only reduce the size of the tank to 218 feet by 208 feet. The Municipal Council had not been given an opportunity of stating its case and it applied to the Government to revise its order. After hearing what the Municipal Council had to say, the Government, by an order, dated 5th June 1939, cancelled its previous order and allowed the Municipal Council to reduce the size of the tank to 125 feet by 125 feet, as it had proposed. The

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petitioner now asks the Court to issue a writ of *certiorari* against the Government and quash its order of 5th June 1939. The order, as required by section 59 of the Government of India Act, 1935, was issued in the name of the Governor of the Province. In *Venkataratnam* v. *Secretary of State for India*(1) a Bench of this Court held that the Court had no jurisdiction to issue a writ against the Governor under section 106 (1) of the Government of India Act, 1915, and no jurisdiction to issue a writ against the Governor "acting with the Ministers", which was the application in that case. The petitioner says that inasmuch as he is not asking for a writ to issue against the Governor, but only against the Provincial Government, his application does not fall within that decision and that it lies by reason of the provisions of the Government of India Act, 1935. He contends further that the Government has no power to revise its own order.

The position under the Government of India Act, 1935, is not here different from the position under the Government of India Act, 1915, and it is abundantly clear that this Court has no power to issue a writ of *certiorari* in this case. By virtue of section 223 of the Government of India Act, 1935, this Court possesses just the same powers as it had before that Act came into force. By virtue of section 106 (1) of the Government of India Act, 1915, it had the jurisdiction and powers vested in it by the Letters Patent. In order to ascertain what those powers were we have got to go back to the provisions of the Charter of the Supreme Court, which was granted on 26th December 1800. The Charter of the Supreme Court expressly provided

(1) (1929) I.L.R. 53 Mad. 979.

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that it was not competent for the Court to hear or determine, or entertain or exercise jurisdiction in a suit or action against the Governor-General of Fort William, or the Governor, or any member of the Council for or on account of anything done by them in their public capacity or "acting as Governor-General, or Governor and Council". The Supreme Court was replaced by the High Court after the passing of the Indian High Courts Act, 1861. Section 9 of that Act provided that the High Courts established under the Act should have and exercise such civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and such powers and authority for and in relation to the administration of justice in the Presidency for which it was established as Her Majesty might grant and save as the Letters Patent might otherwise direct and, subject and without prejudice to the legislative powers of the Governor-General of India in Council in relation to such matters, should have and exercise the jurisdiction of the Courts in the same Presidency abolished by the Act. The Letters Patent granted to this Court under that Act did not enlarge the powers of the Court by taking away the restrictions imposed by the Charter of the Supreme Court. The restrictions consequently remained. Section 110 of the Government of India Act, 1915, expressly provided that the Governor-General, each Governor, and the members of their respective executive councils should not be subject to the jurisdiction of a High Court by reason of anything counselled, ordered or done by any of them in his public capacity only. The corresponding section in the Act of 1935 is section 306 which states that no proceedings whatsoever shall lie in and no process whatsoever shall issue from any Court in India against

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the Governor-General, against the Governor of a Province or against the Secretary of State whether in a personal capacity or otherwise. There are these statutory provisions and the prohibition in the Supreme Court Charter, a prohibition which was not removed by the Letters Patent of the High Court. The position in this respect is therefore the same as it was in 1800.

While accepting this to be the case so far as the Governor is concerned, the learned Advocate for the petitioner says that by virtue of section 49 of the Government of India Act, 1935, he is entitled to the issue of the writ against the Provincial Government. Section 49 says that the executive authority of a Province shall be exercised on behalf of His Majesty by the Governor, either directly or through officers subordinate to him, but nothing in the section shall prevent the Federal or the Provincial Legislature from conferring functions upon subordinate authorities or be deemed to transfer to the Governor any functions conferred by any existing Indian law on any Court, Judge, or officer or any local or other authority. It is argued that this section expressly prevents the Governor from issuing an order under section 36 of the Madras District Municipalities Act, 1920, and that the Provincial Government alone can issue it. This is a far-fetched argument. The Provincial Government has full power under section 36 of the Madras District Municipalities Act, 1920, to control the actions of a Municipal Council. Section 59 requires all executive action of the Government of a Province to be taken in the name of the Governor and the order in question, being an executive order lawfully passed and lawfully issued in the name of the Governor and therefore his order, the Court has no power to interfere with it.

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LEACH C.J.

It is impossible to differentiate between the Governor and the Provincial Government in a matter of the nature of the one now before us. Section 49 has no bearing on the question.

Even if this Court has power to issue a writ of *certiorari* in this matter—I am firmly of the opinion that it has not—this is not a case in which it should exercise it. The order was within the limits of authority and it cannot be said with reason that the Government has no power to cancel or vary its own executive order. If it had not this power, a wrong would be without a remedy, which is contrary to all principle.

For the above reasons this application must be dismissed with costs, two sets, one set in favour of the first respondent and the other set in favour of the other two respondents.

Pending the hearing of this application an interim injunction was issued restraining the Chairman and the Commissioner of the Municipality, the second and the third respondents, from further filling up the tank. As the result of the dismissal of this application the injunction will be dissolved. The second and third respondents are entitled to their costs in the injunction application.

A.S.V.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Patanjali Sastri.

1939, April 27.

DINSHAW DADABHAI ITALIA (TWENTY-FIFTH DEFENDANT), APPELLANT,

v.

MOHAMAD MOHAMAD AND FORTY-THREE OTHERS (PLAINTIFFS 1 TO 3 AND DEFENDANTS AND NIL), RESPONDENTS.*

Will—Executors—Power to carry on business and to pledge the credit of business for same—Mortgage on general assets—No express power to charge general assets—General assets not bound by mortgage—Indian Succession Act (XXXIX of 1925), sec. 307 (1)—Effect of.

A Muhammadan left a will which contained, inter alia, the following terms: "I expressly authorise and empower my executors to raise money required for the businesses by borrowing from banks . . . as the exigencies of the businesses require and for that purpose to pledge the credit of the several firms. I hereby authorise my executors to deal with the various items of my estate whether in the businesses or otherwise by way of sale . . . and to invest the proceeds in any other forms of investment which they consider suitable in their discretion." The executors carried on the business and for that purpose executed mortgages of certain properties belonging to the estate.

Held: The will did not confer upon the executors the power to charge the general assets and, inasmuch as the mortgages were created for the purposes of the business, they were invalid in law.

The will gave the executors the power to pledge "the credit" of the business for the purpose of carrying it on, and so, expressly limited their power of charge, for the purposes of the business, to the trade assets. The general assets of the estate could not form part of the credit of the business, unless

* Original Side Appeal No. 21 of 1937.

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there was express power therein to charge them for the purposes of the business.

APPEAL from the preliminary judgment and order of LAKSHMANA RAO J., dated 20th July 1936 and 16th October 1936 respectively, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 513 of 1928.

T. R. Venkatarama Sastri, K. S. Sankara Ayyar and *T. Aravamuda Ayyangar* for appellant.

A. Viswanatha Ayyar for respondents 1 to 3.

K. Rajah Ayyar for *M. Natesan* for eighth respondent.

O. T. G. Nambiar for twentieth respondent.

V. V. Srinivasa Ayyangar and *V. V. Ramadurai* for twenty-second respondent.

C. Vasudevan for twenty-third respondent.

A. Ramaswami Ayyar for respondents 27 to 34.

Other respondents were not represented.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal arises out of a suit filed on the Original Side of this Court by the first, second and third respondents for the administration of the estate of their grandfather, one Hussain Mean, who died in the month of December 1919 leaving a large estate. The deceased had for many years traded in partnership with his two brothers, Muhammad Jaffar and M. Shamsuddin, and by his will he directed that the business should be carried on by his executors after his death until all his children had attained majority. The executors were Muhammad Jaffar, who is now dead, and his eldest son, Muhammad Yusuf, the fourth respondent, who was the second defendant in the suit. A decree for administration of the estate under the directions of the Court was passed, but

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before the suit came on for hearing ANANTAKRISHNA AYYAR J. added as defendants the appellant and the twenty-second respondent who is in the position of an appellant, having filed a memorandum of objections to the decree. The appellant and the twenty-second respondent claimed to be the mortgagees of certain properties belonging to the estate. The validity of the mortgages was challenged and in order that all questions arising out of the administration of the estate might be dealt with by the Court, the mortgagees were added as defendants. I will not pause to consider whether they should have been joined as defendants or whether the questions regarding their mortgages should have been left to be decided in separate proceedings, as all the parties to the suit and the appeal are agreed that the questions with regard to these mortgages should be decided in the suit.

The mortgage in favour of the appellant was executed on 25th March 1927 by the surviving sons of the testator, the defendants 2 to 7, and by his widow, Muhammad Bi. There was another heir, a daughter named Hassan Bi, but she did not join in the execution of the deed. The properties mortgaged consisted of five items, two of which were sold before the suit was instituted. It is common ground that the mortgage was created for the purposes of the business, but all the properties charged belonged to the general estate of the testator. LAKSHMANA RAO J. who tried the suit held that the executors were not entitled to charge the assets of the testator's general estate for the purposes of carrying on the business and that the mortgage was valid merely to the extent of the respective interest of the executants in the properties charged. The appellant contends that by the will the executors were given full power to mortgage the general assets

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of the estate for the purposes of the business, and that as the surviving executor had executed the deed, the estate is bound, notwithstanding that he was not described as an executor in the document. The appellant also says that even if the mortgage is invalid so far as the estate is concerned he is entitled to rank as a creditor of the testator to the extent of Rs. 20,000. The mortgage in favour of the twenty-second respondent is dated 16th October 1928 and embraces twenty-five items of property. It was executed during the pendency of the suit and the learned Judge held that the doctrine of *lis pendens* applied. He also held that the mortgage was invalid as against the estate for the reason which applied in the case of the appellant's mortgage. All the properties mortgaged belonged to the general estate and the mortgage had been created for the purposes of the business. These facts are not in dispute. On behalf of the twenty-second respondent it is said that the learned Judge erred in applying the doctrine of *lis pendens* and that he should have held that the mortgage was binding on the estate and not merely on the interests of the heirs who had signed the deed, namely, the defendants 2 to 7. The only questions raised in the appeal are those relating to the two mortgages.

In his will the testator refers to three businesses, but we are told that it was the same partnership business carried on at different places under different styles. In his will the testator declared that his estate was to have two shares and his brother Muhammad Jaffar one share in the business. His brother M. Shamsuddin had pre-deceased him and the testator directed that his share was to be ascertained and was not to be utilized in the business. After further

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directions with regard to the carrying on of the business the will proceeds:

"I expressly authorise and empower my executors to raise money required for the businesses by borrowing from banks, sowcars or other persons as the exigencies of the businesses require and for that purpose to pledge the credit of the several firms.

I hereby authorise my executors to deal with the various items of my estate whether in the businesses or otherwise by way of sale or alienation in any other manner and to invest the proceeds in any other forms of investment which they consider suitable in their discretion. Such investments shall not be limited to forms prescribed by the Indian Trusts Act."

The testator constituted his executors the guardians of the properties of his minor children. He bequeathed to Ummu Salima, the daughter of his deceased son, Abdul Aziz, the share to which her father would have been entitled if he had survived the testator, and he bequeathed to the children of Rabia Bi the shares to which she would have been entitled had she lived. Rabia Bi had four children, three of whom were the plaintiffs in the suit. The testator did not make any other dispositions of property. I may mention that neither here nor below has any question been raised as to the validity of the will under the Muhammadan law. The heirs of the testator have all come of age and they have accepted the will as being valid. What is not accepted is the construction which the appellant and the twenty-second respondent would have placed on the provisions of the will relating to the carrying on of the business.

In his argument in support of the appellant's case Mr. T. R. Venkatarama Sastriar conceded, as I understand him, that an executor is not entitled to mortgage or charge the general assets of the estate for the purposes of carrying on the testator's business,

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unless he is so authorised by the will. Mr. Sastriar relied merely on the wording of the will. On behalf of the twenty-second respondent Mr. V. V. Srinivasa Ayyangar has, however, contended that an executor is entitled to charge the general assets of the estate for the purposes of carrying on the testator's business without any authority in the will. Except for a decision of the Rangoon High Court to which I shall presently refer, he has quoted no case in support of his contention. There are numerous decisions which negative the proposition; and as the question has been raised it is necessary to deal with it.

Under English law, unless he is so authorised by the will, an executor has no power to carry on the testator's business, except for the purpose of winding it up; *Collinson* v. *Lister*(1). Where the will contains authority to carry on the testator's business but nothing further, the executor is confined to the employment of the trade assets. If he is authorised to use the general assets, he can, of course, do so, but there must be express authority for this; see *Cutbush* v. *Cutbush*(2), *Ex parte Garland*(3), *Ex parte Richardson*(4) and *M'Neillie* v. *Acton*(5). In *Cutbush* v. *Cutbush*(2) Lord LONGDALE M.R. observed:

"It seems to me, that any person dealing with one carrying on trade must be taken to rely upon the personal liability of the party conducting it; but the security is not limited to the personal credit of the party where the testator has directed the trade to be carried on with his assets; without authority in the will, executors have no right so to deal with the property of the testator and carry on trade with his assets; a party therefore who relies on the credit of the testator's

(1) (1855) 20 Beav. 356; 52 E.R. 639.
(2) (1739) 1 Beav. 184; 48 E.R. 910.
(3) (1804) 10 Ves. Jun. 110; 32 E.R. 786.
(4) (1818) 3 Madd. 138; 56 E.R. 461.
(5) (1853) 4 De G.M. & G. 744; 43 E.R. 699

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estate, should look to the will to ascertain the extent to which the testator has authorised his assets to be embarked in the trade; and if anyone had looked at this will, he would have seen that it was limited to the 'capital credits, stock and effects which were due, owing or belonging to him in the said trade or business at the time of his decease'."

In *Ex parte Richardson*(1) LEACH, Vice-Chancellor, said:

"A trustee under a will, carrying on a trade, pledges the trust property given to him for that purpose, and also his own property; but what is the trust property given to him for that purpose must depend upon the terms of the will. . .

In this case all that was meant to be left to carry on the trade was the capital in the trade; and the executrix was not authorised in employing one shilling of the assets beyond the capital. What the executrix has employed in the trade beyond the capital was in breach of her trust."

In *M'Neillie* v. *Acton*(2) TURNER L.J. said:

"There appears, therefore, to be no case which has gone to the extent of saying that a mere direction to continue the trade is to operate as a charge of the trade debts contracted in continuing the trade on all the estate of the testator; and the question is whether, upon any fair construction, it can be so considered? The consequence of it would be, that all the other directions which are contained in the will must be suspended during the period for which the trade is to continue. If the debt contracted in the course of the trade, or the right of the executors to be indemnified in respect of the expense incurred in carrying on the trade, is to be a charge on the whole of the estate of the testator, the necessary consequence would be that no part of the estate could in the meantime be applied in payment of any of the legacies given in the will, and that all administration of the testator's estate must stop until the period when the trade is wound up. That is, a construction so unreasonable that, unless there are words sufficient for the purpose, it is one, in my opinion, to which the Court would not resort."

(1) (1818) 3 Madd. 138; 56 E.R. 461.
(2) (1853) 4 De G.M. & G. 744; 43 E.R. 699.

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In the present case the will provided that the business should be carried on until all the testator's children had attained majority. If the proposition advanced on behalf of the twenty-second respondent were correct it would have meant that no steps could have been taken for the administration of the estate for many years.

A lot has been said in the course of the argument with regard to the right of indemnity. This question was dealt with by JESSEL M.R. in *In re Johnson. Shearman* v. *Robinson*(1) and the effect of the decision is concisely stated in the head-note to the report which reads as follows :

"Where a trader has by his will directed his executor or trustee to carry on his trade and to employ a specific portion of the trust estate for the purpose, the rule is that, though the executor or trustee is personally liable for debts incurred by him in carrying on the trade pursuant to the will, he has the right to resort for his indemnity to the specific assets so directed to be employed, but no further ; and consequently, the creditors of the trade are entitled to stand in the place of the executor and trustee, and to claim the benefit of that right so as to obtain payment of their debts ; but the rule does not apply where the executor or trustee is in default to the specific trust estate devoted to the trade ; in such a case, the defaulting executor or trustee not being himself entitled to an indemnity except upon the terms of making good his default, the creditors are in no better position, and are therefore not entitled to have their debts paid out of the specific assets unless the default is made good."

There is no difference in the law of India from the law of England with regard to these matters. Section 307 (1) of the Indian Succession Act says that, subject to the provisions of sub-section 2, an executor or administrator has power to dispose of the property of the deceased, vested in him under section 211, either wholly or in part, in such manner as he may

(1) (1880) 15 Ch. D. 548.

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think fit. The generality of the words of this sub-section does not, however, imply that the administrator is entitled to alienate the estate properties for purposes which are not consistent with his trust. Sub-section 2 provides that where the deceased is a Hindu, Muhammadan, Buddist, Sikh or Jaina or an exempted person, the general power given to an executor by sub-section 1 is subject to any restriction which may be imposed by the will appointing him. In this will there is express restriction, but even if there were not, it would be obviously improper for an executor to utilize the general assets of the estate for the purposes of carrying on a business of the testator.

The case to which Mr. Srinivasa Ayyangar referred is that of *Ma Sein Bye* v. *S. R. M. M. R. M. Chetty Firm*(1), where the executors had created an equitable mortgage for the purposes of carrying on a business in which the testator had been a partner. It was held that by reason of section 269 of the Succession Act, 1865, (which was then in force) an executor had an unqualified right to mortgage. Section 269 was in these words :

"An executor or administrator has power to dispose of the property of the deceased either wholly or in part, in such manner as he may think fit."

It was apparently not realized that the section did not extend the powers of an executor beyond those conferred by the law of England, and the principles embodied in the English decisions had application. In *Tarakeswar Das Gupta* v. *Ambica Charan Bhattacharjee*(2) a Division Bench of the Calcutta High Court held that an executor or administrator has no absolute power to dispose of the property of the deceased if

(1) (1925) I.L.R. 3 Ran. 443. (2) (1927) I.L.R. 55 Cal. 892.

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it is not necessary for the purpose of the administration of the estate and that as the section had been taken from English law the English authorities were applicable. The argument that the observations in the Rangoon case correctly state the law cannot be accepted.

I have referred to the relevant portions of the will in this case and I have mentioned that in my opinion it imposes a restriction. I will explain what is in my mind. The will gives the executors power to pledge "the credit" of the business for the purpose of carrying it on. I consider that this clause expressly limits their power of charge, for the purposes of the business, to the trade assets. The general assets of the estate cannot form part of the credit of the business unless there is express power to charge them for the purposes of the business and this there is not. Nor can I see any justification for the suggestion that the clause authorising the executors to deal with "the various items" of his estate whether in the business or otherwise should be read as enlarging the powers of the executors. The words "and to invest the proceeds in any other forms of investment which they consider suitable in their discretion" indicate what was meant. The executors were to have the right of disposing of the assets and re-investing the proceeds in more suitable securities pending the administration of the estate should they so think fit.

I hold that the will does not confer upon the executors the power to charge the general assets and inasmuch as these mortgages were created for the purposes of the business, they are invalid in law. In these circumstances it is not necessary to consider whether the fourth respondent's signature

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in the mortgages meant that he signed as executor. It may be assumed for the purposes of this appeal that he did so sign. His signature even if appended in his capacity of executor would not bind the estate, because he had no power to mortgage the general assets for the purposes of the business.

The contention that the appellant is entitled to be regarded as a creditor of the testator in respect of the sum of Rs. 20,000 is based on allegations of fact which have not been proved. At the time of the testator's death the partnership business had a current account with one Harsukhdoss Chowkmull, who held a floating charge on some of the private properties of the testator. This account at the time of the death of the testator was overdrawn to the extent of Rs. 90,000. On 1st April 1926 the fourth respondent executed two mortgages, one for Rs. 30,000 and the other for Rs. 20,000. The properties covered by these mortgages were subsequently mortgaged to the appellant. It has been contended that the amount raised under the mortgage for Rs. 20,000 was utilized in reduction of the overdraft in the current account with Harsukhdoss Chowkmull. When the appellant's mortgage was executed the two mortgages of 1st April 1926 were discharged and it is said that it must be taken that the appellant's money to the extent of Rs. 20,000 had been utilized in payment of debts due by the testator. This matter was not raised in the trial Court, and in the judgment it is expressly stated that none of the parties claimed any right under the floating security held by Harsukhdoss Chowkmull. In these circumstances the appellant is not entitled to raise this contention, but it is clear that, even if he were entitled to do so, he would have no right to be regarded as a creditor of the testator.

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The account books of the business relating to the account with Harsukhdoss Chowkmull have been put in evidence and the amount which was outstanding at the time of the testator's death was paid off by subsequent payments into the account. The account was further drawn upon and at one time the amount owing was Rs. 1,75,000 but this does not alter the fact that payments in had discharged the liability at the time of the death of the testator. Therefore, on the facts the appellant is not entitled to rank as a creditor of the testator, even if he had set up that claim in the trial Court.

In 1928 the testator's business was transferred by the executors to themselves. The business subsequently failed and the executors were adjudicated insolvents. The appellant asks that he should be allowed to stand in the shoes of the executors for purposes of claiming repayment from out of the business assets of the amounts borrowed from him and shown to have been utilized in the business. This is not objected to and there will be a direction to this effect embodied in the decree. The appellant further asks that certain immovable property, described as item No. 24 in the schedule to the plaint, should be allotted to the fourth respondent in respect of his share of the estate, if this is possible. The reason for the request is that the appellant purchased this property during the pendency of the litigation. There is no objection to a direction to this effect being also included in the decree and this will also be ordered.

It is not necessary to consider the contention raised by the twenty-second respondent to the finding of the learned trial Judge that the doctrine of *lis pendens* applies, because, even if it does not apply, the mortgage is not one which binds the estate generally, but merely

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the interests of the respective heirs who signed the document.

The appeal and the memorandum of cross-objections will be dismissed with costs in favour of the contesting respondents, who are respondents 1 to 3, 8 and 27 to 34. There will be one set of costs in respect of the memorandum of appeal, and one set in respect of the memorandum of objections and a certificate for two Counsel will be granted in each case.

Solicitor for appellant: *N. T. Shamanna.*

Solicitors for twentieth respondent: *King & Partridge.*

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao and Mr. Justice Newsam.

VASANTHARAO AMMANNAMMA (PLAINTIFF), APPELLANT,

v.

VIJIAPURAPU VENKATA KODANDA RAO PANTHULU AND SIX OTHERS (DEFENDANTS), RESPONDENTS.*

1939, May 1.

Will—Hindu—Testator devised properties to be enjoyed by his wife till her death and after her death to be passed on to his daughter and thereafter to be passed on to his grandsons through that daughter—Estate taken by daughter, daughter's estate—Estate taken by grandson, not vested remainder.

A Hindu testator left a will in these terms: "My self-acquired properties . . . belonging to me—all the properties aforesaid shall, on my death, be enjoyed by my wife till he

* Appeal No. 120 of 1936.

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death and after her death, they shall pass to my daughter. Thereafter they shall pass to my grandsons through my daughter . . . After discharging all the said debts, the person who shall be enjoying the said properties as aforesaid shall pay to my four grand daughters each a sum of Rs. 25 per annum . . ."

Held that the estate taken by the daughter was neither an absolute estate nor a life estate but a "daughter's estate" and the estate taken by the grandsons was not a vested remainder.

Expressions of view to the contrary in *Ratna Chetti* v. *Narayanaswami Chettiar*(1) dissented from.

APPEAL against the decree of the Court of the Subordinate Judge of Vizagapatam dated 31st October 1935 in Original Suit No. 86 of 1934.

P. Somasundaram for appellant.

K. R. Vepa for *Y. Suryanarayana* for first respondent.

Other respondents were not represented.

Cur. adv. vult.

VENKATARAMANA RAO J.

The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—The question for determination in this appeal is, what is the nature of the interest taken by the plaintiff and by her sons under the will of her father Maddirala Buchi Sundara Rao Pantulu Garu, dated 26th July 1899. It is the case of the plaintiff that she took an absolute estate in the properties bequeathed to her. It is the case of the first defendant that she took only a life interest and there was a vested remainder in favour of her sons, defendants 2 and 3, and her deceased son, Bayanna Pantulu, whose sons are defendants 4 to 6. The seventh defendant is the son of the third defendant. The suit itself was filed for a declaration that the plaintiff got an absolute estate in the said properties and that the attachment

(1) (1914) 26 M.L.J. 616.

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effected by the first defendant of the interest of defendants 2 to 7 in the property in execution of a decree obtained by him in Original Suit No. 36 of 1930 on the file of the Subordinate Judge's Court of Vizagapatam is invalid. The learned Subordinate Judge on a construction of the will held that the plaintiff did not take an absolute estate and dismissed the suit. It is this decision which is challenged in appeal by the plaintiff.

The main provisions of the will so far as they are material for the decision of this appeal run thus :

"Out of the afore-stated ancestral lands in Dimile and other villages, the one-ninth share of lands to which I am entitled, shall be enjoyed after my death by my wife till her death, and after her death it shall pass to Sundara Rao Pantulu Garu, son of my second elder brother, Maddirala Kamaji Rao Pantulu Garu, deceased.

My self-acquired properties . . . the silver and gold and other movables belonging to me—all the properties aforesaid shall, on my death, be enjoyed by my wife till her death and after her death, they shall pass to my daughter. Thereafter, they shall pass to my grandsons through my daughter.

As stated hereunder, the debts due by me to outsiders should be discharged hereafter from the annual income derived from the said properties mentioned above. After discharging all the said debts, the person who shall be enjoying the said properties as aforestated shall pay to my four grand daughters each a sum of Rs. 25 per annum towards *pasupukunkuma*."

The contention of Mr. Somasundaram on behalf of the plaintiff is that the words of disposition in her favour, namely, "after her (wife's) death, they shall pass to my daughter" confer an absolute estate. It is now settled law that there is no presumption that a gift to a female means a limited gift or carries with it the effect of creating an estate exactly similar to a widow's estate under the law of inheritance; *Vide* the *dictum* of MITTER J. approved by the Privy Council

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in *Surajmani* v. *Rabi Nath Ojha*(1). This was given effect to in *Ramachandra Rao* v. *Ramachandra Rao*(2) where a gift by a husband to his wife *simpliciter* was held to confer an absolute estate. The words used in the will in that case were "my senior wife and junior wife shall each take a half". SESHAGIRI AYYAR J. remarked in the course of the judgment thus:

"Unless there is an express or implied qualification to the contrary, the donor must be deemed to have conveyed all that he was possessed of in the property granted."

This decision, so far as I am aware, has been followed without question by our High Court. If the words used by the testator had stood by themselves, there is a good deal of force in the contention of Mr. Somasundaram. But they do not stand by themselves; closely following them occur the following words:

"Thereafter", (whether he used that expression to mean after the daughter's death or after the estate is taken by the daughter, whichever it is, is immaterial) "through my daughter they shall pass to my grandsons."

Again, there are other provisions in the will which have also to be considered. Even in cases where the words used by the testator confer an absolute ownership, the circumstances or the context may be sufficient to show that such an absolute ownership was not intended. The question in all these cases therefore depends upon the intention of the testator which has to be gathered from the words used by him and the will read as a whole in the light of the surrounding circumstances at or about the date of the will.

In the light of the principles referred to above, let us see what the intention of the testator was in this case. He was a retired Subordinate Judge on the date

(1) (1907) I.L.R. 30 All. 84, 89 (P.C.).
(2) (1918) I.L.R. 42 Mad. 283.

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of the will. There was ancestral property in which he had a share, the division of which was not effected by metes and bounds and wherein not only his brothers but the descendants of his paternal uncles were also interested. The testator was himself a son of one of three brothers and his father had two sons besides the testator. On the date of the will the paternal uncles were dead, the two brothers of the testator were also dead and there was only a daughter by one of his brothers and a son by another brother by name Sundara Rao Pantulu. He himself had a wife and a daughter living and there were sons and daughters by the daughter. His object, as explained by him in the preamble to the will, was to make known how and by whom the property he was possessed of was to be enjoyed after his death without disputes in the family in future. So far as the ancestral property is concerned, he gave a life interest to his wife and after her death he bequeathed it to the son of his brother the said Sundara Rao. Therefore, so far as that property is concerned, it was his intention to retain it in the family of his brothers. It is consistent with the ordinary notion of a Hindu that the ancestral property of the family should be retained in his family.

Coming to the self-acquired property, he directs that his wife should enjoy it during her lifetime. It is immaterial whether it is considered as a widow's estate or a life estate because the wife is dead. He then makes a provision in favour of his daughter to which I have already referred. The question in this case is, what estate did he intend his daughter to take? On a careful consideration of all the clauses in the will, we have come to the conclusion that the estate which the testator intended his daughter to take was an estate which she would take under the law of inheritance,

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that is, a limited estate analogous to that of a widow's estate. It is only then that the intention of the testator would best be effectuated and that every word in the will could be given effect to, as it ought to be given effect to, as far as possible. The testator had not stopped with the disposition in favour of his daughter but he directs that thereafter (which we think is after the lifetime of the daughter) the estate shall pass to his grandsons. It is clear that the ultimate destination of the estate intended by the testator was to the grandsons.

A good deal of argument was advanced on both sides on the word "dwara" or "through" in the disposition in favour of the grandsons. The contention of Mr. Somasundaram is that the testator gave an absolute estate to the daughter at the same time expressing a desire that she should leave it to the grandsons. It is no doubt difficult to understand what exactly the testator meant by the word "through" but we are not able to accept the contention of Mr. Somasundaram that the words by which he intended that the property should go to the grandsons are mere words of recommendation to the daughter. On the other hand, the intention is pretty plain that the estate must go to the grandsons. It is immaterial whether the testator intended that the property should pass to them in the ordinary course of devolution after the death of the daughter or whether he intended the daughter to convey the said property to them. If the testator had really conferred an absolute estate on the daughter and the words used in favour of the grandsons were only words of recommendation, leaving the option to the daughter to convey the estate to his grandsons or not, the intention of the testator would be frustrated because the words used are "shall pass".

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On the other hand, if the estate given to the daughter were to be construed as a life estate or a daughter's estate, the intention would be effectuated and the words used in favour of the grandsons could be given effect to. There is another indication to show that he did not mean to give the daughter an absolute estate. The testator was himself a lawyer and a Judge and knew, or may be presumed to have known, that under the Hindu law an estate owned by a daughter absolutely would go to her daughters in preference to her sons. Therefore, if the daughter took an absolute estate, he must have known that her daughters would get it unless a limitation was placed upon the estate which was going to be conferred upon the daughter. Therefore fully alive to the law he directed that the estate should pass to the grandsons and made a provision in favour of the granddaughters thus:

"After discharging all the said debts, the person who shall be enjoying the said properties as afore-stated shall pay to my four granddaughters each a sum of Rs. 25 per annum towards *pasupukunkuma*."

He would not have cut off his granddaughters with this annuity unless he intended that they should not get the estate. The obligation to pay the annuity was imposed upon the persons who take his property and they are mentioned in the previous paragraph of the will, namely, the widow, the daughter and the grandsons. It is common knowledge that a Hindu would ordinarily prefer, in the absence of a male issue, that his estate should go to his daughter's son in preference to his daughter's daughter, both on account of natural love and affection and also on religious grounds which every pious Brahman might be expected to have in view. The testator knew that the religious efficacy conferred by a daughter's son in regard to funeral

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ceremonies and oblations is equal to that conferred by a son. Therefore it is quite natural to expect that a testator like Buchi Sundara Rao would desire that the estate would ultimately go to his grandsons in preference to his granddaughters. As observed by their Lordships of the Privy Council in *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 a Hindu in respect of devolution of property. There is again another indication that the daughter was not intended to take the property absolutely. In making a provision for the discharge of debts he enjoins that they should be discharged out of the annual income and he does not empower the widow or the daughter to alienate the corpus. No doubt such a power of alienation is not necessary and it can well be understood to be comprised in a pure gift to a widow or a daughter *simpliciter*. But in the context the absence of express words as to power of alienation would seem to connote that the estate intended to be conferred upon the daughter was not absolute.

The question therefore arises, did he intend to confer only a life estate or a daughter's estate? It seems to us that he meant to give a daughter's estate rather than a life estate. He omits the word "during her life" with reference to the disposition in favour of the daughter. The words "pass to my daughter" would rather indicate that in the ordinary course of devolution the estate should pass to her, that is, the daughter and then to the grandsons. The words used in favour of the grandsons seem to indicate that the estate conferred on the daughter was not a life estate because there is no direct gift in favour of the grandsons,

(1) (1874) L.R. 2 I.A. 7

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but on the other hand, what he says is that through his daughter the estate shall pass to his grandsons. He must have intended either that the daughter should convey the property by will or *inter vivos* to the grandsons or that, she having taken the estate, it should pass through her to the grandsons in the ordinary course of devolution. If it was the daughter's estate that was intended to be conferred, there can be no question that the estate taken by the grandsons is not a vested interest. No doubt there have been expressions of view that it is possible to have a vested remainder after a limited estate of a Hindu widow or a daughter; vide *Ratna Chetti* v. *Narayanaswami Chettiar*(1). But it seems to us that it is not possible to have a vested remainder after conferring a limited estate analogous to that of a woman's estate, under the Hindu law. The holder of such an estate, whether she be a widow or a daughter, would fully represent the inheritance. There is nothing to vest in anybody else. The observations of the Privy Council in *Bhagbutti Deyi* v. *Bholanath Thakoor*(2) seem to be almost decisive on the matter. The question pointedly arose in that case whether an estate taken by a wife under the will of her husband was a life estate or a Hindu widow's estate under the law and the gift over in favour of the adopted son was a vested or a contingent remainder. Their Lordships pointed out that, if it was a life estate, the adopted son would take a vested remainder; if it was an estate of a Hindu widow, the estate taken by the adopted son would be a contingent remainder. In that case their Lordships held that the estate taken by the widow was a life estate and that taken by the adopted son was a vested remainder. Even if it is assumed in this case

(1) (1914) 26 M.L.J. 616.
(2) (1875) 24 W.R. 168; I.L.R. 1 Cal. 104 (P.C.).

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that there is a direct gift in favour of the grandsons, the estate taken by them would be a contingent remainder. But there is no direct gift in their favour and it was the intention of the testator that the daughter should take, not an absolute estate, but, only the limited estate of a daughter. It is immaterial whether the words used in favour of the grandsons were intended to connote a power vested in the daughter to convey the property, or whether the words meant that the property should be taken by the grandsons in the ordinary course of devolution.

In the view which we have taken that the daughter took a daughter's estate, there can be no vested remainder which is liable to be attached by the first defendant. But in so far as the plaintiff sued for a declaration that she has got an absolute estate in the suit properties, her suit fails and has to be dismissed. We direct each party to bear his own costs both here and in the Court below.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Pandrang Row and Mr. Justice Venkataramana Rao.

PARIMI SUNDARASIVUDU AND SEVEN OTHERS (PLAINTIFFS), APPELLANTS,

1939, July 17.

v.

BALAJIPALLI ADINARAYANA SASTRY (NINTH DEFENDANT), RESPONDENT.*

Hindu law—Adoption—Authority to widow to adopt—Construction of—"Suitable boy from our family or boy belonging to same gotra *as myself" (husband)—Adoption by widow of her own brother—Valid if.*

Purporting to act in pursuance of an authority to adopt given to her by her deceased husband which ran thus: "My wife shall adopt a suitable boy from our family or a boy belonging to the same *gotra* as myself", a Hindu widow adopted her own brother who did not belong to the family of, and was not of the same *gotra* as, the deceased.

Held that as the condition imposed by the deceased was not complied with, the adoption was invalid.

The qualification laid down by the deceased was part of the power given to his wife. It was a condition annexed to the power. The terms of the power did not warrant an inference of a general intention to adopt.

APPEAL against the decree of the District Court of East Godavari at Rajahmundry in Original Suit No. 13 of 1933.

P. Somasundaram for appellants.

G. Chandrasekara Sastri for respondent.

The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—This is an appeal from the

VENKATA-RAMANA RAO J.

* Appeal No. 118 of 1936.

SUNDARA-SIVUDU v. ADINARAYANA. — VENKATA-RAMANA RAO J.

Judgment of the learned District Judge of Rajahmundry dismissing the plaintiffs' suit for possession of a house which is item 2 of schedule A to the plaint. The plaintiffs claimed title to the property through one Surayya who was alleged to be the adopted son of one Subbarayadu. The adoption was said to have been made by the widow of Subbarayadu in pursuance of an authority given to her by her husband by his last will and testament dated 7th July 1882. Both the factum and the validity of the adoption were denied in the lower Court, but during the trial the factum was not seriously disputed but only the validity of the adoption was put in issue. The learned Judge came to the conclusion that the adoption was invalid on the ground that it did not conform to the authority given by the husband. The substantial question for decision in this appeal is whether the view taken by the learned Judge is sound and this turns on the construction of the said authority. It is contained in one sentence which runs thus :

"My wife shall adopt a suitable boy from our family or a boy belonging to the same *gotra* as myself."

The said Surayya was no other than the brother of the widow of Subbarayadu and it is conceded that he did not belong to the family of Subbarayadu nor had he the same *gotra* as Subbarayadu. As observed by the Privy Council in *Rajendra Prasad Bose* v. *Gopal Prasad Sen*(1), it is well established law that the power to adopt given to a wife must be strictly pursued. There is no doubt that the power in this case has not been strictly pursued, but it is contended by Mr. Somasundaram that, from the fact of Subbarayadu having given a power to adopt, it must be inferred that

(1) (1930) I.L.R. 10 Pat. 187 (P.C.).

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there was a general intention on the part of Subbarayadu to be represented by an adopted son, that the direction given to his wife to adopt a boy from the family or a boy belonging to the same *gotra* as the testator was only indicative of a preference, and that if it was not possible for the widow to comply with the said direction, it would be open to her to adopt any other suitable boy of her own choice. It seems to us that this contention is untenable. It may be open to a Court to infer a general intention to adopt and construe that general intention rather liberally where there are no special instructions given by the husband or, possibly in cases where such instructions were carried out and an adoption made in accordance therewith but the adopted boy died and another adoption was made. In *Suryanarayana* v. *Venkataramana*(1) the Judicial Committee observe thus :

"Their Lordships agree with the learned Judges of the High Court in the opinion that the main factor for consideration in these cases is the intention of the husband. Any special instructions which he may give for the guidance of his widow must be strictly followed ; where no such instructions have been given, but a general intention has been expressed to be represented by a son, their Lordships are of opinion that effect should, if possible, be given to that intention. This more liberal rule has been followed by the High Court of Bombay, as well as in Madras, and is not without support in Bengal."

It is clear from this judgment that where there are special instructions given by the husband, they must be the paramount consideration in testing the validity of the adoption. In this case the terms of the power do not warrant an inference of a general intention to adopt nor were the instructions carried out.

(1) (1906) I.L.R. 29 Mad. 382, 388 (P.C.).

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A number of cases were relied on by Mr. Somasundaram, but it will be found that in most of them the widow carried out the instructions and did adopt a boy in accordance therewith but the adopted boy died and the question arose whether her power was exhausted by the first adoption or whether it was open to her to make a second adoption. The Courts took a liberal view that the testator must be taken to have expressed a general intention that he should be represented by an adopted son. The cases of *Suryanarayana* v. *Venkataramana*(1), *Chenga Reddi* v. *Vasudeva Reddi*(2), *Sindigi Lingappa* alias *Sidda Lingappa* v. *Sindigi Sidda Basappa*(3) and *Yadao* v. *Namdeo*(4) are all of that category. Some of the Privy Council cases on which Mr. Somasundaram relied are all distinguishable on the facts of those cases. In *Mutasaddi Lal* v. *Kundan Lal*(5) the testator directed that one of the sons of one Hardeodas should be adopted. The boy that was adopted was not a boy living at the date on which the authority was given to adopt. It was contended that the testator meant that the boy who was then living was the boy intended to be adopted and not a boy born thereafter. Their Lordships were of the opinion that the special instructions which the testator gave were that one of the family of Hardeodas should be adopted and they were complied with. Therefore it was a case in which the instruction given by the testator was strictly pursued. The observation in *Bhagwat Koer* v. *Dhanukdhari Prashad Singh*(6) to the effect that the Courts must not be astute to defeat an adoption but should uphold it as far possible where it is

(1) (1903) I.L.R. 26 Mad. 681. (2) (1915) 29 M.L.J. 144.
(3) (1916) 32 M.L.J. 47. (4) (1921) I.L.R. 49 Cal. 1 (P.C.).
(5) (1905) I.L.R. 28 All. 377 (P.C.).
(6) (1919) I.L.R. 47 Cal. 466, 479 (P.C.).

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not in excess of the power was relied on, but, where it is in excess of the power, Courts have no option but to declare an adoption invalid. In this case it is our opinion that the adoption was in excess of the power. On a construction of the will it is clear that the instruction of the testator was not to adopt any boy of the widow's choice but that the widow should adopt a boy possessing certain qualifications, namely, that he should belong to his family or failing which he ought to belong to the same *gotra* as himself. The power, as already observed by us, was contained in one sentence and the qualification laid down by the testator is part of the power given to his wife. It is a condition annexed to the power. As observed by the Privy Council in more than one decision, a condition annexed to such a power should be strictly complied with, or else the adoption would be invalid. The case of *Rajendra Prasad Bose* v. *Gopal Prasad Sen*(1) is a case in point. In that case the testator directed a particular boy to be adopted and, if that boy was not available, another boy should be adopted with the permission of his father. He also expressed his general intention that his estate should be inherited by the adopted son. The father of the testator died and twelve years after the father's death the widow made an adoption and the question was whether the adoption was valid. Their Lordships of the Privy Council held that the adoption not having been made with the permission of the father, the adoption was invalid because that was a condition annexed by the testator to the authority given to his widow. It will be seen from the terms of the will that there was an intention that his estate should be represented by an adopted son, but still their Lordships held that the condition annexed to the power not having been

(1) (1930) I.L.R. 10 Pat. 187 (P.C.).

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complied with, the adoption cannot be upheld. Therefore the adoption in this case cannot be held to be valid as the condition imposed by the testator was not complied with.

In this view we do not think it necessary to examine the other contention of Mr. Somasundaram that the widow made every possible attempt to make the adoption but failed to secure a boy of the qualifications required by the testator and therefore the adoption must be upheld. The contention is that we must so read the will as to hold that, if the conditions imposed by the testator were not possible of fulfilment, the widow was permitted to adopt a boy of her own choice by adding the words "if possible" to the power conferred. A contention of this nature was negatived by their Lordships of the Privy Council in *Rajendra Prasad Bose* v. *Gopal Prasad Sen*(1) on the ground that a Court ought not to add words where the intention of the testator is clearly expressed. We are therefore unable to uphold the contention of Mr. Somasundaram.

In the result the appeal fails and is dismissed with costs. The memorandum of cross-objections is also dismissed with costs.

A.S.V.

(1) (1930) I.L.R. 10 Pat. 187 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Mockett.

THE DISTRICT BOARD OF WEST TANJORE, REPRESENTED BY ITS PRESIDENT (PLAINTIFF—COUNTER-PETITIONER), PETITIONER,

1939, July 21.

v.

PONNUSWAMI PALLAVARAYAR (DEFENDANT—PETITIONER), RESPONDENT.*

Madras Agriculturists Relief Act (IV of 1938), sec. 4, cl. (c)—Sum due to local authority—Meaning of—Income from endowments and trusts derived by District Board by reason of operation of ss. 63 or 64 of Madras Local Boards Act (XIV of 1920), if sum due to District Board within meaning of sec. 4, cl. (c), of Madras Act IV of 1938.

A District Board granted to the respondent a lease of properties appertaining to a chatram the administration of which had been made over to it by the Board of Revenue under section 63 of the Madras Local Boards Act, 1920. It obtained a decree against the respondent for arrears due under the lease. The respondent who was an agriculturist within the meaning of the Madras Agriculturists Relief Act, 1938, invoked the protection of the Act. The question was whether, by reason of section 4, clause (*c*), of the Act, the respondent was outside its protection.

Held: that section 4, clause (*c*), was wide enough to include any money due to a local authority and that the provisions of that clause placed the respondent outside the protection of the Act.

Income from endowments and trusts under the management of a District Board comprise income from endowments and trusts whether derived by reason of the operation of section 63 or 64 of the Madras Local Boards Act. That income is the district fund; it is recoverable only by

* Civil Revision Petition No. 306 of 1939.

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the local authority and is therefore a sum due to the local authority.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif of Pattukottai, dated 19th September 1938 and made in Execution Application No. 197 of 1938 in Execution Petition No. 290 of 1938 in Small Cause Suit No. 293 of 1937.

T. R. Venkatarama Sastri and *T. B. Balagopal* for petitioner.

Respondent was not represented.

JUDGMENT.

MOCKETT J.

MOCKETT J.—This Civil Revision Petition raises a nice question under section 4, clause (*c*), of the Madras Agriculturists Relief Act of 1938 read with certain provisions of the Madras Local Boards Act. The respondent has unfortunately not been represented but I have had the advantage of hearing Mr. T. R. Venkatarama Sastri who has placed before me all the relevant provisions of the Acts relating to the matter under consideration.

The only facts that need be stated are that under section 63 of the Madras Local Boards Act the administration of the Mukthambalpuram chatram at Orathanad was made over by the Board of Revenue to the District Board. The defendant is a lessee of certain properties, part of the trust, and a decree has been obtained against him by the District Board of West Tanjore in respect of arrears due under the lease. The defendant calls in aid the provision of the Madras Agriculturists Relief Act. It is conceded that he is an agriculturist within the meaning of that Act but the petitioners rely upon the provisions of section 4, clause (*c*), which, they say, places the respondent

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outside the protection of the Act. Section 4 reads as follows:

"Nothing in this Act shall affect debts and liabilities of an agriculturist falling under the following heads:—

* * *

(*c*) any tax or cess payable to any local authority or any other sum due to them, by way of loan or otherwise."

It will be seen that clause (*c*) of section 4 is worded as comprehensively as possible and seems to me to comprehend any money due to a local authority, but the learned District Munsif has taken the view that the respondent is entitled to the protection of the Agriculturists Relief Act because, to put it shortly, the amount due from him is not money due to a local authority but money due to this chatram itself. The learned Munsif has dealt with the matter with the utmost care but I am unable to share the view which he has taken of this question.

The relevant provisions of the Madras Local Boards Act are as follows: Section 63 provides for the Board of Revenue making over to local boards the management and superintendence of any charitable endowment in respect of which powers and duties attach to the Board of Revenue under the provisions of the Madras Endowments and Escheats Regulation, 1817.

"Thereupon",

says the section,

"all powers and duties which attach to the Board of Revenue in respect thereof shall attach to the local board as if it had been specially named in the said regulation, and the local board shall manage and superintend such endowment."

Section 64 says:

"A local board may accept trusts relating exclusively to the furtherance of any purpose to which its funds may be applied."

So it would seem that under section 63 there is power given to the Board of Revenue to make over

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to the local board the management and superintendence of any charitable endowment. Under section 64 a local board can accept trusts relating exclusively to the furtherance of any purpose to which its funds may be applied. Section 112 sets out the purposes to which local funds may be applied and under clause (*iii*), sub-section 1, of that section one of those purposes is the construction and maintenance of choultries. Section 114 says:

"There shall be constituted for each district a district fund and for each village a village fund."

Section 115 states:

"The rules embodied in Schedule V regarding . . . district funds respectively, and regarding the administration of those funds, shall be read as part of this chapter."

The provisions of the schedule are of the utmost importance in arriving at a decision in this petition. It will be seen at the top of Schedule V that first the words appear—

"It shall be the duty of every local board to provide for the payment of—"

and then a number of matters are set out. Under rule 1-B:

"A district board shall have power to make such provision as it thinks fit for carrying out the requirements of the district in respect of the following matters . . .
(c) the establishment and maintenance of choultries in the district classified as district choultries."

And it is well to recall that section 112, as I have pointed out, states that the funds received under the Act may be applied for the purpose of choultries among others. Under the heading "District Funds" in rule 5-B of Schedule V is found item (9) "Income from endowments and trusts under the management of the district board"; and Mr. Venkatrama Sastriar has naturally relied very strongly on that provision because obviously if these charitable funds are made

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part of the income of the district board, it should necessarily follow that all the provisions for the recovery of that income should be open to the district board itself.

Now those are the provisions and of course at this stage there has yet been no decision on the matter at all. The only decision that has been referred to is *Nelayathakshi Ammal* v. *The Taluk Board, Mayavaram*(1), which is of interest because it will be seen that the Bench consisting of BENSON and KRISHNASWAMI AYYAR JJ. took the view that when a charity was handed over to a local authority, the local authority was absolved from the actual provisions of the deed dedicating the charity. That of course is no direct authority but it seems to convey to my mind the notion that when these charities are handed over, they to a large extent lose their identity and become part of the local authority, at least to this extent that it was held it was not necessary that accounts should be made accessible to all persons as would have been the case if it had not been handed over. At page 336 the Bench uses these words:

"The duty to keep and give inspection of accounts is part of the function of management. When it is transferred by a special law to a statutory body, we must look to that law and not to the instrument of trust for the duties of the manager."

The reason why the lower Court in this case decided against the petitioner can, I think, be shortly stated. The learned Munsif takes the view in paragraph 9 that there is a distinction between funds receivable under section 64 of the Local Boards Act and section 63. The learned Munsif also takes the view that

"under section 64 of the Local Boards Act a local board can accept a trust if its income can be utilized exclusively for

(1) (1910) I.L.R. 34 Mad. 333.

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the purposes laid down in the Act. If the donor wants to endow the local board with an endowment with the object of utilizing its funds for purposes other than the purposes for which the local board's own income can be utilized, then the local board cannot accept such an endowment. There the case laid down under section 63 is different from the one in section 64."

I have endeavoured to indicate that in my view the only difference between section 63 and section 64 is that section 63 provides for the transfer of trusts by the Board of Revenue; section 64 enables the local authority to accept trusts provided that they relate exclusively to the furtherance of any purpose to which its funds may be applied. Of course, a choultry would come under that provision because one of the things which the local board may do is to provide choultries. But the learned Munsif has distinguished between funds derivable under transactions under these two sections although he seems to concede that if the funds, the subject of this case, come under Schedule V, Rule 5-B (9), then the respondent would have been unable to invoke the Agriculturists Relief Act. It seems to me clear that income from endowments and trusts under the management of a district board comprise income from endowments and trusts whether derived by reason of the operation of section 63 or section 64. That income is the district fund. It is recoverable and must be recoverable only by the local authority. I cannot see how it can possibly be said that that is not a sum due to them, viz., the local authority. It seems to me that for all relevant purposes the identity of the chatram is merged in the local authority and I can imagine nothing more inconvenient than that the position should be that for the purpose of recovering this particular item of the board's funds the board should be placed in one

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position but in respect of amounts due to them from the public in another. In view of the facts I think that the order of the lower Court should not be allowed to stand. The learned Munsif obviously withheld jurisdiction vested in him and in consequence his order will be set aside.

This petition is allowed with costs.

V.V.C.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Stodart.

1939, August 24.

RAMACHANDRA DEO (PLAINTIFF), APPELLANT,

v.

KAMOJU BALAJI AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Madras Estates Land Act (I of 1908)—Non-occupancy ryot—Title to hold land free of rent—Acquisition by non-occupancy ryot of, by adverse possession—Conditions—Non-payment of rent for a number of years—Notice of intention to prescribe for higher right in land, if.

There is nothing in the Madras Estates Land Act (I of 1908) which enables a non-occupancy ryot to prescribe for title to hold land free of rent.

Adverse possession in order to become a basis of title must be brought to the notice of the true owner. In a zamindari the major portion of the land is in the occupation of persons who have the right to occupy it but not the whole proprietary right; who are, in other words, occupancy ryots or persons who hold the land in the hope of being occupancy ryots. If such persons wish to prescribe for a higher right in the land they must give open and unequivocal notice of their intention

* Second Appeal No. 832 of 1935.

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to the landholder. Mere non-payment of rent for a number of years does not amount to such notice.

APPEAL against the decree of the District Court of Ganjam in Appeal Suit No. 80 of 1934, preferred against the decree of the Court of the Sub-Collector of Berhampore Division in Original Suit No. 21 of 1933.

The second appeal originally came on for hearing before MADHAVAN NAIR and STODART JJ. when their Lordships made an order asking the lower appellate Court to submit specific findings on the following two issues :

(i) Is the plaint land ryoti land within the plaintiff's zamindari ?

(ii) Is it part of the inam of the defendants ?

In compliance with the above order the District Judge of Ganjam, Puri-Berhampore, submitted findings answering the second issue in the negative and holding that the suit land formed part of Godogovindpur and accordingly answering the first issue in the affirmative.

The second appeal along with memorandum of objections against the findings came on for final hearing after return of the aforesaid findings.

T. V. Rajagopalan for appellant.

C. V. Dikshitulu for *B. Jagannatha Das* for first and second respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by

STODART J.

STODART J.—This second appeal arises out of a suit for rent under section 77 of the Madras Estates Land Act by the zamindar of Bodo Khenidi. The suit proceeded on the footing that the land for which rent was claimed was Survey Number 532 of Godogovindpur, a village in the plaintiff's zamindari. The

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defendants are : (i) a goldsmith of Godogovindpur, (ii) a brahmin describing himself as an inamdar of the neighbouring village on the west called Pattigovindpur which is outside plaintiff's zamindari and (iii) a komati of Nuapada, a village in the plaintiff's zamindari. The first defendant filed a written statement, which was adopted by the second and third defendants claiming that the field was an enfranchised presettlement inam land, that the first and third defendants had bought separate portions from the inamdars, and that the land formed part of Pattigovindpur village. It was also claimed that the defendants had held the land for long over the statutory period without paying rent to the zamindar.

The first defendant gave evidence slightly at variance with his written statement. He said that the second defendant had purchased the portion in his possession by the title deed, Exhibit II-C. This therefore was a new case, namely, that the second defendant held the land by purchase, not by inheritance.

The first defendant also said that the suit land was surrounded on all sides by inam lands of Pattigovindpur.

[His Lordship referred to (i) the course of the litigation in the Courts below and in the High Court which led to the order of the High Court calling for findings, (ii) the proceedings at the re-trial and (iii) the findings submitted by the lower appellate Court and proceeded :]

On appeal three points are urged on behalf of the respondents. First, that the suit land although situated inside the limits of Godogovindpur is nevertheless part of the whole inam village of Pattigovindpur. This as we have said was never pleaded, much less proved. We have already said more than once that

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the defendants claimed the suit land as lying within the village of Pattigovindpur. Then it is urged that the learned District Judge was right in his finding that the defendants had held the land adversely to the plaintiff for more than twelve years. We have already stated that there is no evidence at all of this. Lastly, it is urged that having been in possession for more than twelve years without paying rent, the defendants cannot now be called on to pay rent. And this is the only point of law which arises for decision in this appeal.

We are not prepared to hold on the evidence that the defendants or their predecessors were in possession for over twelve years without paying rent, but assuming that they were, we think that they did not prevent the zamindar from levying rent when he came to know of the occupation of the land. Jeroyati or ryoti land is land in a zamindari in which the tenant has occupancy rights as defined in the Madras Estates Land Act (I of 1908). A ryot who has been let into possession by the landholder or whose possession is recognized by the landholder is called an occupancy ryot and has large rights, the chief of which is that he cannot be evicted except on the ground that he has rendered his holding substantially unfit for agricultural purposes; *sec* section 151. A ryot who has not been let into possession by the landholder or who has not acquired the occupancy right by inheritance or transfer is a non-occupancy ryot. And he too has valuable rights and privileges under the Act. He may make improvements on the land without the landholder's consent (section 14). He is not liable to pay rent for the land in excess of the rent fixed on the land or if no rent is fixed then a fair and equitable rent decided by the Collector (section 45). And finally he

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can compel the landholder to grant him a permanent right of occupancy on tendering as premium a sum equal to two and a half times the rent of the land and the landholder is debarred for twenty years thereafter from enhancing that rent (section 46). It is only when the provisions of sections 45 and 46 have not been complied with that the landholder has the right to evict a non-occupancy ryot by a suit in a Civil Court (section 163). On the other hand the non-occupancy ryot must of course pay rent (section 45) and the rent can be recovered from him by suit in the Collector's Court (section 77) and he can be evicted if he fails to discharge a decree for rent within a certain time, by suit filed in the Collector's Court (section 153). But there is nothing in the Act which enables the non-occupancy ryot to prescribe for title to hold the land free of rent. And having regard to the conditions prevailing in zamindaries it would be surprising if there were any such provision. For in the majority of cases these estates are not surveyed. There is no demarcation of the holdings of the various ryots on the ground. There is no survey map by reference to which the holdings can be located. The recorded area of the land in the land-holder's books is not based on exact measurements nor calculated with mathematical precision. It is easy therefore for a ryot to encroach gradually on unoccupied land adjacent to his holding and the encroachment may pass unnoticed for years. It would be a vexatious burden on the land-holder if he were debarred from claiming rent on such encroachments as soon as he detected them.

It was somewhat faintly argued by learned Counsel for the defendants that if the defendants believed that they had the full ownership of the land—which in itself is a large assumption—and enjoyed

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it as such for over the statutory period, that in itself is sufficient to give them a title by prescription against the zamindar. We cannot concur in this argument. Adverse possession in order to become a basis of title must be brought to the notice of the true owner. Here, if, for the sake of argument, we grant that the defendants actually were on the land for over twelve years before suit—and the evidence of that is not conclusive either—such occupation did not affect the landholder with notice of their claim to be proprietors. For in a zamindari, as it is hardly necessary to point out, the major portion of the land is in the occupation of persons who have the right to occupy it but not the whole proprietary right; who are, in other words, occupancy ryots or persons who hold the land in the hope of being occupancy ryots. If such persons wish to prescribe for a higher right in the land they must give open and unequivocal notice of their intention to the landholder. Nor does the mere non-payment of rent for a number of years amount to such notice since, as we have pointed out, when a land has been encroached upon gradually and secretly the very fact of its being occupied may very well escape notice.

In the result we differ from the lower Court. We find that defendants did not prescribe for title as proprietors for the simple reason that they never asserted any such title. And we find that by non-payment of rent for more than twelve years—assuming that such is the fact—they did not prescribe for the right to enjoy the land for ever without paying rent. We allow this appeal and set aside the decree of the Courts below. The appellant will have his costs of this appeal and of the suit throughout.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Pandrang Row and Mr. Justice Abdur Rahman.

G. ABDUL KHADIR SAHEB (FIRST DEFENDANT), PETITIONER,

1939, September 18.

v.

V. PACHAIYAPPA CHETTI AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 24—Court of Small Causes, Madras—Suit on file of—Transfer of, under sec. 24 of the Code, to City Civil Court, Madras—Permissibility—Madras City Civil Court Act (VII of 1892), secs. 3 and 5—Applicability and effect.

Under section 24 of the Code of Civil Procedure a suit on the file of the Court of Small Causes, Madras, can be transferred from that Court to the City Civil Court, Madras.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court may be pleased to issue an order directing transfer of Small Cause Suit No. 11852 of 1938 from the file of the Court of Small Causes, Madras, to the file of the City Civil Court, Madras, to be tried along with Original Suit No. 157 of 1939 on the file of the City Civil Court, Madras.

P. K. Janakiram for petitioner.

N. Panchanatha Ayyar for first respondent.

P. G. Krishna Ayyar for second respondent.

PANDRANG ROW J.

The ORDER of the Court was pronounced by PANDRANG ROW J.—This is an application made under sections 24 and 151, Civil Procedure Code, for the transfer of Small Cause Suit No. 11852 of 1938 on the

* Civil Miscellaneous Petition No. 1397 of 1939.

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file of the Court of Small Causes, Madras, from that Court to the City Civil Court, Madras, to be tried along with Original Suit No. 157 of 1939 on the file of the latter Court on the ground that the two suits are connected and that it is convenient that they should be tried by the same Court. A preliminary objection has been raised to the application on the ground that under section 24, Civil Procedure Code, there could be no transfer of the kind asked for. Reliance is placed on section 3 of the Madras City Civil Court Act which gives jurisdiction to the City Civil Court to try certain suits excluding suits cognizable by the Court of Small Causes, Madras. There is however a distinct provision in section 5 of the same Act to the effect that every person appointed a Judge of the City Civil Court shall be by virtue of his office a Judge of the Court of Small Causes, Madras, with respect to cases cognizable by the latter Court. It cannot therefore be said that the City Civil Judge to whom the present case may be transferred would have no jurisdiction to try the suit. On the other hand there is a distinct provision in section 24, Civil Procedure Code, which under section 8 of the Code applies to a Small Cause Court, to the following effect :

"The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall for the purposes of such suit be deemed to be a Court of Small Causes."

In view of section 5 of the Madras City Civil Court Act, this does not appear to be a case of conferring by the order of transfer itself jurisdiction on the Court to which the transfer is made, which it would not possess but for the transfer.

There can thus be no sound objection to the entertainment of the application in a case like this under section 24, Civil Procedure Code. In the view we have

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PANDRANG ROW J.

taken of the preliminary objection it seems unnecessary to decide whether another remedy is not available to the petitioner by way of an application to the Chief Justice of the High Court under section 5 of the Madras City Civil Court Act.

On the merits it is clear that the balance of convenience is in favour of the transfer asked for. It seems to us however that we cannot reject the complaint made by the second respondent that he may have, as a result of the transfer to be made, to pay additional court-fee in the City Civil Court. It is not proper that we should deal in advance with the question whether additional court-fee would be properly leviable in the circumstances. But assuming that such additional fee would be leviable, which question however we entirely leave to the City Civil Court to decide, it seems to us that the second respondent's complaint is one for which some redress should be provided. We therefore direct the transfer as prayed for but with the condition that the additional court-fee, if any, which may be required to be paid as a result of the transfer should be paid by the petitioner in this application in the first instance, and that that amount should be treated as the costs of the petitioner in the suit and provided for by the final decree in that suit. There will be no order as to the costs of this petition.

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Burn and Mr. Justice Mocketi.

1939, November 7.

IN RE KATTAMEEDI CHENNA REDDI AND ANOTHER (ACCUSED NOS. 1 AND 2), PRISONERS.*

Evidence Act, Indian (I of 1872), sec. 27—Statement made by accused, under—Recording of—Incomplete—Not the first statement made to police but the second one made before panchayatdars—Admissibility of.

The accused in a murder case had made a statement to the police. But the Circle Inspector thought it wise to get it repeated in the presence of panchayatdars. Accordingly a statement was made by the accused before them and it was recorded merely as follows : " I and the second and third accused removed the jewels from the person of the deceased."

Held that the statement was inadmissible under section 27 of the Indian Evidence Act as it was incomplete and as what was stated by the accused was a repetition of something that he had previously said to a police officer.

The duty of the police, if they desire to record a statement, is to record it as given by the accused and to leave it to the Court to decide what evidence is admissible.

Athappa Goundan, In re(1) followed.

The practice of police officers giving in evidence statements made for the second time before panchayatdars but not statements as made to them in the first instance, condemned.

Public Prosecutor v. *Subba Reddi*(2) referred to.

TRIAL referred by the Court of Session of the Cuddapah Division for confirmation of the sentences of death passed upon the said prisoners and appeals by the said

* Referred Trial No. 114 of 1939 and Criminal Appeals Nos. 469 and 470 of 1939.

(1) I.L.R. [1937] Mad. 695 (F.B.). (2) 1938 M.W.N. 1118.

prisoners against the said sentences passed on them in Sessions Case No. 24 of the Calendar for 1939 on 22nd August 1939.

The first and the second accused together with one Guddi Peeran were charged before the learned Sessions Judge of Cuddapah with the murder on 12th March 1939 of a woman Golla Nagamma. Guddi Peeran who was the third accused was acquitted; the first and the second accused were convicted and sentenced to death and they appealed.

The deceased Nagamma lived at Venkatapuram. On the 12th March, some time before mid-day she was alive. P.W. 3, her husband, said that she gave him his food before he left for Proddatur and P.W. 2, her sister, was with her in her house on that morning. Some time after noon she was found dead, having been throttled.

The deceased was wearing, as was her custom, on her body gold katlu, gold kantini gundulu, gold thalakulu, gold rettakadiyam, gold bendu kammalu, gold upper ear-rings and silver kala kadiyalu. P.W. 2 took the buffaloes out leaving her sister in the house. She grazed the buffaloes, brought them back, collected the buffalo-dung and stacked it. A little before noon she returned home and told her sister that she had stacked the collected buffalo-dung near the palmyra tope. The deceased left, bidding P.W. 2 to follow after she had her food. When she left, the deceased was wearing the jewels mentioned. After her meal P.W. 2 went to the scene and stated that she saw the first accused " accompanied by two strangers " throttling her sister.

P.W. 2 claimed to have seen the murder and she at once reported it to her aunt. P.Ws. 7 to 10 claimed

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to have seen the accused in the neighbourhood of the scene of murder at about the time of the murder. So far as the third accused was concerned, that was all the evidence and the learned Sessions Judge thought that that evidence was insufficient to convict the third accused. There was however in the case of the first and the second accused some further evidence.

C. Narasimhachariar for the first accused.
M. Ranganatha Sastri for the second accused.
Public Prosecutor (*V. L. Ethiraj*) for the Crown.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by MOCKETT J.—

[His Lordship set out the facts of the case summarised above, discussed the evidence and proceeded :]

MOCKETT J.

It appears and it is obviously a fact, that the accused made a statement to the police which might well be admissible under section 27 of the Evidence Act and the statement was admitted by the Magistrate. The statement was made in the presence of panchayatdars, but it is obvious that this was not the first statement that had been made. A statement had been made to the police which P.W. 20 (the Circle Inspector of Police) had thought it wise to get repeated in the presence of panchayatdars. It is obvious that the statement cannot be complete. It is remotely improbable that the accused said simply, "I and the second and third accused removed the jewels from the person of the deceased," without any sort of initial narrative as to how he came to be where the deceased was, or whether the woman was alive or dead at the time. This is an example of the mutilation of a statement made by the accused person, due apparently to

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the Circle Inspector supposing that it was his duty to decide what evidence was admissible and what was not. The duty of the police is, if they desire to record a statement, to record it as given and to leave it to the Court to decide what evidence is admissible. In *Public Prosecutor* v. *Subba Reddi*(1) this Court has condemned the practice of police officers giving in evidence not statements made to them in the first instance but statements made obviously for the second time before panchayatdars. Such statements have been held to be inadmissible. The result of the handling of this statement by the police is that what probably was a simple and admissible statement under section 27 must, in our opinion, be ruled out entirely for reasons which may be restated as follows :—(i) that the statement is obviously incomplete, and (ii) that obviously what was stated by the accused was a repetition of something that he had previously said to a police officer. It is the first statement of the accused, to whomsoever made, that leads to the discovery of the fact, if a fact is discovered. The attention of the trial Judge may usefully be directed to the Full Bench decision of this High Court in *Athappa Goundan, In re*(2).

[His Lordship discussed the other evidence in the case and concluded :]

The learned Sessions Judge was satisfied, and we are satisfied, that the evidence brought home beyond all reasonable doubt the guilt of this murder to the first and the second accused. We therefore confirm the convictions. With regard to the sentence, the second accused is twenty-five years old and the first accused is stated to be seventeen although before the Court of Sessions

(1) 1938 M.W.N. 1118. (2) I.L.R. [1937] Mad. 695 (F.B.).

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his age was given as nineteen. In the case of the first accused, as we have frequently had occasion to remark before, youth by itself is not a reason why the Court should evade its duty of sentencing the accused to death especially in the case of a cruel murder such as this. We think that the sentences of death were rightly passed and we confirm them. The appeals of the accused are dismissed.

V.V.C.

APPELLATE CIVIL—FULL BENCH

Before Sir Lionel Leach, Chief Justice, Mr. Justice Pandrang Row, Mr. Justice Abdur Rahman, Mr. Justice Krishnaswami Ayyangar and Mr. Justice Patanjali Sastri.

1939, October 6.

C. R. RAMASWAMI AYYANGAR (MINOR), REPRESENTED BY HIS MOTHER AND NEXT FRIEND LAKSHMI AMMAL (PLAINTIFF), PETITIONER,

v.

C. S. RANGACHARIAR AND TWENTY-FIVE OTHERS (DEFENDANTS 1 TO 11 AND 14 TO 26), RESPONDENTS.*

Court Fees Act (VII of 1870), *ss.* 7 (*v*) *and* 7 (*iv-A*) *and art.* 17-*B of Sch. II as amended by Madras Act* (*V of* 1922)—*Suit for partition of joint family property and possession by a Hindu minor—His father, brothers, alienees of family property and creditors of the family impleaded as defendants—Proper court-fee to be paid for the general relief of partition under art.* 17-*B of Sch. II of Court Fees Act as amended in Madras—Separate court-fee under sec.* 7 (*v*) *in respect of alienations where possession has passed to alienees—Separate court-fee under sec.* 7 (*iv-A*) *of the Court Fees Act as amended in Madras for cancellation of decrees in suits where plaintiff* eo nomine *a party—No separate court-fee in respect of other debts and alienations whether plaintiff party thereto or not and for appointment of receiver.*

The plaintiff, a Hindu minor, sued through his mother as next friend for partition of the properties of the joint family consisting of himself, his father and his three brothers and for possession of his one-fifth share therein. Besides his father and his three brothers, the plaintiff joined as defendants several other persons (strangers to the family) either as alienees of family properties or as creditors of the family. In his plaint the plaintiff averred that the family was one engaged merely in agriculture and originally had large cash resources

* Civil Revision Petition No. 267 of 1936.

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but that, through the reckless speculation of his father, the cash resources had disappeared and the family properties had been sold or mortgaged and numerous debts contracted. The plaintiff stated that his father's transactions were not binding on the family, but he did not in terms ask for the setting aside of the alienations of family properties or for declarations that his father's other transactions were unenforceable against the estate. His prayers were for: (i) an account of the movable and immovable joint family properties, (ii) the partition by metes and bounds of his one-fifth share, (iii) the appointment of a receiver to manage the properties and collect the rents and income till the disposal of the suit, (iv) the costs of the suit, and (v) such further and necessary reliefs as in the circumstances might be considered necessary and proper.

Held by the Full Bench.—(i) In respect of the general relief for partition and delivery to the plaintiff of his share, the only provision in the Court Fees Act which was applicable was article 17-B of Schedule II of the Act as amended in Madras and that the plaintiff had acted rightly in stamping his general relief under that provision.

Section 7 (v) of the Court Fees Act cannot be deemed to apply to a partition suit where the plaintiff is in joint possession. It can only apply in seeking relief in respect of possession of immovable property when he is out of possession.

The language of section 7 (iv) (*b*) of the Court Fees Act is incompatible with a claim for partition when the plaintiff is in joint possession with the other members of his family.

Majority decision in *Rangiah Chetty* v. *Subramania Chetty*(1) overruled.

(ii) In respect of alienations by his father under which possession had passed to the alienees, as the plaintiff was in effect asking for their being set aside and for his being placed in possession of his share of the property alienated, he must stamp his relief in accordance with the provisions of section 7 (v) of the Court Fees Act, notwithstanding that he had not asked for specific relief in respect of such alienations.

(iii) In respect of decrees passed against the plaintiff in suits in which he had been *eo nomine* impleaded as a party he

(1) (1910) 21 M.L.J. 21 (F.B.).

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must pay the fee prescribed by section 7 (iv-A) of the Court Fees Act as amended in Madras. Such decrees bind the plaintiff until set aside, and therefore he cannot seek to obtain a decision on the footing that his interest in the joint family property is not affected by them. The plaintiff must be held to have impliedly asked for their cancellation and must accordingly stamp his plaint *ad valorem* on the amount of the decrees and not merely on his share fraction, as his liability is for the full amount, though limited to the extent of his share in the joint family estate.

(iv) *Held further* (ABDUR RAHMAN J. *dissenting*).—In regard to the other transactions of his father impugned by the plaintiff, the plaintiff could not, whether he had been made a party thereto or not, be required to pay a separate court-fee as regards any of them, even though he had impleaded the several creditors or alienees and even if the plaint had contained prayers for declarations or cancellations in respect of the said transactions.

The plaintiff was not bound under the substantive law by which he was governed to sue for a declaration or cancellation in respect of any of the said transactions and a prayer for declaration or cancellation would in such cases, even if the plaint contained one, be one for a purely incidental but unnecessary relief. The Court was bound as between the members of the family to decide which were the debts binding on the family before directing a division, whether the several persons interested in supporting the transactions were before the Court or not. The fact that the plaintiff impleaded them would not alter the position.

(v) No separate court-fee need be paid in respect of the prayer for appointment of receiver. The relief was entirely of an interlocutory character.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam, dated 1st February 1936, on the check slip of the court-fee examiner No. 3, Part II, dated 18th October 1935.

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The petition at first came on for hearing before ABDUR RAHMAN J., who made the following

ORDER OF REFERENCE :—

Mr. V. V. Srinivasa Ayyangar appears on behalf of the petitioner and urges that since there is a considerable difference of judicial opinion even in this Presidency it would be better to refer it to a Bench. The respondents' Counsel does not object to this course. The Government Pleader has not been notified in the matter. Notice to the Government Pleader may be given.

If the Hon'ble the CHIEF JUSTICE agrees, the matter may be placed before a Bench for final adjudication.

The petition then came on for hearing before LEACH C.J., KRISHNASWAMI AYYANGAR and SOMAYYA JJ. who made the following further

ORDER OF REFERENCE :—

One of the points raised in this case is whether article 17-B of Schedule II or section 7 (iv) (*b*) of the Court Fees Act applies. In *Rangiah Chetty* v. *Subramania Chetty*(1) a Full Bench of this Court held (one Judge dissenting) that section 7 (iv) (*b*) applies. There have been decisions on this question in other High Courts and there is a divergence of opinion. The other questions involved in the present case are also of importance and in order that the questions may be definitely settled so far as this Court is concerned we consider that the case should be placed before a Full Bench of five Judges.

The petition came on for final hearing before the Full Bench constituted as above.

ON THE REFERENCE :

V. V. Srinivasa Ayyangar (with him *S. Ramanujachariar* and *V. R. Venugopalan*) for petitioner.—The plaint has been properly stamped. A court-fee of Rs. 100 was paid under article 17-B of Schedule II of the Court Fees Act as amended in Madras.

[LEACH C.J.—Are you, Government Pleader, taking any preliminary objection as to whether a revision lies in this case ?]

(1) (1910) 21 M.L.J. 21 (F.B.).

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Government Pleader.—No. In view of the importance of the questions raised, it is desirable that the case should be decided on the merits.

V. V. Srinivasa Ayyangar.—When the plaintiff is called upon to pay an additional court-fee and the Court refuses to proceed with the suit unless such sum is paid a revision petition lies ; *Kulandaivelu Nachiar* v. *Ramaswami Pandia Thalavan*(1).

For purposes of court-fees, the plaint alone should be looked at. [The plaint was then referred to.] To come under article 17-B two conditions are necessary : (i) that the plaint is incapable of valuation and (ii) that it is not otherwise provided for in the Court Fees Act. The right of a co-tenant who sues for a partition of his share cannot be estimated in money ; *Gill* v. *Varadaraghavayya*(2). Much more so in the case of the share of a member of a joint Hindu family who sues for partition. It is not capable of valuation. So the first condition of the article is satisfied. As regards the second condition, I submit that there is no provision in the Court Fees Act which is directly applicable to such a case as this. In a Full Bench decision of this High Court, *Rangiah Chetty* v. *Subramania Chetty*(3), it was held that section 7 (iv) (*b*) is the specific provision which applies to this case. I submit that that decision is wrong. Section 7 (iv) (*b*) does not apply. It refers to a case where a co-parcener sues for joint possession when he has been excluded from it, or for participation in the profits of the common property. It does not cover a suit for partition of joint family property when the plaintiff is in joint possession with the other members. The language used in the clause is "to enforce the right *to share* in any property" and not "to enforce the right to a share." It is the verb "to share" and not the noun "a share" that is used in the section. So the language of the section is incompatible with a claim for partition when the member who sues for his share is in joint possession with the other members of the family. KRISHNASWAMI AYYAR J. who pronounced the leading judgment in the Full Bench case based his decision on two grounds : (i) The Legislature would not have omitted to make a specific provision for such a common form of suit.

(1) (1927) I.L.R. 51 Mad. 664. (2) (1919) I.L.R. 43 Mad. 396.
(3) (1910) 21 M.L.J. 21 (F.B.).

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But there are other common forms of suits for which no specific provision is made in the Court Fees Act, such as, a suit by a co-tenant for partition of his share. So the first reason fails. (ii) The other ground was that the Privy Council had applied a clause similarly worded in the Limitation Act of 1859 to such suits. But the wording of clause 13 of section 1 of the Act of 1859 was changed by the Act of 1871. That change has been maintained in the Acts of 1877 and 1908. Article 127 is the corresponding article to section 1, clause 13, of the old Act. The alteration in the wording of the later Acts clearly limited the article to a case where the member suing is excluded from joint possession. The view of KRISHNASWAMI AYYAR J. that the amendment made no difference is wrong. Article 127 of the Limitation Act applies to a case where a member is not in joint possession. So the language used in the Limitation Act is not of any help in construing section 7 (iv) (*b*) of the Court Fees Act. The opinion of AYLING J. who differed from the other two judges in the Full Bench is correct. The relief for a share by a member who sues for partition of joint family property is incapable of valuation. The plaint in such a suit should be stamped not under section 7 (iv) (*b*) of the Court Fees Act but under article 17-B of Schedule II of the Court Fees Act as amended in Madras. The Calcutta High Court in *Kirty Churn Mitter* v. *Aunath Nath Deb*(1), *Bidhata Roy* v. *Ram Charitra Roy*(2), *Rajani Kanta Bag* v. *Rajabala Dasi*(3) and *Nandalal Mukherji* v. *Kalipada Mukherji*(4) has taken the same view and applied article 17 (vi) of Schedule II of the Court Fees Act. The Bombay High Court applied section 7 (v) of the Court Fees Act; *Balvant Ganesh* v. *Nana Chintamon*(5) and *Dagdu* v. *Totaram*(6).

Government Pleader intervening.—In *Motibhai* v. *Haridas*(7) the Bombay High Court has applied Section 7 (iv) (*b*) of the Court Fees Act.

V. V. Srinivasa Ayyangar.—The High Courts of Allahabad and Lahore have also taken the same view as that of the Calcutta High Court; *Tara Chand Mukerji* v. *Afzal Beg*(8) and *Asa Ram* v. *Jagan Nath*(9).

(1) (1882) I.L.R. 8 Cal. 757. (2) (1907) 6 C.L.J. 651.
(3) (1924) I.L.R. 52 Cal. 128. (4) (1931) I.L.R. 59 Cal. 315.
(5) (1893) I.L.R. 18 Bom. 209. (6) (1909) I.L.R. 33 Bom. 658.
(7) (1896) I.L.R. 22 Bom. 315. (8) (1911) I.L.R. 34 All. 184.
(9) (1934) I.L.R. 15 Lah. 531 (F.B.).

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[ABDUR RAHMAN J.—Why were the creditors added as parties to the suit ?]

To make provision for all the debts due by the family at the time of the partition. [Rule 5 of the Rules framed for partition suits in the Civil Rules of Practice, Vol. I, and the form prescribed at page 283 of the Civil Rules of Practice Vol. II, were referred to.]

The main prayer is for partition. What debts are binding on the family is a question which has got to be incidentally decided. So he need not pay court-fee on each item challenged.

[ABDUR RAHMAN J.—You want the Court to go into those questions and give a final decision. If so, you have to pay court-fee on each of the items challenged.]

The Court is bound to provide for the discharge of the family debts before effecting a partition. The creditors can be added as parties. [Order I, rule 10, of the Civil Procedure Code was referred to.] The plaintiff need not pay separate court-fee on that account. It is the duty of the Court to make provision for the discharge of the binding debts at the time of partition. The main prayer is for partition and whether the debts are binding or not is a question which falls to be incidentally decided.

[*Unni* v. *Kunchi Amma*(1), *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*(2), *Venkureddi* v. *Venku Reddi*(3), *Sat Narain* v. *Sri Kishen Das. Same* v. *Bank of Upper India*(4), *Veeraragavalu* v. *Sreeramulu*(5) and *Manavedan* v. *Manavedan*(6) were referred to.]

[LEACH C.J.—There are certain decrees passed in suits where your client has been made a party. If he wants them to be cancelled he must pay court-fee under section 7 (iv-A) of the Court Fees Act as amended in Madras.]

The father, who is the managing member of the family, is really the party in those suits. The plaintiff was a minor and he was formally made a party. His position is different from

(1) (1890) I.L.R. 14 Mad. 26.
(2) (1907) L.R. 34 I.A. 87; I.L.R. 34 Cal. 329.
(3) (1926) I.L.R. 50 Mad. 535 (F.B.).
(4) (1936) I.L.R. 17 Lah. 644 (P.C.).
(5) A.I.R. 1928 Mad. 816. (6) A.I.R. 1938 Mad. 474.

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that of an adult member. The plaintiff need not seek for the cancellation of the decrees.

[KRISHNASWAMY AYYANGAR J.—If you are a party to the decrees, you must necessarily get them cancelled. Otherwise they are binding on you.]

The plaintiff does not in terms ask for cancellation. So he ought not to be charged for cancellation.

[LEACH C.J.—We are all agreed on the point that the plaint does ask for the cancellation.]

In that case court-fee has got to be paid on items 9 and 10. But the court-fee should be limited only to his share in the property.

[KRISHNASWAMY AYYANGAR J.—In respect of alienations where possession of property has passed to third parties, has not the plaintiff got to pay court-fee under section 7 (v) ?]

In the case of alienations though he questions their validity, yet there is no specific prayer in the plaint to cancel them.

[LEACH C.J.—That may be so. But what your client really asks for is possession of his share of the property which has to be calculated only after setting aside these alienations.]

If your Lordships construe the plaint in that manner, then the plaintiff is bound to pay court-fee under section 7 (v) in respect of items 4, 11 and 14.

[*Kandunni Nair* v. *Raman Nair*(1), *Manikkam Pillai* v. *Murugesam Pillai*(2), *Narayanasami* v. *Swaminatha Aiyar*(3), *Kamaraju* v. *Gunnayya*(4), *Annamalai* v. *Kristappa*(5) and *Perraju* v. *Subbarao*(6) were referred to in the course of the arguments.]

Government Pleader (*B. Sitarama Rao*) for Government.—The point that arises for decision in this case is whether section 7 (iv) (*b*) or article 17-B of Schedule II of the Court Fees Act as amended in Madras, is applicable to suits for partition of joint family property. The Madras High Court has consistently taken the view that section 7 (iv) (*b*) is the proper section that is applicable; *Reference under Court Fees Act, S.* 5(7), *Velu Goundan* v. *Kumaravelu Goundan, &c.*(8),

(1) (1934) I.L.R. 58 Mad. 540.
(2) (1933) 64 M.L.J. 576.
(3) (1937) 2 M.L.J. 616.
(4) A.I.R. 1924 Mad. 322.
(5) (1934) I.L.R. 58 Mad. 385.
(6) (1934) I.L.R. 58 Mad. 821.
(7) (1894) 4 M.L.J. 110.
(8) (1896) I.L.R. 20 Mad. 289.

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and *Rangiah Cheity* v. *Subramania Chetty*(1). In *Reference under Court Fees Act, S.* 5(2), the Judges declined to follow the decisions of the Calcutta High Court in *Kirty Churn Mitter* v. *Aunath Nath Deb*(3) and *Mohendro Chandra Ganguli* v. *Ashutosh Ganguli*(4).

[The language of section 1, clause 13 of the Limitation Act of 1859 and of article 127 of the later Acts of 1871, 1877 and 1908 and of section 7 (iv) (*b*) of the Court Fees Act was referred to.]

[KRISHNASWAMI AYYANGAR J.—The Limitation Act visualises one class of cases, viz., where the plaintiff is out of possession but wants possession.]

The word "excluded" which is found in article 127 of the Limitation Acts of 1871, 1877 and 1908 is not found in the older Act.

[ABDUR RAHMAN J.—Section 7 (iv) (*b*) of the Court Fees Act would not apply where the plaintiff has been already in enjoyment of the joint family property. When the character of the property or the status of the party is denied, then only section 7 (iv) (*b*) applies.]

The plaintiff no doubt is in notional possession of the joint family property so long as his title is not denied. But it does not follow that he is enjoying all the incidents of the joint family property. The words "right to share" in section 7 (iv) (*b*) mean right to partition also. So far as the Madras High Court is concerned it has consistently taken the view that section 7 (iv) (*b*) is applicable. It has not worked any practical difficulty. When the Court Fees Act was amended in the Madras Presidency in 1922—the Full Bench Case, *Rangiah Chetty* v. *Subramania Chetty*(1), was decided in 1910—the Legislature did not touch that section. Although it is not possible to value the right of a coparcener to share in a partition suit, still he can put his own value under section 7 (iv) (*b*). So no hardship or injustice would result by applying that section.

In respect of alienated properties, where possession has passed to strangers, all the High Courts are agreed that section 7 (v) is applicable. Where an alienation is by the manager

(1) (1910) 21 M.L.J. 21 (F.B.).
(2) (1894) 4 M.L.J. 110.
(3) (1882) I.L.R. 8 Cal. 757.
(4) (1893) I.L.R. 20 Cal. 762.

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of the joint family the plaintiff need not seek to set it aside; *Unni* v. *Kunchi Amma*(1), *Chappan* v. *Raru*(2) and *Annamalai* v. *Kristappa*(3). But when a declaration is asked for he must pay court-fee on it. If the Court finds the declaration to be superfluous it can be ignored.

In the present case the plaintiff makes the creditors also parties and wants an adjudication against them. So he must pay court-fee on the items challenged. Here there is joinder of several claims under section 17 of the Court Fees Act. The plaintiff wants the declaration that certain debts are not binding and he also wants the relief of partition. They are two distinct subject matters. The period of limitation prescribed for each of them is different. [*Sibaran Jha Pandey* v. *Lokenath Missir*(4) was referred to.] Plaintiff must pay court-fee on each of the claims. He wants a declaration against the creditor who is a third party that a debt is not binding. He wants relief against the coparceners of the family for a partition of his share. The declaration is against A and the relief for partition is against B. It is not a case of declaration and consequential relief, since the relief for partition does not flow from the declaration. So the plaintiff must pay a separate court-fee to obtain a declaratory decree under article 17-A (i) of schedule II of the Court Fees Act as amended in Madras.

In the case of decrees passed in suits where the plaintiff was made a party, he must pay court-fee under section 7 (iv-A) of the Court Fees Act as amended in Madras for cancellation of those decrees. The court-fee will be on the whole of the decree amount and not on the fraction of his share.

T. S. Venkatarama Aiyar, K. R. Rangaswami Ayyangar, K. Rajagopala Ayyangar, S. Venkatesan and *R. Viswanathan* for respondents.

Cur. adv. vult.

JUDGMENT.

LEACH C.J.

LEACH C.J.—This petition raises important questions with regard to the stamping of plaints in suits for the partition of estates of joint Hindu families.

(1) (1890) I.L.R. 14 Mad. 26.
(2) (1912) I.L.R. 37 Mad. 420.
(3) (1931) I.L.R. 58 Mad. 385.
(4) (1924) I.L.R. 3 Pat. 618.

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The petitioner is the minor son of a Hindu father. Through his mother as next friend he has filed a suit in the Court of the Subordinate Judge of Kumbakonam for partition of the family properties and for possession of his one-fifth share therein. He has joined as defendants his father, his three brothers, and twenty-two other persons. The stranger defendants are made parties either as alienees of family properties or as creditors of the family. In his plaint the plaintiff avers that the family is one engaged merely in agriculture and that, before the matters complained of, it had large cash resources. He alleges that his father has engaged in reckless speculation in land, in trade, and in litigation with the result that the cash resources have disappeared, the family properties have been sold or mortgaged and numerous debts contracted. The plaintiff says that his father's transactions are not binding on the family, but he has not in terms asked for the setting aside of the alienations of family properties or for declarations that his father's other transactions are unenforceable against the estate. His prayers are for (i) an account of the movable and immovable joint family properties, (ii) the partition by metes and bounds of his one-fifth share, (iii) the appointment of a receiver to manage the properties and collect the rents and income till the disposal of the suit, (iv) the costs of the suit and (v) such further and necessary reliefs as in the circumstances may be considered necessary and proper. He values his share of the family properties at Rs. 40,000, but has merely stamped his plaint with a court-fee of Rs. 100 under article 17-B of Schedule II of the Court Fees Act as amended in Madras.

On the filing of the plaint the Subordinate Judge called for a statement of the transactions which the

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plaintiff says are invalid as against the family and a statement was submitted. From this statement and the order of the Subordinate Judge with which this petition is concerned the following particulars have been extracted :—

Item number and nature of alienation or debt.	Amount. RS. A. P.	In whose favour.	Person or persons alleged to have entered into the transaction or have been held liable.
1. Simple mortgage, dated 15th November 1932.	45,000 0 0	Fifth defendant.	First defendant for himself and as manager of the joint family.
2. Simple mortgage, dated 7th March 1934.	7,600 0 0	Sixth and Seventh defendants.	First defendant.
3. Simple mortgage, dated 13th March 1934.	3,297 0 0	Eighth defendant.	Do.
4. (a) Usufructuary mortgage, dated 23rd December 1933.	8,800 0 0	Ninth defendant.	Do.
(b) Sale in court auction in Original Suit No. 15 of 1933, Sub-Court, Kumbakonam.	..	Do.	(Not stated.)
5. Promissory-note, dated 14th March 1933.	4,000 0 0	Tenth defendant.	Defendants 1 and 26.
6. Charge-decree-debt in Original Suit No. 39 of 1926 on the file of the Subordinate Judge's Court, Kumbakonam.	26,000 0 0	Eleventh defendant.	First defendant.
7. Simple money-decree-debt in Small Cause Suit No. 211 of Subordinate Judge's Court.	600 0 0	Twelfth defendant.	(Not stated).
8. Simple money-decree-debt in Original Suit No. 42 of 1933 on the file of Subordinate Judge's Court, Kumbakonam.	3,000 0 0	Thirteenth defendant.	First defendant.

Item number and nature of alienation or debt.	Amount. RS. A. P.	In whose favour.	Person or persons alleged to have entered into the transaction or have been held liable.
9. Simple money-decree-debt in Original Suit No. 23 of 1933, Mayavaram Subordinate Judge's Court.	6,343 7 8	Fourteenth defendant.	Defendants 1 to 4 and plaintiff.
10. Simple money-decree-debt in Original Suit No. 10 of 1933, Mayavaram Subordinate Judge's Court.	6,000 0 0	Fifteenth defendant.	Do.
11. Sale, dated 29th July 1934.	18,879 5 8	Eighteenth defendant.	First defendant.
12. Simple money-decree-debt on the file of the Subordinate Judge's Court, Kumbakonam, in Original Suit No. 15 of 1933.	9,000 0 0	Nineteenth defendant.	Do.
13. Decree in Original Suit No. 298 of 1934 on the file of the District Munsif's Court of Valangiman.	3,680 0 0	Twentieth defendant.	(Not stated).
14. Sale	750 0 0	Twenty-first defendant.	First defendant.
15. Simple money-decree in Small Cause Suit No. 400 of 1933 of the Subordinate Judge's Court, Kumbakonam.	675 0 0	Twenty-second defendant.	Do.
16. (a) Simple mortgage.	5,600 0 0	Twenty-third defendant.	First defendant as manager.
(b) Simple money-decree-debt in Small Cause Suit No. 375 of 1933 on the file of the Subordinate Judge's Court, Kumbakonam.	978 0 0	..	First defendant.
17. Simple money-decree-debt in Small Cause Suit No. 814 of 1933 on the file of the Subordinate Judge's Court, Kumbakonam.	246 0 0	Twenty-fourth defendant.	Do.

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Item number and nature of alienation or debt.	Amount.			In whose favour.	Person or persons alleged to have entered into the transaction or have been held liable.	
	RS.	A.	P.			
18. Simple money-decree-debt in Original Suit No. 66 of 1933 on the file of the Subordinate Judge's Court, Kumbakonam.	5,513	8	5	Twenty-fifth defendant.	Defendants 1 to 4.	
19. Simple money debt.	400	0	0	Twenty-sixth defendant.	(Not stated.)	

It does not appear from the statement nor from the order of the Subordinate Judge why the sixteenth and the seventeenth defendants are made parties, though in the plaint it has been alleged that they are among the persons from whom the first defendant has borrowed.

The Subordinate Judge has held that, as the plaintiff himself is "constructively" a party to the mortgage for Rs. 45,000, he must pay in respect of this matter a court-fee in accordance with the *ad valorem* scale specified in article 1 of Schedule I of the Court Fees Act. He has also held that the plaintiff is constructively a party to the transactions which are items 9, 10, 11, 13, 16 (*a*) and 18 in the above table and has directed the plaintiff to pay a court-fee in respect of these items also on the *ad valorem* scale. In the Subordinate Judge's opinion the plaintiff is not even constructively a party to the other transactions, but he has held that he should pay under article 17-A (1) of Schedule II a court-fee of Rs. 100 in respect of each "for the relief of declaration". The Subordinate Judge has also called upon the plaintiff to pay a court-fee of Rs. 100 under article 17-B of Schedule II because he has asked for the appointment of a receiver. The total amount

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payable by way of court-fees under this order is Rs. 6,324–9–0. The plaintiff contends that, as he has not expressly asked for relief in respect of the transactions which he challenges, he can only be called upon to pay a court-fee of Rs. 100 under the provisions of article 17-B of Schedule II in respect of his prayer to be put in possession of his share in the estate.

Section 17 of the Court Fees Act provides that where a suit embraces two or more distinct subjects the plaint shall be chargeable with the aggregate amount of the fees to which the plaint in suits embracing separately each of such subjects would be liable under the Act. Before discussing the question of the stamping of the plaint in respect of the transactions which the plaintiff challenges, it is necessary to decide under which provision of the Act the plaint requires to be stamped in respect of the general relief for partition and delivery to the plaintiff of his share. The plaintiff's contention that article 17-B of Schedule II applies here, is contrary to the majority decision of the Full Bench of this Court (WHITE C.J., KRISHNASWAMI AYYAR and AYLING JJ.) in *Rangiah Chetty* v. *Subramania Chetty*(1). It was there held by WHITE C.J. and KRISHNASWAMI AYYAR J. that a suit for partition of joint family property where the plaintiff is in joint possession with the other coparceners is governed by section 7, clause (iv) (*b*), and that therefore the plaint in such a suit should be stamped *ad valorem* on the amount at which the relief sought is valued. AYLING J. dissented and held that the case fell within article 17 (vi) of Schedule II which is now article 17-B of the Madras Court Fees (Amendment) Act, 1922. The latter Act made extensive

(1) (1910) 21 M.L.J. 21 (F.B.).

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amendments in the Court Fees Act of 1870 in certain other respects. The opinion of WHITE C.J. and KRISHNASWAMI AYYAR J. is not shared by any other Indian High Court. The Calcutta High Court has applied article 17 (vi) of Schedule II; see *Kirty Churn Mitter* v. *Aunath Nath Deb*(1), *Bidhata Roy* v. *Ram Charitra Roy*(2), *Rajani Kanta Bag* v. *Rajabala Dasi*(3) and *Nandalal Mukherji* v. *Kalipada Mukherji*(4). The Allahabad and the Lahore High Courts are of the same opinion; see *Tara Chand Mukerji* v. *Afzal Beg*(5) and *Asa Ram* v. *Jagan Nath*(6). The Bombay High Court has held that even where the plaintiff is in joint possession of the family property the provisions of section 7 (v) should be applied; *Balvant Ganesh* v. *Nana Chintamon*(7) and *Dagdu* v. *Totaram*(8). It is true that in *Motibhai* v. *Haridas*(9) section 7 (iv) (*b*) was applied, but in *Dagdu* v. *Totaram*(8) an attempt was made to distinguish the former decision and it cannot be regarded as representing the Bombay view. The question having been raised we must consider whether *Rangiah Chetty* v. *Subramania Chetty*(10) was correctly decided.

Section 7 (iv) (*b*) says that suits to enforce the right to share in any property on the ground that it is joint family property shall be stamped according to the amount at which the relief sought is valued in the plaint. The reasons for the majority view in *Rangiah Chetty* v. *Subramania Chetty*(10) are to be found in the judgment of KRISHNASWAMI AYYAR J. in which WHITE C.J. concurred. The reasons given

(1) (1882) I.L.R. 8 Cal. 757.
(2) (1907) 6 C.L.J. 651.
(3) (1924) I.L.R. 52 Cal. 128.
(4) (1931) I.L.R. 59 Cal. 315.
(5) (1911) I.L.R. 34 All. 184
(6) (1934) I.L.R. 15 Lah. 531 (F.B.).
(7) (1893) I.L.R. 18 Bom. 209.
(8) (1909) I.L.R. 33 Bom. 658.
(9) (1896) I.L.R. 22 Bom. 315.
(10) (1910) 21 M.L.J. 21 (F.B.).

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by KRISHNASWAMI AYYAR J. can be shortly stated in this way. It would not be likely that the Legislature in enacting a measure with regard to court-fees would have omitted to make specific provision for such a common form of suit as a suit for partition by a member of a joint Hindu family and the Privy Council had applied a clause similarly worded in the Limitation Act of 1859 to such suits. The clause referred to in that Act is clause 13 of section 1, which fixed a period of twelve years for suits to enforce the right to share in any property moveable or immoveable on the ground that it is joint family property. AYLING J. agreed with the opinion expressed in *Dagdu* v. *Totaram*(1) that a suit to recover by partition a definite and ascertained share of a specified property could not fall under section 7 (iv) (*b*), but he did not accept the Bombay view that section 7 (v) was the appropriate section. He accepted the decision in *Kirty Churn Mitter* v. *Aunath Nath Deb*(2) as embodying the correct view. In that case GARTH C.J. observed that it was impossible to say what would be the value to the plaintiff of the change in the nature of his property. A partition suit changes the form of enjoyment of the property. Instead of an undivided share the plaintiff claims a divided share. AYLING J. agreed that it was impossible to estimate in money the value of such a suit. In this connection it may be mentioned that in *Gill* v. *Varadaraghavayya*(3) WALLIS C.J. and SADASIVA AYYAR J. held that a suit for partition of immoveable property by a person who alleged that he was in possession of it as co-tenant on behalf of himself and others was governed by article 17 (vi) of Schedule II (now article 17-B) because the

(1) (1909) I.L.R. 33 Bom. 658.
(2) (1882) I.L.R. 8 Cal. 757.
(3) (1919) I.L.R. 43 Mad. 396.

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value of the subject-matter was not capable of valuation.

The Bombay High Court stands alone in its application of section 7 (v). That section says that in suits for the possession of land, houses and gardens the stamp fee shall be paid according to the value of the subject-matter, and states how that value shall be arrived at. In my opinion this sub-section cannot be deemed to apply to a partition suit where the plaintiff is in joint possession. A joint owner who is in possession does not need to sue for possession. He has possession and the fact that his possession is shared by others does not affect the position. I consider that section 7 (v) can only apply where the plaintiff is seeking relief in respect of possession of immoveable property when he is out of possession.

If section 7 (v) is ruled out the only other provisions of the Court Fees Act which call for consideration are section 7 (iv) (*b*) and article 17-B of Schedule II. The language of section 7 (iv) (*b*) is, however, incompatible with a claim for partition when the plaintiff is in joint possession with the other members of his family. A suit to enforce a right *to share* in any property on the ground that it is joint family property is a suit of a different nature from a suit to enforce the right to *a share*. Where the claim is *to share*, it implies that the plaintiff is not in possession ; whereas a suit to obtain possession of *a share* is compatible with the plaintiff being in joint possession of the whole.

With regard to the reasoning of KRISHNASWAMI AYYAR J. based on section 1, clause 13, of the Limitation Act of 1859, it falls to be observed that the wording of this clause was changed by the Limitation Act of 1871 and that the change has been maintained

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in the Acts of 1877 and 1908. The corresponding article to section 1, clause 13 of the Act of 1859 in the two later Acts is article 127, which provides a period of limitation of twelve years in respect of a suit by a person excluded from joint family property to enforce a right to share therein. The article now clearly only refers to a suit by a person who is excluded from joint family property. KRISHNASWAMI AYYAR J. did not think that this amendment made any difference in the interpretation of the article, but in my opinion the alteration of the wording certainly robbed the argument of any force it might have had. As altered its applicability is expressly limited to a case where the member suing is not in joint possession. If the words of section 7 (iv) (*b*) are to be given their ordinary meaning they cannot apply to a suit for partition by a member of a joint family who is still in joint possession. It follows that I consider that the majority decision in *Rangiah Chetty* v. *Subramania Chetty*(1) is erroneous and should be overruled. In these circumstances the only provision in the Court Fees Act which is applicable is article 17-B of Schedule II and in stamping his general relief under this provision the plaintiff has acted rightly.

I am unable to accept the plaintiff's contention that he should not be called upon to pay court-fees in respect of any of the transactions which he challenges because he has not asked for specific relief in respect of them. His plaint challenges the validity of transactions entered into by his father as manager of the family, and particulars of these transactions have been supplied. The plaintiff must pay court-fees in accordance with the relief which he is actually

(1) (1910) 21 M.L.J. 21 (F.B.).

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seeking. He cannot be allowed to evade payment by omitting to ask for relief when the success of his suit depends on relief being granted to him. The Court must look at the real nature of the suit and decide what the plaintiff is asking for. In this case he is asking for possession of his share in the estate to be calculated after certain transactions have been set aside. Mr. V. V. Srinivasa Ayyangar has rightly conceded that if it is necessary for the plaintiff to ask for relief in respect of any of the transactions he must pay extra court-fee. The plaintiff is in effect asking in respect of alienations where possession has passed to the alienees that they be set aside and that he be placed in possession of his share of the properties alienated. In respect of these transactions the plaintiff clearly has to stamp his relief in accordance with the provisions of section 7 (v). This will apply to items Nos. 4, 11 and 14 of the table set out above.

In respect of decrees passed against him in suits in which he had been *eo nomine* impleaded as a party, it is plain that he must pay the fee prescribed by section 7 (iv-A). Such decrees bind him until set aside, and therefore he cannot seek to obtain a decision on the footing that his interest in the joint family property is not affected by them. It makes no difference that the plaintiff is a minor or merely a junior member of the family as the considerations which apply to the decree of a competent Court once it is passed are essentially different from those applicable to the transactions of a party. The plaintiff must be held to have impliedly asked for a cancellation of the decrees passed against him and must accordingly stamp his plaint *ad valorem* on the amount of the decrees and not merely on his share fraction, as his liability is for the full amount, though

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necessarily limited to the extent of his share in the joint family assets. These remarks apply to items Nos. 9 and 10 in the table.

The other transactions of the first defendant, whether the plaintiff is made a party thereto or not, stand on a different footing. He is not bound under the substantive law by which he is governed, to sue for a declaration or cancellation in respect of any of them. The legal position has been correctly explained in *Unni* v. *Kunchi Amma*(1) in the following words which were taken from an unreported decision of this Court:

> "If a person not having authority to execute a deed or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it, to sue to set it aside, for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist."

The same principle has been distinctly laid down by the Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*(2) where their Lordships point out the jural basis underlying such transactions. In that case the reversioner sued for a declaration that a lease granted by the widow of the last male owner was not binding on him and for khas possession. It was objected that the omission to set aside the lease by a suit instituted within the time limited by article 91 of the Indian Limitation Act was fatal to the suit. The following observations which are equally applicable to a father or manager of a joint family are apposite:

> "A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs

(1) (1890) I.L.R. 14 Mad. 26.
(2) (1907) L.R. 34 I.A. 87; I.L.R. 34 Cal. 329, 333.

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upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. It is true that the appellants prayed by their plaint for a declaration that the ijara was inoperative as against them, as leading up to their prayer for delivery to them of khas possession. But it was not necessary for them to do so, and they might have merely claimed possession, leaving it to the defendants to plead and (if they could) prove the circumstances, which they relied on, for showing that the ijara or any derivative dealings with the property were not in fact voidable, but were binding on the reversionary heirs."

In such cases even if the plaint contains a prayer for a declaration or cancellation, there is good reason for holding it to be one for a purely incidental, but unnecessary, relief. As I have indicated there is no such prayer in the plaint and in the light of the principles explained there is no justification for implying them and then demanding a fee for it. Nor can I see any force in the argument that the position is altered by the joinder in the suit of the parties to the transactions who are interested in supporting them. Whether they are before the Court or not, the Court is bound as between the members of the family to decide which are the debts binding on the family, before directing a division; vide *Venkureddi* v. *Venku Reddi*(1) and *Sat Narain* v. *Sri Kishen Das. Same* v. *Bank of Upper India*(2). The presence of the third parties would no doubt invest the decision with a

(1) (1926) I.L.R. 50 Mad. 535 (F.B.). (2) (1936) I.L.R. 17 Lah. 644 (P.C.).

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finality, but this is scarcely a ground for reading into the plaint a prayer which the member suing is not obliged to seek under the law in the face of the provision in Order I, rule 10 (2), of the Code of Civil Procedure which permits the name of any person to be included in a suit, whose presence before the Court would enable it effectually and completely to adjudicate upon and settle all questions involved in the suit. I am unable therefore to appreciate the argument that, by reason of his impleading the several creditors, the plaintiff must be deemed to have asked for declarations in respect of each of the transactions impugned and must pay a separate court-fee as regards each one of them.

It follows that in my opinion the plaintiff cannot be called upon to pay any additional court-fee in respect of the transactions challenged other than the transactions described in items Nos. 4, 9, 10, 11 and 14. It will be for the respective defendants to establish their right to rank as creditors in the other transactions when the account is taken. Neither can the plaintiff be called upon to pay a separate court-fee in respect of his prayer for the appointment of a receiver. This relief is entirely of an interlocutory character.

The record will be remitted to the trial Court and the plaintiff will be given an opportunity of stamping his plaint in accordance with this judgment. Notice of this petition was served on the Government Pleader but as the plaintiff has succeeded in part there will be no order as to costs.

PANDRANG ROW J.—I agree with my Lord.

KRISHNASWAMI AYYANGAR J.—I concur in the opinion expressed by my Lord the CHIEF JUSTICE.

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PATANJALI SASTRI J.—I concur in the judgment just delivered by my Lord the CHIEF JUSTICE.

ABDUR RAHMAN J.—I agree with my Lord the CHIEF JUSTICE in regard to the conclusions at which he has arrived on the various questions involved in this revision except on one and would therefore give my reasons.

Three divergent views have been expressed by different High Courts in regard to the court-fee to be put on a plaint for partition of joint family property where the plaintiff happens to be in joint possession of the same with his coparceners. The Calcutta and Allahabad High Courts have consistently taken the view that the fee in such a case would have to be fixed under article 17 (vi) of Schedule II to the Court Fees Act; vide *Kirty Churn Mitter* v. *Aunath Nath Deb*(1), *Bidhata Roy* v. *Ram Charitra Roy*(2), *Rajani Kanta Bag* v. *Rajabala Dasi*(3), *Nandalal Mukherji* v. *Kalipada Mukherji*(4) and *Tara Chand Mukerji* v. *Afzal Beg*(5). The Lahore High Court was taking a different view before but has in a recent Full Bench case decided to fall in with the view of the Calcutta and the Allahabad Courts; vide *Asa Ram* v. *Jagan Nath*(6). The Bombay High Court has been, except in one case *Motibhai* v. *Haridas*(7), of opinion that inasmuch as a suit for partition involves a claim for possession, it should be governed by section 7 (v) of the Act. The view adopted in this Presidency after the Full Bench decision in *Rangiah Chetty* v. *Subramania Chetty*(8) has been that the fee was to be paid in accordance with the rule contained in section 7 (iv) (*b*) of the

(1) (1882) I.L.R. 8 Cal. 757.
(2) (1907) 6 C.L.J. 651.
(3) (1924) I.L.R. 52 Cal. 128.
(4) (1931) I.L.R. 59 Cal. 315.
(5) (1911) I.L.R. 34 All. 184.
(6) (1934) I.L.R. 15 Lah. 531 (F.B.).
(7) (1896) I.L.R. 22 Bom. 315.
(8) (1910) 21 M.L.J. 21 (F.B.).

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Act. In view of this conflict of judicial opinion I referred the revision raising this and three other questions when it came up before me for an authoritative decision by a larger Bench. It was placed before a Full Bench which decided to place this and other questions for a decision by five Judges and this Bench was constituted in consequence.

The questions which arise for determination in this revision are: (*a*) What is the requisite fee payable in cases where a plaintiff asks for partition of family property of which he is or claims to be in joint possession? (*b*) What would be the court-fee payable in respect of a property which a plaintiff has included in his suit for partition but which property has been alienated by a manager of the family and its possession has passed out of the family? (*c*) Whether it is incumbent upon the plaintiff, if he wishes to get rid of any decrees or alienations to which he was *eo nomine* a party, to sue for their cancellation. If so, what fee would he be liable to pay for that relief? (*d*) Was it essential for the plaintiff to sue for a declaration or cancellation in regard to transactions (decrees or alienations) to which he had not been made a party? Or, in other words, would he be justified in ignoring these transactions altogether and claiming partition although he impleads the decree-holder or the alienee, thus desiring to have a final adjudication as between him and them in regard to the binding character of the decrees or alienations? If he is not justified in ignoring these transactions and is bound to ask for a relief, what should he sue for and what is the requisite fee for that relief?

As to the first question, it was conceded by the learned Judges of this Court whose decision prevailed

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in the Full Bench Case, *Rangiah Chetty* v. *Subramania Chetty*(1), that the subject-matter in dispute, which was nothing but a convenience sought by the plaintiff in the form of his enjoyment, was not capable of being estimated at a money value. They however declined to apply the provisions of article 17 (vi) to a suit of this nature as they found the second condition necessary for its application to be wanting. They felt that section 7 (iv) (*b*) in terms applied to a suit for partition even when the plaintiff claimed to be in joint possession of the family property and since the provisions of article 17 (vi) could not be attracted as long as a provision could be found in the Act for a suit of this kind, they held the above-stated article to be inapplicable. There is no doubt that if section 7 (iv) (*b*) applied to a suit of this nature, article 17 (vi) would have no application. But the question is if section 7 (iv) (*b*) is applicable. It reads as follows :

"To enforce the right to share in any property on the ground that it is joint family property."

It has to be admitted that the language of this clause is clumsy and has now been repealed in Bengal where a new section has been enacted in its place which provides a fixed fee in suits for partition where the plaintiff is in joint possession of property. The same course has not been adopted in other Provinces, although in the interests of the litigant public it might have been properly so adopted. Since the old section of the Act still exists on the statute book, we have to determine if this clause was rightly applied by the learned Judges of the Madras High Court to this class of cases.

It might be stated at the outset that this sub-section is apparently applicable to persons who own joint family property in the sense in which that

(1) (1910) 21 M.L.J. 21 (F.B.).

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expression is used in the Hindu law and could not be applied to persons who are merely tenants-in-common. The only Lahore case which was brought to our notice in which the present section was extended to Muhammadans has been dissented from by a Full Bench of that Court ; vide *Asa Ram* v. *Jagan Nath*(1).

As for the words used in section 7 (iv) (*b*), ordinarily the expression "to enforce the right to share" would convey the meaning that the plaintiff wanted to enforce a right which he had been deprived from sharing and not that he wished to exercise a right which he had been enjoying although in a different form or manner. I am not at present considering cases where a person has not been permitted to enjoy even joint rights in the family property, or in other words, where he has been ousted from joint enjoyment of the property, but only those in which he had been enjoying and in regard to which he wished to seek a partition, that is to say, where he wished to enjoy his specific share in the property separately after severing his rights from those of the other members of the coparcenary or joint family as the case may be. In the latter type of cases the plaintiff can only be said to have asked for a change in the mode of enjoyment and it would not be, to my mind, quite correct to say that in seeking this changed mode of enjoyment he was trying to enforce a right to share a joint property, a right which he had been enjoying heretofore without any hindrance by the other members. If a plaintiff has been in joint enjoyment and he does not wish to continue to enjoy the property in that manner, all that he need ask for is, not possession which is already with him, but partition, a relief for which

(1) (1934) I.L.R. 15 Lah. 531 (F.B.).

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no provision has been specifically made in the Court Fees Act. The language of the section, if construed grammatically, does not help us in arriving at the result that the provisions of the sub-section were meant to cover cases of partition at the instance of a person who had been in joint enjoyment of the family property. Let me then examine the reasons given by the learned Judges in the Full Bench decision *Rangiah Chetty* v. *Subramania Chetty*(1) for coming to the conclusion that this section was applicable in regard to suits of the nature mentioned therein. The first reason given by them was that the language of the section if it was not construed in the manner suggested, would lead to the startling result that while provision in regard to, what they call, rare cases (i.e., cases where coparceners bring suits for joint possession after being excluded from the enjoyment of or for participation in the profits of the joint property) might be found to have been contained in this sub-section, no provision for common cases, i.e., suits for partition by coparceners in possession, would be found to have been made at all. This reasoning would not, with great deference to the learned Judges, justify us in bringing cases within the scope of this sub-section if they would not otherwise fall within it. Where has the very common case of a suit for partition of property owned jointly by tenants-in-common been, one might well ask, provided under the Act? Is there any reason to hold, that while cases of partition by tenants-in-common of property which cannot fall within the expression "joint family property" should be held to fall under article 17 (vi) of Schedule II of the Act, suits for partition by joint

(1) (1910) 21 M.L.J. 21 (F.B.).

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tenants should be deemed to come under this clause? I find none for drawing this distinction.

The second reason given by the learned Judges was drawn by an analogy from the construction placed on similar words by their Lordships of the Judicial Committee and by the High Courts in India occurring in article 127 of the Limitation Acts of 1871, 1877 and 1908 or its corresponding provision in the earlier Limitation Act of 1859; see *Hari* v. *Maruti*(1), *Nilo Ramchandra* v. *Govind Ballal and Others*(2), *Raghunath Bali* v. *Maharaj Bali*(3) and *Pirthi Pal and Uman Parshad* v. *Jowahir Singh*(4). The words of that article in the first column in the present Limitation Act and in its predecessor (Act XV of 1877) read as follows:

"By a person excluded from joint family property to enforce a right to share therein."

It is manifest from the language that this article was meant to apply to a person who was excluded from the joint family property. The same language was employed in Act IX of 1871 with the difference that the word "Hindu" was used instead of the word "person". This would be of no consequence. In all these Acts of Limitation the period of limitation was to begin from the date when the exclusion became known to the plaintiff. As for Act XIV of 1859, section I, clause 13, contained a provision for suits "to enforce the right to share in any property, movable or immovable, on the ground that it is joint family property". The period prescribed was twelve years and it was to run from the death of the person from whom the property alleged to be joint was said to have descended or from the date of the last payment

(1) (1882) I.L.R. 6 Bom. 741.
(2) (1885) I.L.R. 10 Bom. 25.
(3) (1885) I.L.R. 11 Cal. 777 (P.C.).
(4) (1887) I.L.R. 14 Cal. 493 (P.C.).

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to the plaintiff or any person through whom he claimed by the person who was in possession or enjoyment of such property on the ground of such alleged share. It would thus be seen that it applied only to persons who were not in joint enjoyment of the property which was claimed to have descended to them from the deceased or to those who did not get their shares of income from the persons who were actually in possession. The provisions contained in the various Limitation Acts were thus not applicable to persons who were in joint enjoyment of the property but to those only who had been excluded from its enjoyment either actually or by non-payment of any income on account of their share. There would have been no difficulty if, in applying the analogy of the construction placed on the words of the Limitation Acts to the language employed in section 7 (iv) (*b*) of the Court Fees Act, the same assumption of exclusion could be made here as well; but unfortunately it is not so. It was taken to cover cases where the plaintiff had been in joint enjoyment of family property. If an excluded person wishes to enforce his right against a person in possession, he would necessarily have to establish it before he can be permitted to enforce it and in attempting to enforce his right to share a property, when the right is one of joint enjoyment, he must confine his claims to share its enjoyment, and cannot ask for its actual participation by getting a share or a slice out of the joint property. It would therefore seem to follow that the demand for a share was not contemplated or in any case covered by this sub-section.

These were the only two reasons given by the learned Judges in coming to the conclusion that section 7 (iv) (*b*) applied to a suit for partition by a

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member of a joint Hindu family in respect of property of which he had been in joint possession with the other members. The other reasons given by them were advanced really to repel the arguments put before them to show that the section was inapplicable. Stress was laid by the Counsel who appeared in the case on the fact that the clause uses the verb "to share" and not the noun "share" and on the use of the words "on the ground that it is joint family property". They were repelled by KRISHNASWAMI AYYAR J., who wrote the leading Judgment in the Full Bench case, on the ground that the use of the verb instead of the noun was justified as "until partition no member of a joint Hindu family is entitled to a definite portion of the family estate." As for the use of the expression "on the ground that it is joint family property", it was met by saying that the word should not be construed to mean "on the ground that it is property of a continuing joint family". It may be true that if a person has not communicated his intention to sever himself from a joint Hindu family before he files a suit for partition he would be a member of a joint Hindu family at the time when the suit is instituted. But the moment the plaint is actually presented by him or on his behalf, a disruption of the joint family comes into effect and what the plaintiff would be entitled to, and that is plainly the object of his suit which is one for partition, is a share in the joint family property. He cannot, after a severance has taken place, ask to share the joint family property but only for a share in that property. It goes without saying that as soon as a severance in status takes place in the eye of law, the property does not retain the character, which it had before partition, of joint family property. Hence in a suit for partition the

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property, although undivided, cannot continue to be described to be that of a joint family. It would be thus clear that in a suit for partition—whatever be the plaintiff's status before suit—his share must be held to be definite after its institution and he must be held to be claiming a share in the property which was once joint family property and not to share the property on the ground that it is joint family property. I am therefore of opinion that section 7 (iv) (*b*) could not be held to apply to a suit for partition instituted by a member of a joint Hindu family against the other members when the former was in joint enjoyment of the property.

The question then is whether section 7 (v) as held by the Bombay High Court in *Balvant Ganesh* v. *Nana Chintamon*(1) and *Dagdu* v. *Totaram*(2) is applicable to the facts of this case. The facts have not been very clearly stated in these cases and it is not possible to say whether the plaintiffs were in joint possession of the property on the dates on which those suits were instituted. If they were in possession or claimed to be so, we would have to say, with very great respect to the learned Judges who decided those cases, that sufficient weight was not given by them to that fact. If a plaintiff is required in cases where he has been in joint enjoyment of property to pay court-fee as he would be when suing for possession, it would follow that his joint possession of the property which he has had at the time of the suit has been wholly ignored and at all events regarded of no consequence or value. If the view was taken in cases even when the plaintiff was in joint enjoyment, it cannot be supported. If the plaintiffs were on the other hand out of possession

(1) (1893) I.L.R. 18 Bom. 209. (2) (1909) I.L.R. 33 Bom. 658.

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on the date on which they had filed these suits, they were rightly required to pay a court-fee under section 7 (v).

Section 7 (iv) (*b*) and section 7 (v) have been found to be inapplicable. There is no other provision in the Court Fees Act which would cover suits of this nature. If the convenience which the plaintiff desires in having his share partitioned is incapable of being estimated at a money value, as it undoubtedly is, the only article applicable to a suit of this kind would be article 17 (vi) or article 17-B as enacted in Madras.

The second question presents no difficulty. If the plaintiff was not in possession, either actual or constructive, of the property at the time when he instituted the suit, the provisions contained in section 7 (v) of the Court Fees Act would apply and he would have to pay court-fee in accordance with rules contained therein. Of course it is the allegation of the plaintiff himself which is material in this respect. But the plaintiff on his own showing was not in possession of some of the properties such as these which were sold or given under a usufructuary mortgage.

As for the third question a perusal of the plaint would show that the plaintiff, after referring to a large number of transactions in paragraphs 6, 7 and 8 of the plaint and after alleging that the debts contracted by the first defendant, who was the plaintiff's father, were wholly for speculative objects and that the family enjoyed no benefit at all from the debts borrowed by him, asserted in paragraph 13 of the plaint that the alienations made by him in favour of defendants were null and void and did not bind the plaintiff's share in the joint family property. The plaintiff was ordered by the trial Court to furnish a statement of the various

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transactions which he wished to impugn and this was submitted by him. A perusal of this statement shows that he has impugned decrees for money to which he was a party and certain alienations of joint property some of which have passed out of the family's possession. It has not been shown in this statement whether the mortgages, executed by defendant 1 as a father or manager of the family, describe the plaintiff *eo nomine* to be a party to those documents. But the lower Court holds that he was made a party to some of them. The mortgagees, the decree-holders and the creditors have been impleaded as parties to the suit and although the plaintiff has asked for no specific relief and has contented himself with the prayer that an account of the movable and immovable joint family properties be taken, yet it is obvious that, if the Court must have regard to the substance of the thing and not to the mere form in which the relief has been prayed for, the plaintiff must be, in formulating his relief in that manner, taken to have asked for the questions of the binding nature of these alienations, decrees and debts to be adjudicated finally in this suit. If the plaintiff was *eo nomine* a party to the decrees, as he is shown to be, or to any of the mortgages it would be incumbent upon him to ask the Court to go into the question whether they were binding on him. Unless that is done the Court would be fully justified in assuming a decree to have been rightly passed against the plaintiff or an alienation to have been *prima facie* properly effected on his behalf by his father. I am not concerned just now with any question of burden of proof and consider it to be irrelevant for this purpose. If the plaintiff wishes to get rid of the decrees or alienations to which he was made a party, he must ask for specific relief in regard to these transactions. The

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question then is as to what that relief should be. Not only has a cancellation of the whole of the decree or document been provided for in section 7 (iv-A) (Madras Amendment) of the Court Fees Act but the amendment covers cases where a plaintiff wishes to have a part of the decree or document cancelled. In the presence of this provision, it is impossible to come to any conclusion other than that the plaintiff must sue in such cases for cancellation and pay a court-fee in accordance with the rule contained in section 7 (iv-A) of the Court Fees Act.

The last question to be decided is in respect of transactions or decrees to which the plaintiff was not *eo nomine* a party. It has been argued and not without some force that the plaintiff may well ignore decrees passed against or instruments executed by a member of the family even though that member be his own father and manager of joint family and that he could ask for a partition of the property without having any regard to such alienations and could insist that no funds need be reserved at the time of partition for payment to such decree-holders or alienees. The argument would have been unassailable if the plaintiff had not impleaded such alienees or creditors in the suit and had not asked for a decree for accounts. The course adopted by him suggests that he wanted the Court to go into these questions and adjudicate on them once and for all. If the plaintiff desired the Court to go into these questions and prayed for a relief which must in the circumstances be taken as tantamount to asking for an adjudication of the questions relating to his liability for the decrees passed against his father or to the binding nature of the alienations of family property, there is no reason why he, the plaintiff, should not pay court-fee in regard to them.

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He may not have been liable to pay any court-fee if such an objection was raised by one of the defendants and the Court had impleaded a creditor or an alienee at the defendant's suggestion and had gone into that question or even when he, i.e., the plaintiff himself, had impugned a debt or a transaction but had not impleaded the creditor or the alienee. These can be explained however on different grounds. In the first case the plaintiff cannot be held liable to pay as the matter would have to be gone into at the instance of the defendant and in the second case the matter would be decided as between the parties to the partition suit only. Naturally the alienee or the creditor would not be bound by the decision in that case and cannot take advantage of it even if it is settled in his favour although in his absence. In such cases the plaintiff cannot be said to have asked for any final adjudication of these questions except for purposes of partition and is not liable to pay court-fee for anything else except for that suit. But when he does ask for this adjudication, either expressly or in such a manner that he must be deemed to have asked for these questions to be gone into and finally decided, there is no reason why he should not be required to pay for the relief which he has asked to be given to him. The plaintiff's allegations that the alienations or debts were not binding on him made against the parties whom he had impleaded as defendants can only be attributed to his desire to have final adjudication of these questions as between him and them. In view of these assertions, his prayer for accounts must be taken to be the equivalent of a prayer for declaration that these debts and alienations were not binding on the plaintiff. A prayer for declaration cannot be, and I say so with great deference, regarded under the

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circumstances as either superfluous or even ancillary. A suit for partition in which the plaintiff wants an adjudication against a creditor or an alienee comprises two causes of action and although permitted by procedure to be included in one suit, it covers two distinct subject-matters, both of which should be paid for. The fact that two periods of limitation are applicable to these causes of action would show that both of them are not only separate but independent. It is unnecessary to say what the result would have been if no such prayer had been made by him at all in the plaint although it is quite possible to conceive that in the absence of an express prayer by him, he might have been taken to have done so and the court-fee demanded as if that prayer had been made by him. In the circumstances of this case he should in my opinion be asked to pay court-fee as for simple declarations under article 17-A (i). The prayer for partition cannot in my opinion be considered to be one for consequential relief as the relief for partition cannot be said to directly flow from the declaration although it may be that in the event of such a declaration being granted his share may be augmented to a certain extent. It must not be overlooked that the plaintiff's prayer for the declaration is against the creditors or the alienees while the relief for partition is being asked for by the plaintiff not against them, i.e., the creditors or the alienees but against his co-sharers.

V.V.C.

APPELLATE CIVIL.

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

1939, October 11.

MAHADEVI *alias* KUNHI THAMPURATTI (SECOND DEFENDANT), PETITIONER,

v.

P. P. SANKARA MENON (PLAINTIFF), RESPONDENT. *

Provincial Small Cause Courts Act (IX of 1887), Sch. II, art. 31—Applicability to suit by agent against principal for a sum of money—Suit cognizable by Small Cause Court.

The respondent was the agent of a stanam and it was his duty as such to collect the rents due to the stanam and to meet all proper expenses in connection with the estate. He was suspended from his duties about a year after the date of his appointment and his suspension was followed by his dismissal about four months later. He sued to recover from the petitioner a sum of money, alleging that, after taking into account what he (respondent) had collected by way of rent and what he had expended, and the salary due to him during his period of suspension together with the peon's salary which he had himself met, the petitioner was liable in the said sum.

Held that the suit was not a suit for an account within the meaning of article 31 of the second schedule to the Provincial Small Cause Courts Act, 1887, and that the District Munsif (Court below) exercising small cause jurisdiction had jurisdiction to try the suit.

Konduru Runga Reddi v. *Subbiah Setty and Kumbahala Subbamma*(1) followed.

Abdul Rahiman Rowther v. *Jamalluddin Sahib*(2) disapproved.

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

* Civil Revision Petition No. 1292 of 1936.

(1) (1904) I.L.R. 28 Mad. 394.

(2) (1938) 2 M.L.J. 76.

District Munsif of Calicut in Small Cause Suit No. 1666 of 1935.

P. Govinda Menon for petitioner.

D. A. Krishna Variar for respondent.

The JUDGMENT of the Court was delivered by LEACH C.J.—The question involved in this petition is whether the District Munsif of Calicut exercising small cause jurisdiction was right in entertaining the suit filed by the respondent against the petitioner. The respondent was the agent of a stanam and it was his duty as such to collect the rents due to the stanam and meet all proper expenses in connection with the estate. He was appointed as the agent on 17th September 1931. For reasons which have not been disclosed, and in any event would not be material, he was suspended from his duties on 21st August 1932. His suspension was followed by his dismissal on 17th December 1932. The respondent filed the suit out of which this petition arises to recover from the petitioner a sum of Rs. 189-9-9. His case was that after taking into account what he had collected by way of rent and what he had expended and the salary due to him during his period of suspension together with the peon's salary which he had himself met, the petitioner was liable in the sum mentioned. The petitioner objected to the jurisdiction of the Court on the ground that this was a suit for an account within the meaning of article 31 of the Second Schedule to the Provincial Small Cause Courts Act, 1887. Article 31 excludes from small cause jurisdiction a suit for an account. The District Munsif held that this was not a suit for an account within the meaning of article 31 and passed a decree for Rs. 106-5-0 with interest and costs.

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LEACH C.J.

It is manifest that the District Munsif was right in holding that he had jurisdiction to try the suit. As was pointed out by a Bench of this Court in *Konduru Runga Reddi* v. *Subbiah Setty and Kumbahala Subbamma*(1) a suit for an account is a special form of suit. It does not embrace every case in which accounts have to be looked into to ascertain the amount due to the plaintiff. A special process is required to take an account and Small Cause Courts have no means of dealing with such an action. I may add that a suit for an account implies that the plaintiff is entitled under the substantive law to demand an account from the defendant. If he establishes the right, the defendant is called upon to submit an account and if he fails to comply he does so at his own risk. If the account is submitted the plaintiff may file objections. When the preliminaries are completed the account is taken by the Court, usually through an officer appointed for the purpose.

A similar decision to that in *Konduru Runga Reddi* v. *Subbiah Setty and Kumbahala Subbamma*(1) was given by another Bench of this Court in *Varadarajulu Chettiar* v. *Narayanasami Chetty*(2). *Konduru Runga Reddi* v. *Subbiah Setty and Kumbahala Subbamma*(1) was followed by ABDUR RAHMAN J. in *Ramachandra Madhavadoss Co.* v. *Moidunkutti Birankutti & Bros.*(3). A dissentient note was, however, sounded by VENKATASUBBA RAO J. in *Abdul Rahiman Rowther* v. *Jamalluddin Sahib*(4). The learned Judge considered that the substance of the suit had to be looked into and if it involved the taking of an account it was a suit for an account within the meaning of article 31. The learned Judge referred to the

(1) (1904) I.L.R. 28 Mad. 394.
(2) (1913) 24 M.L.J. 693.
(3) (1938) 2 M.L.J. 112.
(4) (1938) 2 M.L.J. 76.

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decision in *Konduru Runga Reddi* v. *Subbiah Setty and Kumbahala Subbamma*(1) by which he was bound but he did not follow it. The opinion which VENKATASUBBA RAO J. expressed is not only contrary to the authorities which were binding on him, but is clearly one which cannot be supported.

In the present case the respondent was in effect suing for an indemnity against his principal. Section 222 of the Indian Contract Act says that the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him. An employer can call upon his agent for an account, but an agent cannot call upon his employer for an account.

The decision of the District Munsif that he had jurisdiction to entertain the suit was right. The petition therefore fails and must be dismissed with costs.

N.S.

(1) (1904) I.L.R. 28 Mad. 394.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Patanjali Sastri.

1939, August 9.

EDWARD H. M. BOWER (APPLICANT), APPELLANT,

v.

LT.-COL. A. M. V. HESTERLOW AND TWO OTHERS (NIL), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 92—Public Trust—Deed of trust providing scholarships—Restrictions regarding age, educational qualifications, parentage, residence, etc., of intending applicants—Public trust or private trust—Deviation from deed of trust—Permissibility of.

A member of the Anglo-Indian community formulated a scheme to help Anglo-Indian youths in their studies. He set aside Government securities of the face value of Rs. 30,000 as an endowment fund. The interest on the capital was to be devoted to making advances to Anglo-Indian youths who wished to qualify for professions or obtain higher education generally. The advances which were to be called "scholarships" were to be repaid by the recipients out of their earnings on completion of their education. The trust deed which was drawn up and executed provided that each recipient of an advance should take out a life insurance policy and assign it as security to the trustees. The premium and other incidental expenses were to be met by the trustees and added to the amount of the loan. On re-payment of the loan with interest at four per cent the policy was to be re-assigned to the insured. In the event of the insured dying before the re-payment of the loan, sufficient of the money due on the policy to discharge the debt was to be paid to the trustees and the balance paid to the persons nominated by him "or otherwise according to the terms of the policy taken in the matter." He placed certain restrictions as regards age, educational qualifications, parentage, residence, etc., on the intending applicants to the scholarship.

Held that the trust created was a public trust and as such governed by the provisions of section 92 of the Code of Civil Procedure.

* Original Side Appeal No. 78 of 1937.

In re New. In re Leavers. In re Morley(1) and *In re Monk. Giffen* v. *Wedd*(2) referred to.

APPEAL against the judgment and decree of GENTLE J., dated 24th August 1937 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 135 of 1937.

The Advocate-General (*Sir A. Krishnaswami Ayyar*) for *V. Sundararajan* for appellant.

V. C. Viraraghavachari for first respondent.

Other respondents were not represented.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal arises out of a decision on an originating summons issued under Order XLV of the Rules of the Original Side of this Court. The summons was taken out by the appellant, the sole remaining trustee of a trust known as the Richmond Educational Trust. The appellant sought an order of the Court permitting a deviation from the trust deed and asked for the appointment of two new trustees. The appellant regarded the trust as a private one and relied on the provisions of section 34 of the Indian Trusts Act. The matter came before GENTLE J. who dismissed the summons so far as it related to the prayer for permission to deviate from the trust deed, but granted the prayer for the appointment of additional trustees. The appellant has appealed against the first part of the order, as he contends that the learned Judge erred in not sanctioning the deviation. The main question, however, is whether this trust is to be regarded as being of a public or private nature. If it is a public trust the application did not lie.

(1) [1901] 2 Ch. 534. (2) [1927] 2 Ch. 197.

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The trust was created by one Thomas Richmond, a member of the English and the Madras Bars, under a deed dated 11th April 1918. The founder apparently regarded the trust as being of a private character. He was a member of the Anglo-Indian community and he formulated a scheme to help Anglo-Indian youths in their studies. He set aside Government securities of the face value of Rs. 30,000 as an endowment fund. The interest on the capital was to be devoted to making advances to Anglo-Indian youths who wished to qualify for professions or obtain higher education generally. The advances which were to be called "scholarships" were to be repaid by the recipients out of their earnings on completion of their education. The trust deed which was drawn up and executed provided that each recipient of an advance should take out a life insurance policy for a sum equivalent to double the advance and assign the policy as security to the trustees. The premium and other incidental expenses were to be met by the trustees and added to the amount of the loan. On repayment of the loan with interest at four per cent the policy was to be re-assigned to the insured. In the event of the insured dying before the repayment of the loan, sufficient of the money due on the policy to discharge the debt was to be paid to the trustees and the balance paid to the persons nominated by him, "or otherwise according to the terms of the policy taken in the matter". There were to be certain restrictions and these are embodied in paragraphs 4 and 5 of the deed. These paragraphs read as follows:

"(4) The candidate shall not be less than the age of eighteen years on the date of the execution of the Instrument for repayment and must have passed either the High School Examination, the School Final Examination or any other examination or test qualifying the candidate to appear for the University Examinations or for professional examinations or tests in India, Great Britain, or elsewhere."

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(5) The candidate's father, mother, guardian or himself shall have been a *bona fide* member of the Anglo-Indian Association, Southern India, for a period one year before the award of the scholarship or the candidate an orphan brought up in an orphanage in Southern India for a period of more than two years and who had won a Government scholarship while in the Orphanage and has further been a recipient of a scholarship from the Anglo-Indian Association, Government or other sources after his sixteenth year."

Mr. Richmond was one of the original trustees and acted as such until his death in 1930. Since the creation of the trust a large number of advances has been made to Anglo-Indian students. Unfortunately many of them have not fulfilled their obligations to the trust. In fact, we are told that only a very few of them have repaid their advances. The consequence has been that the trustees have had to keep up the payments under the policies in order to safeguard themselves. The payments of premia on the policies on the lives of those who have already benefited by the trust materially restrict the carrying out of the objects of the trust. There is at present outstanding about Rs. 44,000. The main object of the appellant in taking out the orginating summons was to obtain an order from the Court permitting the trustees to change the form of security. It was proposed that a beneficiary should provide two sureties for the repayment of the loan made to him and the obligation to take out a life policy should be cancelled. If this were allowed it was anticipated that the trustees would be able to fulfil the objects which the donor had in mind.

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The learned Judge refused to give any direction because he considered that the Court should not interfere with the provisions of a trust deed unless there were exceptional circumstances and in his opinion there were no exceptional circumstances here. He held that the donor must have had in mind when he decided on the conditions of the trust that a portion of the income would of necessity have to be devoted to the payments of premia on the lives of beneficiaries and in refusing to give the direction sought relied on the judgment of ROMER L.J. in *In re New. In re Leavers. In re Morley*(1). We are unable to share the view that the facts in this case did not warrant a deviation from the trust deed to the extent of permitting security to be given in another form and we can see nothing in the case cited which runs contrary to this view. If relief were not given in this case it would undoubtedly mean the frustration to a large extent of the objects of the trust. If the matter remained there we should have no hesitation in passing an order which would enable the trustees to take the security in the shape of surety bonds. The matter, however, does not remain there. There is the further question whether this is a public or a private trust. We are of opinion that this is not a private trust, but is a public trust and is therefore governed by the provisions of section 92 of the Code of Civil Procedure. The trust was created for the benefit of the Anglo-Indian community of this Presidency. The fact that the donor placed restrictions to the extent set out in clauses 4 and 5 of the deed which I have already quoted does not, we consider, make the trust any the less a public trust.

(1) [1901] 2 Ch. 534.

BOWER v. HESTERLOW. LEACH C.J.

Authority for the proposition that a loan fund of this nature constitutes a charity is to be found in *In re Monk. Giffen* v. *Wedd*(1). In that case the testator bequeathed his residuary estate to trustees upon trust to set aside £800 as a "coal fund" for the benefit of the inhabitants of his native village and to hold the rest of his residuary estate as a "loans fund" for the purpose of making loans to poor and deserving inhabitants of the village. It is true that in that case there was no interest to be charged on the loans and in this case the rules which have been framed in accordance with the trust deed do require interest at the rate of four per cent to be paid by the beneficiaries on the amounts received by them. Considering that it was the intention to grant loans to Anglo-Indian youths without occupation merely on the security of life policies the interest to be charged was very low. A scheme of loans for educational purposes at such low interest must be regarded as a scheme of a charitable nature.

Holding as we do that this is a public trust, it was not open to the appellant to take out an originating summons. The matter comes within section 92 of the Code of Civil Procedure and proceedings under that section can only be taken with the sanction of the Advocate-General. It follows that the order dismissing the appellant's application must stand because the application was not competent, but the trustees will be at liberty to take such other steps as they may be advised.

The costs of the trustees will come out of the estate.

G.R.

(1) [1927] 2 Ch. 197.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Patanjali Sastri.

1939, August 18.

PANDIT SHIVA RAO AND ANOTHER (APPLICANTS), APPELLANTS,

v.

D. A. SHANMUGASUNDARASWAMI, OFFICIAL LIQUIDATOR, AND TWO OTHERS (RESPONDENTS), RESPONDENTS.*

Indian Registration Act (XVI of 1908), sec. 17 (1) (e)—Effect of—Final decree in a suit on mortgage—Deed of assignment of—If compulsorily registrable—Non-registration of deed—Transfer of Property Act (IV of 1882), ss. 59 and 100—If a charge on immovable property created under—Transfer of Property Act (IV of 1882), sec. 55 (4)—Vendor's lien under —If lost by execution of the deed.

By a registered deed the appellants conveyed to L.F. Coy., Ltd., certain lands and also assigned the benefit of a mortgage decree which they had obtained. The consideration was Rs. 80,000 payable in instalments. The deed purported to charge both the immovable property and the mortgage decree for the due payment of the balance of the consideration. The company went into liquidation and the Official Liquidator challenged the right of the appellants to rank as secured creditors in respect of the monies that remained due to them under the deed.

Held: When a final mortgage decree is passed the document declaring the mortgagee's rights in the mortgaged property is the decree itself and not the mortgage deed. The decree does not merely recite the pre-existing mortgage right but gives the mortgagee something more than the deed. It finally establishes the mortgagee's right to have the property sold and directs that it be sold. The assignment of a mortgage decree falls within section 17 (1) (e) of the Indian Registration Act and must now be regarded as compulsorily registrable on the footing that such a decree represents an interest in immovable property.

Held further: In view of the provisions of sections 59 and 100 of the Transfer of Property Act, the deed did not operate to create a charge in law though the parties might have been under the impression that a charge had been created and the appellants were not deprived of the vendor's lien under section 55 (4) of the Transfer of Property Act.

* Original Side Appeal No. 71 of 1938.

APPEAL from the judgment and order of GENTLE J., dated 9th September 1938, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 876 of 1938 in Original Petition No. 179 of 1936.

B. Sitarama Rao and *K. Vittal Rao* for appellants.

D. A. Shanmugasundaraswami (Official Liquidator), first respondent, in person.

Thyagarajan for *S. V. Shenoy* for second respondent.

K. R. Shenai for third respondent.

Cur. adv. vult.

JUDGMENT.

LEACH C.J.

LEACH C.J.—The appellants appeal against an order refusing to recognize them as secured creditors of the Lakshmi Forest Company, Limited, which is now under liquidation under an order for compulsory winding up. On 3rd September 1932 by a registered deed the appellants conveyed to the company certain lands in the village of Shedimane, South Kanara district, and assigned the benefit of a mortgage decree which they had obtained in the Court of the Subordinate Judge of South Kanara. The consideration was Rs. 80,000, payable in instalments. The deed purported to charge both the immovable property and the mortgage decree for the due payment of the balance of the consideration. It was also provided

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that the vendors should remit a sum of Rs. 10,000 if the company should pay the balance falling due before 1st April 1933 with interest from 30th June 1932. The right to rank as secured creditors was challenged by the liquidator, and the appellants took out a Judge's Summons for a declaration that under the general law and also under the provisions of the deed they were secured creditors in respect of the monies remaining due to them under the deed. The deed had not been registered in accordance with the provisions of section 109 of the Indian Companies Act, 1913, and was therefore clearly void against the liquidator and any creditor of the company, if put forward as embodying a charge. The appellants, however, claimed that they were entitled to rank as secured creditors by reason of the lien given to an unpaid vendor by section 55 (4) of the Transfer of Property Act. This claim was disallowed by GENTLE J. The learned Judge held that they were not entitled to the statutory lien because the deed of conveyance contained a contract contrary to the provisions of section 55 (4) in that it created without any allocation a charge on both movable and immovable property and under the section the appellants could only claim a lien in respect of immovable property. The appellants challenge the decision of the learned Judge on three grounds. In the first place it is said that the mortgage decree is not movable property, but immovable property. Secondly, it is said that the conveyance did not in law effect any charge. In the third place it is said that even if the decree be regarded as movable property the appellants are entitled to a lien as equity had extended the principle of the vendor's lien to movable property of this description.

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Before the amendment of section 17 of the Indian Registration Act there was a conflict of opinion whether a mortgage decree could be regarded as movable or immovable property. In *Gopal Narayan* v. *Trimbak Sadashiv and Another*(1) the Bombay High Court held that the assignment of a mortgage decree required registration. The Calcutta and the Allahabad High Courts expressed opinions to the contrary; see *Gous Mahomed* v. *Khawas Ali Khan*(2), *Baij Nath Lohea* v. *Binoyendra Nath Palit*(3), *Ram Ratan Chuckerbutty* v. *Jogesh Chandra Bhattacharya*(4), *Abdul Majid* v. *Muhammad Faizullah*(5), *Ahmad Khan* v. *Abdul Rahman Khan*(6) and *Mumtaz Ahmad* v. *Sri Ram*(7). This controversy has been decided in favour of the Bombay view by the addition made to the provisions of section 17 of the Indian Registration Act by section 10 of the Transfer of Property (Amendment) Supplementary Act, 1929, which came into force on 1st April 1930. That Act added clause (*e*) to sub-section 1 of section 17 of the Registration Act. The clause reads as follows :—

> "Non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property."

The wording here follows that used in clause (*b*).

It has been argued by Mr. Thyagarajan on behalf of the second respondent that the Court is not justified in regarding a mortgage decree as immovable property

(1) (1876) I.L.R. 1 Bom. 267.
(2) (1896) I.L.R. 23 Cal. 450.
(3) (1901) 6 C.W.N. 5.
(4) (1907) 12 C.W.N. 625.
(5) (1890) I.L.R. 13 All. 89.
(6) (1904) I.L.R. 26 All. 603.
(7) (1913) I.L.R. 35 All. 524.

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by reason of the addition of clause (*e*) to the section. He says that there has been no amendment of the definition of immovable property to be found in section 3 (25) of the General Clauses Act and in section 2 (6) of the Indian Registration Act and the considerations which weighed with the Calcutta and the Allahabad High Courts still apply. As I have already indicated, I am unable to accept the argument. By virtue of the amendment of section 17 of the Registration Act an assignment of a mortgage decree is placed in the same category as instruments falling within clause (*b*), and admittedly such instruments must be regarded as immovable property. When a final mortgage decree has been passed the document declaring the mortgagee's rights in the mortgaged property is the decree itself and not the mortgage deed. The decree gives the mortgagee something more than the deed. It finally establishes the mortgagee's right to have the property sold and directs that it be sold. The Code of Civil Procedure contains a form for the drawing up of a final mortgage decree and unless the Legislature regarded the decree to be drawn up in accordance with such form as operating to declare the mortgagee's rights in the mortgaged property the amendment of the section would be idle. For the reasons indicated I hold that a mortgage decree must be regarded as immovable property.

I am also unable to share the opinion of the learned Judge that the conveyance of 3rd September 1932 created a charge, either as regards the lands or as regards the mortgage decree. Section 59 of the Transfer of Property Act requires a mortgage deed to be signed by the mortgagor, attested by at least two witnesses, and registered. Section 100 provides that where immovable property of one person is by

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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".

In *Viswanadham* v. *Menon*(1) a Bench of which I was a member held that the words "so far as may be" had not the effect of taking section 59 out of the purview of section 100. Unless given by statute a charge on immovable property can only be created by a registered instrument, executed by the person creating the charge and attested by at least two witnesses. In the present case, the company was not a party to the deed of conveyance and as it has not created a charge by another instrument, there is in law no charge at all. The mere fact that the parties regarded the properties mentioned in the deed as being subject to a charge would not, by reason of the provisions of sections 59 and 100, operate to create a charge in law. In these circumstances it cannot, in my opinion, be said that the parties had entered into a contract which deprived the appellants of the lien under section 55 (4) of the Transfer of Property Act.

The appellants' contention that equity has extended the principle of the vendor's lien to movable property of certain descriptions is based on the judgments in *Mycock* v. *Beatson*(2), *Collins* v. *Collins*(3), *In re Albert Life Assurance Company. Ex parte Western Life Assurance Society*(4), *Davies* v. *Thomas*(5) and *In re Stucley. Stucley* v. *Kekewich*(6); but holding, as

(1) I.L.R. [1939] Mad. 199.
(2) (1879) 13 Ch. D. 384.
(3) (1862) 31 Beav. 346; 54 E.R. 1172.
(4) (1870) L.R. 11 Eq. 164.
(5) [1900] 2 Ch. 462.
(6) [1906] 1 Ch. 67.

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I do, that a mortgage decree drawn up in the ordinary form must now be regarded as immovable property and that the deed of 3rd September 1932 did not operate to deprive the appellants of their statutory lien under section 55 (4) of the Transfer of Property Act, it is not necessary to consider whether this argument is well founded, and, if well founded, the principle could be applied in India having regard to the provisions of the Sale of Goods Act.

The appeal succeeds on the first two points and consequently there will be a declaration in favour of the appellants that they are entitled to a charge on the property conveyed for the balance of the purchase money. The appellants are also entitled to their costs, which will be paid out of the assets of the company.

The Court has been informed that in other proceedings a creditor is claiming priority over the appellants, but this matter is not now before us and therefore cannot be inquired into. To avoid any misunderstanding I will, however, add that our decision is entirely without prejudice to any claim to priority.

PATANJALI SASTRI J.

PATANJALI SASTRI J.—The main question argued in this appeal is whether a final decree for sale obtained in a suit brought to enforce a simple mortgage of immovable property is to be regarded as immovable property for the purposes of Chapter III of the Transfer of Property Act relating to sale of immovable property. The facts giving rise to the question have been fully set out in the judgment of my Lord the CHIEF JUSTICE, and it is unnecessary to recapitulate them here.

The Transfer of Property Act does not define the term "immovable property" except negatively by excluding standing timber, growing crops and grass. The General Clauses Act (X of 1897) contains a

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definition in section 3 (25) which is applicable to the Transfer of Property Act. There is also a definition in section 2 (6) of the Registration Act for the purposes of that Act. According to both these definitions, so far as they are material to the present discussion, immovable property includes lands and benefits to arise out of land. We then have the definition of "mortgage" in section 58 of the Transfer of Property Act as the transfer of an interest in specific immovable property for the purpose of securing payment of money advanced, etc. This interest in the case of a simple mortgage consists of course in the right to bring the mortgaged property to sale for the realization of the debt. A simple mortgage has thus a dual character. It is a debt with right to be recouped from the sale proceeds of specific immovable property.

Now, it has been held in this Court, having regard to these definitions, that a debt secured by hypothecation of land is immovable property for the purposes of sections 54, 55 (2) and 123 of the Transfer of Property Act, see *Official Receiver, Trichinopoly* v. *Lakshman Aiyar*(1), *Balagurumurthy Chetty* v. *Ramakrishna Chetty and Others*(2) and *Perumal Ammal* v. *Perumal Naicker*(3); and this position appears to have been accepted by their Lordships of the Privy Council in the recent decision in *Fanny Skinner* v. *Bank of Upper India, Limited*(4) where it was held that an assignment of a simple mortgage was of no effect as a transfer of the security by reason of non-registration. But the question in what category a final decree for sale obtained on a simple mortgage has to be placed has not been the subject of decision in this Court, though there are conflicting decisions on the point in

(1) (1921) 41 M.L.J. 453. (2) (1921) 41 M.L.J. 267.
(3) (1920) I.L.R. 44 Mad. 196. (4) (1935) I.L.R. 57 All. 314 (P.C.).

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some of the other High Courts in India. Before referring to these decisions which are not however binding on this Court though, of course, they are entitled to great weight, it is desirable, in my opinion, to consider the question on principle. *Prima facie,* if a simple mortgage is to be treated as an interest in land or as a benefit arising out of land and thus coming within the definition of immovable property, there seems to be no valid reason why a decree directing the enforcement of such mortgage should be regarded any the less as immovable property. Before the decree, the mortgagee had the right to bring the mortgaged property to sale through Court for the payment of his debt, or he could give up the security and sue for mere recovery of the debt. After the decree, however, he can no longer seek to recover the debt apart from realizing the security and, unless the security proves insufficient on actual realization, his only right, having regard to the provisions of the Civil Procedure Code in that behalf, is to bring the mortgaged property to sale in execution of the decree. Thus, the decree does not in any way affect the mortgagee's interest in the mortgaged property which still remains in him in full force, and indeed his remedy is now confined to a realization of that interest, the mortgage debt being, to that extent, deprived of its dual character. It is thus clear that the decree only marks a stage in the process of realizing the security and the only change effected by it in the position of the mortgagee is to effectuate the benefit arising to him out of the land, the subject of the mortgage, by bringing it one step—and that an important step—nearer realization. It is therefore difficult to see on principle why a final decree for sale should be relegated to a different category of property from the mortgage itself on which it is based.

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Turning now to the decided cases, we find that the High Courts at Bombay, Allahabad and Calcutta have had occasion to consider this point. The earliest case in Bombay is *Hari Govind Joshi* v. *Ramachandra Pandurang Joshi*(1) where speaking of a court-sale of a mortgage decree, the learned Judges observed that what was purchased

> "was not a mere paper on which the decree was written but the interest in immovable property which was recoverable under that decree and such interest must be regarded as immovable property within the meaning of section 259 of the Civil Procedure Code".

In a later case, *Gopal Narayan* v. *Trimbak Sadashiv and another*(2), the same view was taken and it was held that an assignment of a mortgage decree was compulsorily registrable. The Calcutta High Court in the earlier case of *Koob Lall Chowdhry* v. *Nittyanund Singh*(3) held that an unregistered deed of assignment of a mortgage decree was defective so far as it related to the mortgage lien on the property. In a later case, *Gous Mahomed* v. *Khawas Ali Khan*(4), however, that Court adopted the view that section 17 (*b*) of the Registration Act does not apply to a deed of assignment of a mortgage decree as it could not be said to be immovable property within the definition contained in that Act. There is no reference to the earlier decision of the same Court and the learned Judges do not refer to the definition of a mortgage in section 58 of the Transfer of Property Act as involving the transfer of an interest in specific immovable property. In a still later decision reported as *Baij Nath Lohea* v. *Binoyendra Nath Palit*(5) the question arose whether a mortgage decree was immovable property for the

(1) (1872) 9 Bom. H.C.R. 64.
(2) (1876) I.L.R. 1 Bom. 267.
(3) (1883) I.L.R. 9 Cal. 839.
(4) (1896) I.L.R. 23 Cal. 450.
(5) (1901) 6 C.W.N. 5.

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purpose of Order XXI, rule 90, of the Civil Procedure Code when a court-sale of such a decree was sought to be set aside under that provision. In this case, the definition of immovable property in the General Clauses Act was referred to and it was held that a mortgage decree did not come within that definition. Here again the earlier decision of the same Court in *Koob Lall Chowdhry* v. *Nittyanund Singh*(1) was not referred to. In the Allahabad High Court the treatment of the subject followed more or less the same course. In the earliest case, *Musammat Bhawani Kuar* v. *Gulab Rai*(2), the question arose whether the sale of a mortgage decree was a sale of movable property within the meaning of section 252 of the Civil Procedure Code which provided that no irregularity in the sale of movable property under an execution shall vitiate the sale and it was held to be a sale of an interest in immovable property. In *Abdul Majid* v. *Muhammad Faizullah*(3), however, the Court held that a deed of assignment of a mortgage decree did not come within the mischief of section 49 of the Registration Act as it could not be regarded as immovable property. In the two later cases, *Ahmad Khan* v. *Abdul Rahman Khan*(4) and *Mumtaz Ahmad* v. *Sri Ram*(5), the decision in *Abdul Majid* v. *Muhammad Faizullah*(3) was followed. In none of these cases was any reference made to the earlier decision of the same Court in *Musammat Bhawani Kuar* v. *Gulab Rai*(2).

In this state of the authorities, the Legislature added clause (*e*) to section 17 (1) of the Registration Act by section 10 of the Transfer of Property (Amendment) Supplementary Act, 1929, thereby making

(1) (1883) I.L.R. 9 Cal. 839.
(2) (1877) I.L.R. 1 All. 348.
(3) (1890) I.L.R. 13 All. 89.
(4) (1904) I.L.R. 26 All. 603.
(5) (1913) I.L.R. 35 All. 524.

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compulsorily registrable instruments transferring or assigning any decree or order of Court when such decree or order purports or operates to create, declare, assign, limit or extinguish any right, title or interest of the value of Rs. 100 and upwards to or in immovable property. It is clear to my mind that the object of this amendment was to affirm the Bombay view, and supersede the Calcutta and Allahabad decisions referred to above holding the contrary. It is, however, urged that this newly added clause would not apply to mortgage decrees as the words, "purports or operates to create, declare, etc.", must, in view of the Privy Council decision in *Bageshwari Charan Singh* v. *Jagarnath Kuari*(1) be construed to mean, "in itself purports or operates to create, declare, etc.", whereas a mortgage decree merely declares a pre-existing right, i.e., the mortgage right of the decree-holder. I think that this argument proceeds on a misapprehension of their Lordships' decision in the case referred to above. The distinction which their Lordships had in mind is the one between a mere recital of title as a fact and something which in itself creates a title. A reference to the passage from the judgment of WEST J. in *Sakharam Krishnaji and Another* v. *Madan Krishnaji and Others*(2) which their Lordships quote with approval would make their meaning still more clear. The learned Judge there says:

"There (i.e. in section 17) 'declare' is placed along with 'create, assign, limit or extinguish a right, title or interest' and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to. I think this is equally the case with the word 'declare'. It implies a declaration of will; not a mere statement of fact."

(1) (1931) I.L.R. 11 Pat. 272 (P.C.).
(2) (1881) I.L.R. 5 Bom. 232.

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A mortgage decree does not merely recite the pre-existing mortgage right. By its own force, it declares, even if it does not create, the decree-holder's right to have the property sold through the machinery of the Court for the realization of his debt without any further impediment. It embodies the expression of the Court's will that a definite change of the legal relation of the mortgagor to the property should forthwith be brought about by the property being sold in satisfaction of the decree. It seems to me, therefore, idle to contend that a decree stands on the same footing as a document containing merely a recital of an existing right. In one sense, no doubt, a decree or order of Court does not ordinarily bring into existence any right which did not already vest in one of the parties litigant and to insist that it should do so in order to come within clause (*e*) of section 17 would be to render that provision almost nugatory.

The assignment of a mortgage decree thus falls within section 17 (i) (*e*) and must now be regarded as compulsorily registrable on the footing, clearly, that such a decree represents an interest in immovable property. It follows that much of the reasoning underlying the decisions of the Allahabad and Calcutta High Courts holding that a mortgage decree cannot be regarded as immovable property falls to the ground and I cannot, therefore, regard them useful precedents on the question now under consideration.

For the above reasons I am of opinion that a final decree for sale on a simple mortgage must be regarded as immovable property for the purpose of Chapter III of the Transfer of Property Act.

On the other questions argued at the Bar, I agree in the conclusions of my Lord and have nothing material to add.

G.R.

ORIGINAL MATRIMONIAL.

Before Mr. Justice Mockett.

MRS. T. R. MANJULA BAI, PETITIONER,

v.

K. JANOJI RAO, RESPONDENT.*

1939, September 27.

Divorce—Dissolution of marriage—Wife's petition for, on grounds of adultery and cruelty—Adultery not proved—Proof of cruelty—Court refusing dissolution of marriage but ordering judicial separation—Subsequent petition for dissolution of marriage—Proof of subsequent adultery—Reliance on finding of cruelty in first petition—Propriety of—Indian Divorce Act (IV of 1869), *sec.* 7.

On a wife's petition for dissolution of marriage on the grounds of her husband's adultery and cruelty it was found that he had committed acts of cruelty. Judicial separation was ordered and dissolution of marriage was refused on the ground that adultery had not been proved. Some time later she filed another petition for dissolution of marriage on the grounds of her husband's adultery and cruelty. She proved acts of adultery committed subsequent to the decree for judicial separation and, as regards cruelty, she relied upon the finding on her first petition.

Held that she was entitled to do so and obtain decree *nisi* for dissolution of marriage.

Bland v. *Bland*(1) followed.

Collins v. *Collins*(2) distinguished.

T. Muniswami Reddi for petitioner.

Respondent was not represented.

JUDGMENT.

MOCKETT J.

MOCKETT J.—This is a wife's petition for dissolution of marriage on the grounds of adultery and cruelty. She filed Original Matrimonial Suit No. 17 of 1937

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* Original Matrimonial Suit No. 1 of 1939.

(1) (1866) L.R. 1 P. & D. 237. (2) (1928) I.L.R. 56 Cal. 166.

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claiming the same relief on the grounds of cruelty and adultery. The learned Judge, GENTLE J., on 6th September 1938 refused a decree for dissolution of marriage on the ground that adultery had not been proved. But he allowed the petitioner to amend her petition by adding a prayer for an order for judicial separation on the ground of cruelty which had been proved. The petitioner before me relies so far as cruelty is concerned on the decree and judgment of GENTLE J., and so far as adultery is concerned has brought evidence to show that since November of last year the respondent, her husband, has been living with another woman at Trichinopoly. No evidence of cruelty was called before me. Is this procedure correct ? I think the petitioner was entitled to adopt this course. Under section 7 of the Indian Divorce Act, the Courts in India act and give relief on principles and rules which in the opinion of the said Courts are as near as may be conformable to the principles and rules on which the English Courts act. No decision in India exactly on the question before me has been cited but I have no doubt whatever that the procedure laid down in *Bland* v. *Bland*(1), a case exactly in point, should be followed here. In that case there had been (as in this case) a decree for judicial separation on the ground of cruelty in a previous petition, and in the petition before the Court the following procedure was followed :

"Proof was given of the marriage, and of adultery committed by the respondent subsequent to the decree for judicial separation. The original decree for judicial separation on the ground of cruelty was before the Court, and evidence was given of the respondent's identity with the respondent in the suit for judicial separation."

(1) (1866) L.R. 1 P. & D. 237.

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That procedure has been followed before me and I find that there is proof, for the purposes of this petition, of cruelty. So far as the adultery is concerned, there is the evidence of the wife, confirmed by the evidence of the husband's landlord, one Sambasivam Pillai, that the husband and the other woman have been living together as husband and wife and are still living together in the same house. The case reported as *Collins* v. *Collins*(1) has no bearing upon this case, except that the procedure in *Bland* v. *Bland*(2) is noted by RANKIN C.J. I would however respectfully agree with the decision in *Collins* v. *Collins*(1) which is to the effect that a petitioner, in the absence of a fresh matrimonial offence, is not entitled to a decree for dissolution of marriage upon precisely the same grounds as those on which she obtained a judicial separation previously. As the learned CHIEF JUSTICE points out, the Courts could not possibly countenance a petitioner who had material for claiming dissolution, refraining from claiming it in his petition and obtaining only a decree for judicial separation, and then later on, when he thought it convenient, coming to the Court to repeat the same evidence all over again and asking for a decree for dissolution. In this case there is, besides the decree for judicial separation, entirely fresh evidence of adultery. The provisions of the Act have therefore been complied with. That being so the petitioner will have a decree *nisi* with costs.

G.R.

(1) (1928) I.L.R. 56 Cal. 166. (2) (1866) L.R. 1 P. & D. 237, 238.

APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice Krishnaswami Ayyangar.

1939, August 7.

RAMAYYA GOUNDAN (PLAINTIFF), APPELLANT,

v.

KOLANDA GOUNDAN AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu law—Joint family—Manager—Power of, to allot to individual members portion of family property for maintenance without effecting severance of status—Income and savings of such member out of such lands—Non-accountability for—Corpus of the property—Reversion back to the family in the absence of express provision to the contrary.

It is within the competence of a manager of a joint Hindu family, without effecting a severence in status, to allot to individual members a sufficient portion of the family property having regard to its status and circumstances in order to enable them to maintain themselves out of its yield without having to bring the same into the family granary for common consumption. In such a case the individual members are not accountable for the income of the property so allotted but the corpus of the property, in the absence of an express provision to the contrary, will revert to the family.

APPEAL against the decree of the Court of the Subordinate Judge of Salem, dated 23rd December 1935, in Original Suit No. 46 of 1934.

K. V. Sesha Ayyangar and *C. M. J. Ernest* for appellant.

D. Ramaswami Ayyangar for *C. S. Venkatachari* and *K. S. Sundaram* for respondents 1 and 3.

Other respondents were not represented.

* Appeal No. 136 of 1936.

RAMAYYA *v.* KOLANDA.

KRISHNASWAMI AYYANGAR J.

JUDGMENT.

KRISHNASWAMI AYYANGAR J.—This is an appeal by the plaintiff in a suit for partition which was tried and decided by the Subordinate Judge of Salem. The appellant is one of four brothers and was admittedly entitled to a fourth share of the joint family properties. The only question in the appeal is, what are the common properties, movable and immovable, which belonged to the joint family and liable to be divided between the appellant and his three brothers who are respondents 1 to 3 in the appeal? A decree for partition has been passed by the Subordinate Judge in respect of such only of the immovable properties as according to his finding formed the ancestral estate. The plaintiff's claim, however, extended further and covered items of properties standing in the names of the individual defendants as also money outstanding in their names. As regards these items of properties and outstandings the learned Subordinate Judge held against the appellant and to that extent negatived his claim. Before us, the arguments advanced on behalf of the appellant were confined to these disallowed items.

The admitted facts are these. The appellant and the three respondents are the sons of one Kali Goundan who died in 1926. The family admittedly became divided in status on 22nd August 1925 on which date the brothers executed a muchilika in favour of certain arbitrators with a view to a division of the family properties. The execution of the muchilika without more was effective enough to bring about a disruption. Whether a severance in status had taken place at an earlier date is a matter in controversy, but it is not necessary for the purpose of this appeal to decide it. The parties belong to the caste of Goundans and,

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according to the undisputed evidence in the case, it would seem that in this community as soon as a son marries he leaves the family residence, sets up for himself and begins to live separately with his wife in a separate house or a portion of a house alloted to him by the father or manager of the family. Commensality ceases but no separation in estate follows. It often happens that a portion of the family lands is allotted to him in order that he may cultivate it and maintain himself, his wife and children out of its income. Such an arrangement makes for convenience and harmony and tends to promote the continuance of goodwill while avoiding at the same time the kind of friction that often occurs in a growing family living together under a common roof with a common mess. The custom appears to have been acted upon in the family of the parties to this litigation. Each one of the brothers as soon as he married was allowed to set up separately for himself, being given a portion of the family property approximating roughly to his share for his own exclusive enjoyment. The first and the second defendants must have begun to live separately a long time back and cultivate and enjoy for themselves the lands that were allotted to them by the father. At the date of the suit it would appear that the first defendant was about fifty-five years old or thereabouts and he must have started to live separately years before. The plaintiff was himself about forty years at the time and his marriage appears to have taken place about fifteen years prior. The allotments made to the brothers of what, I have no reason to doubt, were but reasonable portions of the family lands by way of a fair provision for their maintenance have never in fact been challenged at any time.

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I think it is perfectly within the competence of the manager of a Hindu family to allot to individual members a sufficient portion of the family property having regard to its status and circumstances in order to enable them to maintain themselves out of its income. So long as the provision is fair and reasonable and the manager acts in good faith without making the occasion a pretext for favouritism or injustice, the arrangement would be upheld by a Court as within the powers of the managing member. For it cannot be denied that every member of the family, while it remains joint, has a right to be maintained out of the common assets. When the manager proceeds *bona fide* to satisfy such a claim, which is plainly the inherent right of every member, he is merely discharging a duty incumbent upon him under the law. In fact, the propriety of his act in this behalf cannot be questioned. For, when the manager acts in such circumstances, it must be regarded as the act of the entire family not capable of being impeached at the instance of a single dissentient member. His consent will be presumed for every dealing with the family estate by the manager dictated by the necessities of the family or of the individuals composing it.

Mr. Sesha Ayyangar, the learned Counsel for the appellant, has not argued that the provision made for each one of the brothers in this case, as and when he married and began to live apart, was either extravagant in itself or incommensurate with the size of the family estate. But what he did urge was that, irrespective of these considerations, the Hindu law stamps the savings derived from every portion of the joint property with the character of joint family property so as to make them as such divisible among the members as the family property itself. It is not

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necessary for the purpose of this appeal to go into the larger question as to the character of the income in general derived from a portion of the joint family property when it happens to be in the hands of an individual member. If a member of the family has been entrusted with a block of joint family property for the purpose of mere management on behalf of the family and not for exclusive enjoyment or, if he, against the will of the manager, takes and retains possession of it and derives income out of it, it may well be that that income will partake of the joint family character. That however is not the kind of question that confronts me in the present case. As I have said, the joint family acting through the manager has made an allotment of property to the member concerned in order that he may maintain himself out of it without having to bring its yield into the family granary for common consumption. In such a case it is impossible to argue that the family could have intended to make the member accountable for the income of the property so allotted. The idea, undoubtedly, when an arrangement of this kind is made, is that, while the corpus of the property should continue to remain joint, the income should exclusively belong to and be at the disposal of the member concerned.

In this case there is every reason for thinking that the acquisitions by the brothers were as much the result of their own industry and thrift as they were the natural produce of the land itself. The acquisitions claimed represent savings extending over a fairly long period. Years after the allotment and years after the acquisition it is scarcely just or equitable that the acquirer should be forced to share the product of his thrift and industry with, it may be, an

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indolent or ease-loving coparcener. I do not think that there is any principle of Hindu law which tends to the perpetuation of such gross injustice and, in the absence of definite authority, I am not prepared to accede to such a proposition. In fact there is authority to the contrary in a decision of a Bench of this Court reported as *Bengal Insurance & Real Property Co., Ltd.* v. *Velayammal*(1). At the bottom of page 1001 the learned Judges observe as follows:—

"The question then is whether any profit made out of money paid to a member of a joint family by the manager for his personal use, which he is free to spend as soon as he receives it, must, because he chooses to invest it for some purpose which is clearly not intended to be for the benefit of the family, be deemed to be a family acquisition. A profit made by the member of a joint family from the enjoyment of joint property without detriment to it is his separate self-acquired property; *Lachmeswar Singh* v. *Manowar Hossein*(2). When money is given to a member of a family by the manager from family funds to be spent by him for his personal use, it seems to us that any profit made by him can hardly be said to be in detriment of the joint property."

This decision does support the conclusion that I have myself reached though it seems to proceed on a somewhat different principle. I may observe that in this case emphasis is laid on the fact that the acquisition was made without, as it was termed, detriment to the family property. It seems to me that it would be more appropriate to look at this question from the point of view of the right of each individual member of the family to be maintained out of the common assets and the duty of the manager to maintain or make a reasonable provision for the maintenance of the junior members. A provision so made must be held to be binding upon the family and every member

(1) I.L.R. [1937] Mad. 990. (2) (1891) I.L.R. 19 Cal. 253 (P.C.).

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of it. I may in this connection perhaps refer to the analogical case of a widow to whom property is often handed over for her enjoyment in lieu of maintenance. It cannot be suggested that any savings from the income of such property can be called back by the family which made the provision. The corpus of the property would no doubt, in the absence of an express provision to the contrary, revert to the family, but the savings out of the income will not; not even at her death, unless incorporated with the property itself by a consentient act of hers. I am unable to see any difference in principle between a maintenance arrangement in favour of a female member of the family and that made almost in similar circumstances to a junior male member of the family. I am therefore of opinion that there is no substance in the appellant's contention, and I must accordingly negative it.

I may also point out that the plaintiff and the other members of the family seem all along to have proceeded upon the footing that the income derived by each member from out of the lands allotted to him was his own and not that of the family. In 1925 the four brothers executed a panchayat muchilika in favour of certain arbitrators with a view, as I have already mentioned, to get the family properties partitioned between them. It is remarkable that in this document the brothers wanted a division only of the family outstandings belonging to the money-lending business carried on by the father and of the ancestral lands, and did not put forward a claim for the division of the acquisitions of the individual members. It is conceded that on this date there were individual acquisitions in the shape of both outstandings and immovable properties standing in the names of each of the brothers and yet nobody ever thought of advancing a

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claim to divide them. To my mind this is a striking piece of evidence against the present contention of the appellant. The consciousness of the members of this family therefore would undoubtedly seem to be that the income which each brother derived out of the portion of the property cultivated by him was to be his entirely. I am accordingly of opinion that the appeal fails and must be dismissed with costs of respondents 1 and 3.

MOCKETT J.—I agree.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Stodart.

1939, September 1.

MYTHILI AMMAL (FIRST RESPONDENT—DECREE-HOLDER), APPELLANT,

v.

JANAKI AMMAL AND ANOTHER (PETITIONER AND RESPONDENT-JUDGMENT-DEBTOR), RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 65 (a) and (e)—Income-tax return—Secondary evidence of—Certified copy—Admissibility in evidence of—Sec. 74 of Evidence Act—" Public document ".

In execution of a money decree obtained by the appellant against her husband, the second respondent, she attached a house as belonging to her husband. The first respondent, the mother of the second, filed a claim praying that the attachment might be raised on the ground that the house was her own. At the trial of that claim the appellant filed certified copies of certain income-tax returns made by the first respondent when

*Appeal Against Order No. 470 of 1937.

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she was in control of her son's estate to show that in those returns the first respondent had made statements about the house in question inconsistent with her claim to be the owner of it.

Held that the certified copies were not admissible in evidence.

Section 65 (*a*) of the Indian Evidence Act (I of 1872) did not apply because (i) the returns submitted to the income-tax authorities were not in the possession or power of the first respondent against whom they were sought to be proved and (ii) the said returns were not in the possession or power of a person not subject to the process of the Court or legally bound to produce them, who, having been given notice to produce, had refused to do so. The Income-tax Officer in whose custody the returns were was subject to the process of the Court. He could be summoned to attend the Court although he could not be required to produce those documents which were classed as confidential by the Income-Tax Act of 1922. Further the Income-tax Officer could not be described as a person legally bound to produce such documents.

Section 65 (*e*) of the Evidence Act did not apply because an income-tax return is not a "public document" as defined in section 74 of that Act. A return made by an assessee is not part of the act of the Income-tax Officer nor is it part of the record of the act of that officer within the meaning of section 74.

APPEAL against the order of the District Court of South Arcot, dated 29th September 1937 and made in Civil Miscellaneous Petition No. 224 of 1937 in Original Suit No. 10 of 1924 on the file of the Sub-Court, Cuddalore.

T. R. Venkatarama Sastri and *T. V. Rajagopalan* for appellant.

K. Rajah Ayyar for *K. Srinivasan* for first respondent.

Second respondent was not represented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by

STODART J.

STODART J.—This appeal is against an order made in

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execution of the decree in Original Suit No. 10 of 1924 on the file of the Subordinate Judge's Court, Cuddalore. The subject of the petition is a house, No. 40, South Car Street, Chidambaram. Mythili, the decree-holder, was entitled under the decree to recover Rs. 5,800 from her husband Mahadevan, the judgment-debtor. To realise this sum she attached the aforesaid house as belonging to her husband. Janaki Ammal, mother of Mahadevan, filed a claim praying that the attachment should be raised on the ground that the house was her own. This claim was tried by the learned District Judge, South Arcot, who held that the house did belong to Janaki. Hence this appeal by Mythili, the decree-holder.

The learned District Judge chiefly addressed himself to the question whether the purchase-money for the house which was purchased in Janaki's name came out of Mahadevan's estate or was furnished by Janaki. He held that, apart from the oral evidence of Janaki, there was no evidence that the purchase money was paid by Janaki out of her own funds but that, on the other hand, there was evidence that it did not come out of the estate of Mahadevan.

The points chiefly urged by learned Counsel for the appellant are: (i) that the learned Judge did not appreciate the evidence properly and (ii) that he shut out evidence which was produced by Mythili which if taken into account materially helped her case.

[His Lordship considered the evidence in the case and proceeded:]

Our conclusion therefore is that the learned District Judge was correct in holding that the accounts of the estate do not prove that the money paid as consideration for the purchase of the house came out of the estate of Mahadevan, husband of the appellant.

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The only other point which we have to decide arises on the contention of learned Counsel for the appellant that the learned District Judge was wrong in shutting out the income-tax returns filed by Janaki when she was in control of Mahadevan's estate. The original returns are of course in the office of the income-tax authorities. Their contents were sought to be proved by certified copies. The contention of learned Counsel is that in these returns Janaki has made statements about this house inconsistent with her present claim to be the owner of it. Now, what Janaki said in the returns submitted to the income-tax authorities can be proved by exhibiting the returns themselves. This has not been done. And it is difficult to see how it could be done since such returns are confidential. It is the policy of the law that statements made in these returns shall not be brought up in Court against the person making them or for that matter against anyone else. But the learned Counsel contends that income-tax returns can be proved by secondary evidence. As we read section 65 of the Indian Evidence Act we do not find it possible to accede to this contention. Section 65 enumerates the cases in which the contents of a document may be proved by secondary evidence. Section 65 (*a*) does not apply, because (i) the documents now in question are not in the possession or power of Janaki against whom they are sought to be proved and (ii) the documents are not in the possession or power of a person not subject to the process of the Court or legally bound to produce them who having been given notice to produce has refused to do so. The Income-tax Officer in whose custody the documents are, is subject to the process of the Court. He can be summoned to attend the Court although he cannot be required to produce

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these documents which are classed as confidential by the Income-Tax Act; *see* section 54 of the Act. Again the Income-tax Officer cannot be described in the circumstances just explained as a person legally bound to produce such documents. The learned Counsel faced with this difficulty falls back on section 65 (*e*) of the Evidence Act by which secondary evidence is allowable of the contents of a public document. "Public document" is defined in section 74 of the Indian Evidence Act and means a document forming the act or record of the act—

(i) of the sovereign authority,
(ii) of official bodies and tribunals, and
(iii) of public officers, legislative, judicial and executive.

It is urged upon us that the income-tax return, inasmuch as it is made in compliance with a notice issued under section 22 (2) of the Income-Tax Act, and when made becomes the basis of an assessment made under section 23, is therefore part of the record of the act of assessment. We do not agree in this view. Section 23 of the Act is :—

"If the Income-tax Officer is satisfied that a return is correct and complete he shall assess the total income of the assessee and shall determine the sum payable by him on the basis of such return."

We think this section is perfectly clear. In the matter of assessing a person to tax, when does the Income-tax Officer perform an act within the meaning of section 74 of the Indian Evidence Act? The answer can only be when he assesses the income of that person and determines the sum payable. And the record of that act is the notice of demand made in the prescribed form under section 29 of the Income-Tax Act in which the Income-tax Officer communicates his

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decision to the assessee and requires him to pay the tax. We find it quite impossible to infer from the words of the Act that the return made by the assessee is either part of the act of the Income-tax Officer—indeed we think that such a proposition is absurd on the face of it—or that it is part of the record of the act of that officer. And indeed a reference to section 54 of the Income-Tax Act demonstrates that a return made by an assessee cannot possibly be part of the record of the act of the Income-tax Officer. In that section such returns are made confidential. No Court can require any public servant to produce them before it. A public servant who discloses the contents of such returns except in certain special circumstances is punishable with imprisonment which may extend to six months and is also liable to fine. But if the return is, as now argued, a public document, anyone who happens to come into possession of a certified copy of it can produce the copy into Court, and so prove the contents of the return, thus defeating the express provisions of section 54. From the fact that certified copies of the returns made by Janaki have been tendered in evidence in the present case, we presume that the granting of certified copies is in certain circumstances permissible by some rule made under the Income-Tax Act. Most probably they can be granted to the person who has made the return for his own private information, since that would not come under the head of disclosure under section 54 (2). But that does not mean that a third party who has, in some way come into possession of the certified copies can use them to his own advantage. If it did then we would be faced with the ludicrous position that the Income-tax Officer, though forbidden to

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disclose the contents of the returns, could by furnishing certified copies facilitate such disclosure.

We agree with the learned District Judge that the certified copies—they were actually marked as exhibits in the lower Court and numbered XXXV and XXXVA—are not admissible in evidence.

On the merits of the case we have been taken very carefully through the evidence by learned Counsel on both sides and we think the conclusions of the learned District Judge are correct. We would only add that it has not been shown that in February 1918 when Janaki bought this house, she had any reason to deceive her son or to act prejudicially to his interests. On the contrary the evidence is that at that time she was much attached to him. If she had intended to buy the house for him and not for herself there was no reason whatever why she should not have bought it in his name. We dismiss this appeal with costs.

N.S.

APPELLATE CRIMINAL—FULL BENCH.

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

1939, September 19.

IN RE MUTHUSWAMI CHETTIAR,
(13TH COUNTER-PETITIONER), PETITIONER IN THE CRIMINAL REVISION CASE No. 245 OF 1939.*

Code of Criminal Procedure (Act V of 1898), ss. 107 and 112—Notice under—Nature of information to be stated.

A notice issued to the petitioner under section 112, Criminal Procedure Code, stated *inter alia* that the petitioner was a

* Criminal Revision Cases Nos. 245, 246, 298, and 340 of 1939 (Criminal Revision Petitions Nos. 226, 227, 276 and 316 of 1939).

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leader of one of the rival factions in the village, that the feelings between the factions had become strained, that there was a likelihood of a breach of the peace in the village and that the petitioner was giving active support to the members of his faction to further their nefarious activities in the village. It appeared that the nefarious activities referred to were known to the petitioner.

Held by the Full Bench that the notice complied with the requirements of the section.

All that section 112 requires is that the substance of the information shall be set forth and, if this is done and the other requirements of the section are complied with, the notice is a valid one.

Though there must be something more than the past misconduct of the person proceeded against to justify a notice being served upon him, it is not necessary that the information should show the particular act which is in contemplation at the time. The information must be of a nature which convinces the Magistrate that there is a likelihood of a breach of the peace. What will satisfy him must depend upon the particular facts of the case. Before a person on whom a notice has been served under section 112 can be required to enter into a security bond under section 107 the matter must be fully investigated by the Magistrate.

Case-law reviewed.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, and petition under sections 435 and 439 and 561-A of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Subdivisional Magistrate of Pollachi, dated 22nd February 1939, made in Miscellaneous Cases Nos. 63 of 1938 and 68 of 1938 respectively.

These petitions first came on for hearing before PATANJALI SASTRI J. who made the following

ORDER OF REFERENCE :—

These Criminal Revision Cases raise an important question as to the construction and scope of section 107 of the Code

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of Criminal Procedure. On the one hand, it is argued for the petitioners that the information and the evidence on which a Magistrate can act under this section must relate to a breach of the peace or wrongful act *in contemplation* at the time when such information is given to the Magistrate, and that any wider construction of the provision might have the effect of turning the section into a weapon of oppression in the hands of the magistracy. On the other hand, it is contended by the learned Public Prosecutor that such a restriction of the scope of the section would impair its practical usefulness as a provision authorising preventive or precautionary proceedings being instituted against persons who, in the opinion of the local magistrates, are likely to disturb public tranquillity, and it is therefore urged that a wider construction should be placed upon it. The language of the provision is by no means free from ambiguity and there is considerable divergence of judicial opinion on the point—See for example *High Court Proceedings No.* 1952(1), *Maruthapali Goundar* v. *Emperor*(2) and *Run Bahadoor Singh* v. *Tilessuree Koer*(3), relied upon for the petitioners *Kumarappa Chettiar* v. *Emperor*(4) and the decision of LAKSHMANA RAO J. in Criminal Revision Case No. 105 of 1939 (not yet reported), relied upon by the Public Prosecutor.

Having regard to the general importance of the question raised and the conflict of decisions referred to above, I think it is desirable that there should be an authoritative ruling on the point by a Division Bench or Full Bench and I therefore direct this case to be placed before my Lord the CHIEF JUSTICE for necessary orders as to posting.

These petitions then came on for hearing before the Full Bench constituted as above.

ON THE REFERENCE :—

G. Gopalaswami for petitioner (in Criminal Revision Case No. 240 of 1939).—The notice given under section 107, Criminal Procedure Code, does not contain all the necessary details. There is no allegation that the petitioner was committing acts of breach of the peace. [Sections 107, 112 to 117,

(1) (1876) 2 Weir 49.
(2) 1937 M.W.N. (Cr.) 9.
(3) (1874) 22 W.R. (Cr.) 79.
(4) 1937 M.W.N. (Cr.) 224.

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Criminal Procedure Code, were referred to.] The words used in the section are " when a person is likely to commit a breach of the peace ", etc. It would not apply to a person who instigates or abets a breach of the peace. The person himself must commit the act.

[LEACH C.J.—The petitioner is a leader of one faction. The information is that he is giving active support to the nefarious activities of his faction. He is instigating his faction to attack the rival faction. That is surely a wrongful act.]

The notice given under section 107 must conform to the provisions of section 112, Criminal Procedure Code. It must give all the necessary details, the time, the place and the particulars of the act. Otherwise the notice is illegal and void. The order under section 112 corresponds to a charge framed against an accused person. The petitioner must know beforehand the case he has got to meet. For that the necessary details must be furnished. If a wider interpretation is given to section 107 great injustice and hardship would be caused to the accused.

[PATANJALI SASTRI J.—What section 112 requires is only to state the substance of the information and not the details as you say.]

[LEACH C.J.—The Magistrate may not know the particulars himself. But still he may be convinced that there is a likelihood of a breach of the peace. In such a case he can issue notice under section 107.]

When the information is lodged with the Magistrate the acts alleged to be in contemplation should be specified. [The following decisions were cited :—*High Court Proceedings No.* 1952 (1), *Konda Reddy* v. *King-Emperor*(2), *Maruthapali Goundar* v. *Emperor*(3), *Santhanaramaswami* v. *Emperor*(4), *Kalia Goundan In re*(5) and *Run Bahadoor Singh* v. *Tilessuree Koer*(6)].

The other High Courts take a restricted view of section 107 and hold that the notice given thereunder must give the necessary details. The procedure to be followed under this section is the same as in summons cases.

(1) (1876) 2 Weir 49.
(2) (1917) I.L.R. 41 Mad. 246
(3) 1937 M.W.N. (Cr.) 9.
(4) 1937 M.W.N. (Cr.) 189.
(5) (1930) 59 M.L.J. 887.
(6) (1874) 22 W.R. (Cr.) 79.

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[*Shadi Lal* v. *The Crown*(1), *Ranga Reddi* v. *King Emperor*(2), *Kripasindhu Naiko* v. *Emperor*(3), *In re Kutti Goundan*(4), *Bahadur Patnaik* v. *Emperor*(5), *In re Karuthaswami Servai*(6), *Bhutnath Ghosh* v. *The Emperor*(7), *Emperor* v. *Nihal*(8), *Emperor* v. *Rajbansi*(9), *Behari Lal* v. *Khub Chand*(10), *Maharaj Kumar Nand Deo* v. *The King-Emperor*(11) and *Ainuddin* v. *Emperor*(12) were referred to].

It must be shown under section 107 that a person is contemplating to do certain acts which will result in a breach of the peace in the near future. Beyond the fact that the petitioner is a leader of one faction there is nothing that is alleged against him.

K. S. Jayarama Iyer, *N. Shankar Bhat*, *S. R. Subramaniam* and *N. Somasundaram* for other petitioners.

Public Prosecutor (*V. L. Ethiraj*) for the Crown.—If a narrow interpretation is given to section 107, the purpose for which the security sections were enacted is not served. The decision of KING J. in *Kumarappa Chettiar* v. *Emperor*(13) and the decision of LAKSHMANA RAO J. in the unreported case (Criminal Revision Case No. 105 of 1939) are correct. Section 107, Criminal Procedure Code, is plain and KNOX J. in *Jaguji Rai* v. *Emperor*(14) has interpreted it in its plain terms. I respectfully adopt it. It is not possible to find out the intention of the person accused and know what acts he is contemplating to do. If the Magistrate is satisfied that a breach of the peace is likely to happen and the substance of the information is set out in the notice that is sufficient for the purpose of the section. In this case the petitioner is the leader of one faction. There is bitter enmity between the two factions in the village. He is giving active support to his faction. The facts mentioned in the notice are sufficient. The cases cited on the other side are all cases which were decided when they came up for final disposal except the

(1) (1930) I.L.R. 12 Lah. 457, 463.
(2) (1919) I.L.R. 43 Mad. 450.
(3) 1918 M.W.N. 751.
(4) (1924) 47 M.L.J. 689.
(5) 1933 M.W.N. (Cr.) 137.
(6) (1929) I.L.R. 53 Mad. 173, 185 (F.B.).
(7) (1929) I.L.R. 57 Cal. 503, 510.
(8) (1926) I.L.R. 49 All. 5.
(9) (1920) I.L.R. 42 All. 646.
(10) (1883) I.L.R. 6 All. 48.
(11) A.I.R. 1922 Pat. 209.
(12) A.I.R. 1922 Cal. 97.
(13) 1937 M.W.N. (Cr.) 224.
(14) (1918) 16 A.L.J. 567.

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decision of KING J. in *Santhanaramaswami* v. *Emperor*(1). The present case is in the preliminary stage where notice has been served on the petitioner to show cause why he should not be ordered to give security for keeping the peace. He can show to the Magistrate at the time of enquiry that he was not a leader and that he was not giving active support to his party. The issue of notice is only a preliminary step. It is only after enquiry as mentioned in section 117 that a final order under section 107 will be made. So there is no hardship or injustice caused to the petitioner.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—In the village of Negamam, in the Coimbatore district, there are two factions and there is strong enmity between them. Their enmity dates back to the Legislative Assembly elections held in 1934, if not earlier. At the present time the factions are opposing one another with regard to the management of an institution known as the Lakshmi Vilas and Dravyasagaya Nidhi, Limited, and the management of a temple known as the Kannikaparameswari temple. On 23rd September 1938 the Subdivisional Magistrate of Pollachi served notice on twelve persons under section 112 of the Code of Criminal Procedure, calling upon them to show cause why they should not be ordered to execute security bonds under section 107. According to an affidavit of the petitioner in Criminal Revision Case No. 245 of 1939 filed in the present proceedings rioting had taken place on *that day*. The accusations against these twelve persons, who have been referred to as the counter-petitioners, are set out in paragraph 3 of the petitioner's affidavit which reads as follows :—

"The counter-petitioners 1 to 12 noted in column 4 who are residents within the jurisdiction of the Subdivisional Magistrate, Pollachi, and who are members, partisans and hirelings of a faction of which Pillaya Chetty of Negamam

(1) 1937 M.W.N. (Cr.) 189.

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LEACH C.J.

is the leader, have been systematically committing acts of rowdyism, assault, trespass and intimidation on members of the opposite party and on 23rd September 1938 all of them were found armed with weapons for a similar purpose endangering public peace. The feelings between the parties are very much strained and they are likely to come to a clash at any moment resulting in a breach of peace disturbing the public tranquillity seriously. Hence it is requested that the counter-petitioners may be ordered to execute a bond with sureties for keeping peace for a period of one year. Pending termination of the proceedings all the counter-petitioners may be ordered to execute interim bonds as breach of peace is likely to occur at any time."

The Magistrate considered that the information was of such a nature that he was justified in ordering the counter-petitioners to execute interim security bonds. These bonds were executed on 14th October 1938. On 5th February 1939 the police laid information against the petitioner, and it is obvious from the notice which was subsequently served upon him under section 112 that the information was to the effect that he was also a leader of the faction of which the counter-petitioners were said to be members and was giving them active support. At the same time information was laid against Pillaya Chetti, the person previously referred to as the leader of the faction and one Mylasami Kavandan. The Magistrate was satisfied that there was a likelihood of a breach of the peace occurring and issued notice under section 112 against the petitioner and the two other persons. In this notice they were referred to as counter-petitioners 13, 14 and 15 respectively. The petitioner says that the notice served upon him does not comply with the requirements of the section and that the proceedings which have been instituted against him have been unlawfully instituted. The notice reads as follows :—

"Whereas it has been made to appear to me by credible information that there are two factions in the village of

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Negamam led by Annal Chetti on the one side and Muthusami Chetti (petitioner) and Pillaya Chetti on the other side;

That there is misunderstanding between Annal Chetti and counter-petitioners 13 and 14 (Muthusami Chetti and Pillaya Chetti) regarding the management of Lakshmi Vilas and Dravyasagaya Nidhi, Limited, and owing to the Delhi Assembly elections in 1934 and also in respect of the management of the Kannikaparameswari temple;

That there is dispute and civil litigation between the two factions regarding possession of the temple lands, that consequently the feelings between the two parties have become strained and that there is likelihood of a breach of the peace in the village, that counter-petitioners 13 to 15 (petitioners herein and the counter-petitioners 14 and 15) are giving active support to counter-petitioners 1 to 12 to further their nefarious activities in the village;

That counter-petitioner 15 trespassed into the house of Kamatchi Chetti on 23rd September 1938 and created trouble;

That counter-petitioners 1 to 12 who were responsible for the disturbance in the village on 23rd September 1938 had come there at the instance of counter-petitioner 15 to help counter-petitioner 14 and his son and to retaliate the attempted attack on them on 21st September 1938;

That you are likely to commit a serious breach of the peace and disturb the public tranquillity at the village of Negamam;

You are hereby required under section 107 (i), Criminal Procedure Code, to appear before this Court at 11 a.m. on 8th March 1939 at Pollachi and to show cause why you should not be ordered to execute bonds for Rs. 1,000 each with two sureties each in a like sum to keep the peace for one year."

As pointed out by our learned brother PATANJALI SASTRI J. in the referring order, the petitioner's case is that a notice under section 107 of the Code of Criminal Procedure must relate to a breach of the peace or a wrongful act in contemplation at the time when the information is given to the Magistrate, and that a notice which does not go to this length is necessarily void. The Public Prosecutor challenges this contention and says that if the section were so interpreted it would impair its practical usefulness.

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Section 107 (1) states:

"Whenever a Presidency Magistrate, District Magistrate, Subdivisional Magistrate, or Magistrate of the First class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity the Magistrate if, in his opinion, there is sufficient ground for proceeding, may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without surety, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix."

The requirements of this sub-section are therefore: (i) There must be information that a person is likely to commit a breach of the peace or disturb the public tranquillity or do a wrongful act which may probably cause a breach of the peace or disturb the public tranquillity; (ii) the Magistrate, if he is of the opinion that there is sufficient ground for requiring the person against whom the information is laid to show cause why he should not be ordered to execute a security bond for keeping the peace, should issue notice to him; and (iii) in calling upon the person to show cause the Magistrate must proceed "in manner hereinafter provided" which means that he must issue a notice in accordance with the requirements of section 112. That section says that when a Magistrate deems it necessary to require a person to show cause he shall make an order in writing setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required. As will be shown presently section 112 has on occasions been misread and further particulars than those required by the section have been insisted upon. All that the section requires is that the substance of the information shall be set forth

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and if this is done and the other requirements of the section are complied with, the notice is a valid one.

Section 117 provides the procedure to be followed when a notice has been issued under section 112. When an order under section 112 has been read or explained under section 113 to a person present in Court, or when a person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken and to take such further evidence as may appear necessary. The enquiry shall be made as nearly as may be practicable, where the order requires security for keeping the peace, in the manner prescribed for conducting trials and recording evidence in summons cases. Therefore before a person on whom a notice has been served under section 112 can be required to enter into a security bond under section 107 the matter must be fully investigated by the Magistrate.

The cases on which the petitioner relies in support of his contention that the notice must set forth the particular breach of the peace or wrongful act in contemplation are: *High Court Proceedings No.* 1952(1), *Konda Reddy* v. *King-Emperor*(2), *Marutha-pali Goundar* v. *Emperor*(3), *Santhanaramaswami* v. *Emperor*(4) and *In re Kalia Goundan*(5). In *High Court Proceedings No.* 1952(1) complaints were made against twenty-one persons that they were constantly creating disturbances in bazaars and they were called upon to show cause why they should not be bound over to keep the peace. The Court expressed the opinion

(1) (1876) 2 Weir 49.
(2) (1917) I.L.R. 41 Mad. 246.
(3) 1937 M.W.N. (Cr.) 9.
(4) 1937 M.W.N. (Cr.) 189.
(5) (1930) 59 M.L.J. 887.

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that the act of which information is given and in respect of which security is required must be an act which is shown to be in contemplation at the time the information is given and not merely one a repetition of which may be apprehended from past misconduct of the kind without anything further. This case was under the old Code, but the language of sections 107 and 112 was materially the same. While we agree that there must be something more than the past misconduct of the person proceeded against to justify a notice being served upon him, we are unable to agree that the Code requires the information to show the particular act which is in contemplation at the time. The Magistrate must be satisfied that there is a likelihood of a breach of the peace. What will satisfy him must depend on the particular facts of the case.

In *Konda Reddi* v. *King-Emperor*(1), ABDUR RAHIM and NAPIER JJ. considered that proceedings under section 107 of the Code of Criminal Procedure should be quashed if the notice issued did not give particulars of the persons threatened and when the apprehension of a breach of the peace arose. There the notice stated that

> "seven persons headed by Nagireddy Konda Reddy, the first accused, a rich and influential resident of Kaluvoy, and others are addicted to crimes of violence involving a breach of the peace and threatened injury to the lives and property of several persons and there is an imminent danger of a breach of the peace."

The decision in a particular case must depend on the facts of the case and we are unable to agree that the absence of such particulars as these would necessarily vitiate the notice. In the first instance the particulars may not have been given to the Magistrate, but nevertheless he may have been

(1) (1917) I.L.R. 41 Mad. 246.

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convinced that there was a likelihood of a breach of the peace, in which case it was his duty to issue the notice. The passing of an order requiring security will, of course, depend on the nature of the evidence given at the subsequent inquiry.

In *Maruthapali Goundar* v. *Emperor*(1) PANDRANG ROW J. accepted the proposition that it was necessary to state in the notice the likelihood of the commission in the near future of a particular breach of the peace or a wrongful act likely to lead to a breach of the peace. In *Santhanaramaswami* v. *Emperor*(2) KING J. considered that the notice in that case was wrong because neither time, nor place, nor any indication of the identity of the persons alleged to have been threatened had been given, but here the learned Judge was insisting upon something which the section does not insist upon. In *Kumarappa Chettiar* v. *Emperor*(3) KING J. rightly observed that in order to justify an order under section 107 it must be proved that the persons concerned are likely to break the peace. In *In re Kalia Goundan*(4) KRISHNAN PANDALAI J. considered that section 112 requires the Magistrate to give an "abstract of the facts" upon which he charges the persons proceeded against with being likely to commit a breach of the peace. If by an abstract is meant something more than the substance of the information we do not agree. The learned Judge did not regard the notice in that case as being sufficient but this opinion is certainly to be doubted. It is, however, not necessary for the purposes of this case to discuss the facts of that case as the judgment does not appear to go beyond the other judgments to which reference has been made.

(1) 1937 M.W.N. (Cr.) 9.
(2) 1937 M.W.N. (Cr.) 189
(3) 1937 M.W.N. (Cr.) 224.
(4) (1930) 59 M.L.J. 887.

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There is no doubt that action taken under section 112 constitutes a judicial act and therefore the Magistrate should not act arbitrarily. There must be information of a nature which convinces him that there is a likelihood of a breach of the peace. It is impossible to formulate a hard and fast rule with regard to the nature of the information on which a Magistrate should act. What is reasonably sufficient to satisfy a Magistrate must depend on the particular situation. The person who gives the information may not be in a position to give details, but the source of the information may be sufficient to convince the Magistrate that a breach of the peace is likely, and if he is convinced the law requires him to take action. We consider that KNOX J. aptly stated the position in *Jaguji Rai* v. *Emperor*(1) when he said:

"As I read this section there may be cases in which a Magistrate of the First Class is merely informed that a person is likely to disturb the public tranquillity without any information being given as to his intent to do wrongful acts. The Magistrate is responsible for the peace of the district. He acts upon this information and he is required to set forth in writing the substance of the information received. In this case we are not told that the Magistrate has received any information of definite acts intended. Apparently from the information he received he was satisfied that the persons concerning whom the information had been given were likely to commit some act which might occasion a breach of the peace. The reason given for this probability was that they were on terms of enmity with each other. Where the Magistrate can go into further particulars, he should certainly go into them. But it may well be that all the information he receives is that there will be a breach of the public peace, and if he considers that information to come from a reliable source, he has jurisdiction to make the order required by section 112."

The High Court has undoubtedly power to quash proceedings where the notice issued does not comply

(1) (1918) 16 A.L.J. 567.

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with the requirements of section 112, but before doing so it must be satisfied that there has been a failure to comply. It must be remembered that the issue of the notice is merely a preliminary step and no order can be passed under section 107 unless the inquiry which follows the issue of the notice shows that the laying of the information was justified. The High Court can always interfere when the inquiry has not been held in accordance with the law or a wrong conclusion has been arrived at. Far too much stress has been laid in the past on the wording of the notice and too little regard paid to the safeguards provided by the subsequent procedure.

In the course of the arguments advanced on behalf of the petitioner several cases have been quoted which relate to action taken under section 110. There are conflicting decisions on the question of what the notice in such a case should contain. It is, however, not necessary for us to discuss the cases relating to section 110. Section 107 is a self-contained section and the Court is not required for the purposes of this petition to travel beyond the cases which have reference to that section.

Now, applying the provisions of section 112 to the notice issued in this case what is the position ? The notice states that the petitioner is a leader of one of the rival factions in the village, that the feelings between the factions have become strained, that there is a likelihood of a breach of the peace in the village and that the petitioner is giving active support to the members of his faction to further their nefarious activities in the village. The nefarious activities referred to are known to the petitioner who has set them out in the affidavit which he has sworn and filed in support of his petition asking for the quashing of the

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proceedings. It is impossible in these circumstances to say with reason that the substance of the information received by the Magistrate has not been set out and it is also impossible to say with reason that there is no case shown for inquiry under section 107. We regard this notice as complying with the requirements of the section, and therefore there is no foundation for the application to this Court to exercise its revisional powers. It follows that the petition must be dismissed and the Magistrate will proceed with the inquiry in accordance with law.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

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

1939, November 3.

PALADUGU VEERA RAMACHANDRA RAO (THIRD DEFENDANT), APPELLANT,

v.

PALADUGU PARASURAMAYYA AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), *sec.* 48—*Amendment of decree under sec.* 152—*Application for execution after twelve years from date of decree but within twelve years of amendment—If barred under sec.* 48—*Art.* 182, *Limitation Act (IX of* 1908)—*Effect of.*

On 9th March 1922 the first respondent obtained in the Court of the Subordinate Judge of Bezwada a money decree against the appellant, the appellant's uncle and a cousin, who were members of an undivided family. The amount for which judgment was obtained was Rs. 3,735 but a mistake was made in drawing up the decree and the figure inserted

*Appeal Against Appellate Order No. 135 of 1935.

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was Rs. 2,200. On 16th July 1928 the mistake was corrected under section 152, Civil Procedure Code. On 6th December 1933 the respondent caused the decree to be transferred to the Court of the Subordinate Judge of Guntur for execution and on 5th March 1934 he applied for the attachment of certain immovable property. On the appellant's objection that the property was his personal property and the decree had only made him liable to the extent of his interest in the family property, the attachment was raised. On 12th November 1935, the respondent filed another application for execution and asked for the attachment of two decrees, one obtained by the appellant alone and the other in conjunction with his cousin. The Subordinate Judge dismissed it on the ground that it was barred by the law of limitation. On appeal, the District Judge of Guntur held that the decree was barred so far as it related to the sum of Rs. 2,200 but that it was enforceable to the extent of Rs. 1,535, the difference between the Rs. 2,200 and Rs. 3,735, the figure which was inserted in the decree as the result of the amendment. On appeal to the High Court against the above order,

held that section 48 of the Civil Procedure Code applied to the case and that the decree had become time-barred. Inasmuch as article 182 of the Limitation Act clearly leaves the provisions of section 48 of the Civil Procedure Code untouched, there can be no execution of a decree governed by section 48 when twelve years have passed from the date of the decree, amendment or no amendment. An amendment of a decree to bring it in accordance with the judgment does not have the effect of starting a fresh period of limitation.

The decision in Civil Miscellaneous Appeal No. 264 of 1931 overruled.

Faqir Chand v. *Kundan Singh*(1) approved.

Narsingrao Konher Inamdar v. *Bando Krishna*(2), *Ganesh Das* v. *Vishan Das*(3) and *Musammat Dulhin* v. *Mahanth Harihar Gir*(4) referred to.

APPEAL against the order of the District Court of Guntur, dated 9th February 1936, and made in Appeal No. 33 of 1936 preferred against the order of the

(1) (1932) I.L.R. 54 All. 622.
(2) (1918) I.L.R. 42 Bom. 309.
(3) A.I.R. 1935 Lah. 292.
(4) (1939) I.L.R. 18 Pat. 395.

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Court of the Subordinate Judge of Guntur in Execution Petition No. 443 of 1935 in Original Suit No. 17 of 1921.

V. Parthasarathi (*P. Satyanarayana Rao*) for appellant.—The decree in this case was passed on 9th March 1922. Amendment was granted on 16th July 1928. The present execution petition was filed on 12th November 1935. It is therefore clearly barred under the provisions of section 48 of the Civil Procedure Code. The "decree sought to be executed" is the decree that was passed on 9th March 1922. The decree should bear the date of the judgment under Order XX, rule 7.

[LEACH C.J.—The amendment is to bring the decree in conformity with the judgment according to section 152 of the Civil Procedure Code. That will not have the effect of changing the date of the decree.]

[KRISHNASWAMI AYYANGAR J.—What is the date of a decree in cases of review ?]

When a review application is granted there will be a new decree in conformity with the judgment that is reviewed. Though under the Limitation Act of 1908 as amended a new clause was inserted, making the date of amendment, the starting point for limitation under article 182, still no such amendment was made in section 48 of the Civil Procedure Code (Act V of 1908).

The High Courts of Bombay, Allahabad, Lahore and Patna hold that the amendment of the decree cannot have the effect of enlarging the period of twelve years mentioned in section 48, Civil Procedure Code, which is final. Article 182 of the Limitation Act leaves untouched section 48 of the Civil Procedure Code. [*Narsingrao Konher Inamdar* v. *Bando Krishna*(1), *Faqir Chand* v. *Kundan Singh*(2), *Musammat Dulhin* v. *Mahanath Harihar Gir*(3), *Ganesh Das* v. *Vishan Das*(4) and *Babu Narendra Bahadur Singh* v. *Oudh Commercial Bank, Limited, Fyzabad*(5) were referred to.] The decision in the unreported case (Civil Miscellaneous Appeal No. 264 of 1931) relied on by the lower appellate Court is wrongly decided.

(1) (1918) I.L.R. 42 Bom. 309.
(2) (1932) I.L.R. 54 All. 622.
(3) (1939) I.L.R. 18 Pat. 395.
(4) A.I.R. 1935 Lah. 292.
(5) (1934) I.L.R. 10 Luck. 208.

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[LEACH C.J.—That case does not discuss the sections, nor does it refer to the authorities.]

A. Lakshmayya for respondents.—The period of twelve years mentioned in section 48 is a period of limitation which can be extended. This has been recognized in *Rameshvar Singh* v. *Homeshvar Singh*(1) where, for instance, a decree-holder is prevented by the operation of an injunction from proceeding with the execution of the decree. The time so lost can be exempted and twelve years may be exceeded. [Section 15 of the Limitation Act and *Drigpal Singh* v. *Pancham Singh*(2) were referred to.]

Under section 152, Civil Procedure Code, an amendment of the judgment or decree may be made by the Court at any time. It may be done even twelve years after the decree or judgment. In such cases, the amendment would be useless if the period of twelve years mentioned in section 48 of the Code is not capable of extension. It would introduce an anomaly into the Code. The period of twelve years is a period of limitation prescribed and can be extended.

The second point is that the present application is merely a continuation of the former application. By asking for a different relief, though after twelve years, it does not become a new application. In some cases it was not treated as a fresh application. [*Jhorama Patrani* v. *Latchanna Dora*(3) was referred to.]

JUDGMENT.

LEACH C.J.

LEACH C.J.—This appeal raises a question of limitation. On 9th March 1922 the first respondent obtained in the Court of the Subordinate Judge of Bezwada a money decree against the appellant, the appellant's uncle and a cousin, who were the members of an undivided family. The amount for which judgment was obtained was Rs. 3,735, but a mistake was made in drawing up the decree and the figure inserted was Rs. 2,200. It was not until 16th July

(1) (1920) 40 M.L.J. 1 (P.C.). (2) I.L.R. [1939] All. 647.
(3) 1939 M.W.N. 988.

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1928 that the mistake was corrected under the provisions of section 152 of the Code of Civil Procedure. On 6th December 1933 the respondent caused the decree to be transferred to the Court of the Subordinate Judge of Guntur for execution and on 5th March 1934 he applied for attachment of certain immovable property. The appellant objected to the attachment on the ground that the property was his personal property and the decree had only made him liable to the extent of his interest in the family property. This objection was well founded and the attachment was raised. On 12th November 1935 the respondent filed another application for execution. Here he asked for the attachment of two decrees, one obtained by the appellant alone and the other in conjunction with his cousin. It was contended that the application was barred by the law of limitation and the contention was upheld by the Subordinate Judge. An appeal followed to the District Judge of Guntur who held that the decree was barred so far as it related to the sum of Rs. 2,200 but it was enforceable to the extent of Rs. 1,535, the difference between the Rs. 2,200 and Rs. 3,735, the figure which was inserted in the decree as the result of the amendment.

It is obvious that the District Judge's decision was wrong in allowing execution of part of the decree. The respondent must be entitled to the full amount, if entitled to anything. When the provisions of section 48 of the Code of Civil Procedure and article 182 of the Limitation Act are considered it however becomes manifest that the Subordinate Judge was right in holding that the decree was time-barred.

Section 48 (1) of the Code of Civil Procedure reads as follows:

"Where an application to execute a decree not being a decree granting an injunction has been made, no order for

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the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from

(a) the date of the decree sought to be executed, or

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree."

Therefore a decree which has been passed for more than twelve years cannot be executed, but where the decree or an order passed subsequent to the decree directs payment of money or the delivery of property to be made at a certain date or at recurring periods the date of the default in such a case shall be the starting point for the period of twelve years. Order XX, rule 7, provides that the decree shall bear the date of the judgment.

Sub-section 2 of section 48 says :

"Nothing in this section shall be deemed—

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application ; or

(b) to limit or otherwise affect the operation of article 180 of the second schedule to the Indian Limitation Act, 1877."

The corresponding article in the present Limitation Act is article 182. Now, turning to clause 4 of that article we find that the period of limitation where a decree has been amended is three years from the date of the amendment, but the article is expressly limited to applications for execution not provided for by article 183 or by section 48 of the Code of Civil Procedure. Article 183 refers to applications to enforce judgments of High Courts and it has no bearing here.

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Inasmuch as article 182 clearly leaves the provisions of section 48 untouched there can be no execution of a decree governed by section 48 when twelve years have passed from the date of the decree, amendment or no amendment. It is true that there is no period of limitation for an amendment of a decree to correct an accidental slip or omission under section 152 of the Code. But because the Code gives the Court power to correct slips or omissions at any time it does not mean that the law of limitation is affected. A correction made in a time-barred decree leaves the decree still time-barred.

The question under consideration has been the subject of decisions by the Bombay, Allahabad, Lahore, and Patna High Courts and they have all agreed that an amendment of a decree to bring it in accordance with the judgment does not have the effect of starting a fresh period of limitation; see *Narsingrao Konher Inamdar* v. *Bando Krishna*(1), *Faqir Chand* v. *Kundan Singh*(2), *Ganesh Das* v. *Vishan Das*(3) and *Musammat Dulhin* v. *Mahanath Harihar Gir*(4). In *Faqir Chand* v. *Kundan Singh*(2) the Allahabad High Court observed :

"Now no change was made in section 48 of the Code of Civil Procedure providing for the extension of the period of twelve years in that section from the date of the amendment of a decree. We consider that the Legislature advisedly omitted that provision for extension from section 48, and that the omission was not accidental. In our opinion the effect of the omission is that an amendment of a decree does not give a new date for starting a period of limitation, if the application for execution is beyond the period of twelve years allowed by section 48 ; that is the period of twelve years

(1) (1918) I.L.R. 42 Bom. 309.
(2) (1932) I.L.R. 54 All. 622.
(3) A.I.R. 1935 Lah. 292.
(4) (1939) I.L.R. 18 Pat. 395.

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under section 48 is final and cannot be extended by any amendment of the decree, whether that amendment is made before the expiry of the period of twelve years or whether that amendment is made after the expiry of the period of twelve years. The reason why no amendment was made in section 48 is that probably the greater period of twelve years is allowed by that section, and it is probably the intention of the Legislature that that period of twelve years should be final, and that within that period a decree-holder should amend his decree and obtain all consequent remedies. If a decree-holder neglects to amend his decree within a sufficient period before the expiry of twelve years to allow him to obtain his remedy by execution, then he has only himself to blame."

I agree entirely with what is said here.

In an unreported case of this Court (Civil Miscellaneous Appeal No. 264 of 1931) MADHAVAN NAIR and CORNISH JJ., without giving any reasons, held that the period of limitation should be calculated from the date of the amendment of the decree. As their decision runs contrary to the plain wording of section 48 of the Code of Civil Procedure and article 182 of the Limitation Act it cannot be allowed to stand.

The learned Advocate for the respondent has argued that section 48 of the Code of Civil Procedure is not in all cases final and has drawn attention to the provisions of section 15 of the Limitation Act, but all that need be said is that section 48 is final unless there is some statutory provision which governs it in a particular case, and that is not the position here. Section 48 applies in the present case and as more than twelve years had elapsed before the last application for execution was made the decree had become time-barred.

The appeal will be allowed and the judgment of the Subordinate Judge restored. The appellant is entitled to his costs in this Court and in the District Court.

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KRISHNASWAMI AYYANGAR J.

A memorandum of cross-objections filed by the respondent does not call for consideration and will be dismissed without costs.

KRISHNASWAMI AYYANGAR J.—I am of the same opinion. Indeed there is no escape from it when the language of section 48 of the Code of Civil Procedure is read in the light of the provisions of article 182 of the Indian Limitation Act. The words used in the first column of that article make it clear that the Legislature did not intend to interfere in any way with the limit of time fixed by section 48. The Code of Civil Procedure and the Limitation Act were enacted at the same time and a comparison of the provisions of the two statutes makes it abundantly clear that there is an intimate relationship between the two. In the Limitation Act of 1908 a new provision was inserted to fix the point of time from which the period of limitation under article 182 has to be calculated where the decree is amended; clause (4) was added to the article, so as to make it clear in such a case that it is the date of the amendment from which limitation will run. While the case of an amendment is thus met and provided for by article 182 of the Limitation Act it is significant that the language of section 48 of the Code of Civil Procedure has been left unaltered. It is therefore a fair inference that the period of twelve years should be counted from the date of the decree irrespective of any amendment that it might have undergone since. The date of the amendment does not therefore furnish a fresh starting point under section 48, Civil Procedure Code, and must accordingly be ignored in making the calculation.

It was suggested on behalf of the respondent that the fact that there is no period of time limited for an application for an amendment under section 152

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introduces an anomaly. It was said that a Court may grant and may be obliged to grant an amendment even after the period of twelve years fixed by section 48 of the Code of Civil Procedure and where an amendment is so granted the order would be rendered futile and barren unless section 48 is understood as permitting the twelve years' period to be calculated from the date of the amendment. This may be an anomaly but the remedy is in the hands of the Legislature. When the language of the statute is clear we cannot refuse to give effect to it on considerations of this kind.

SOMAYYA J.—I agree with my Lord the CHIEF JUSTICE.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

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

1939, October 2.

KARINAGISETTI CHENNAPPA (PLAINTIFF), APPELLANT,

v.

KARINAGISETTI ONKARAPPA (DEFENDANT), RESPONDENT.*

Limitation Act (IX of 1908), sec. 21 (1)—Hindu law—Minor—Paternal grandmother, nearest living relation—If "lawful guardian" under the section.

Held by the Full Bench.—The paternal grandmother of a Hindu minor is not, even when she happens to be his nearest living relation, the lawful guardian of the minor, within the meaning of section 21 of the Indian Limitation Act, 1908.

* Second Appeal No. 318 of 1935.

CHENNAPPA v. ONKARAPPA.

The father and in his absence the mother of a Hindu minor are his lawful guardians not requiring an appointment by Court for acting as such. Where the father and the mother have died, no relative can become the lawful guardian without an order of the Court.

Surayya v. *Subbamma*(1) overruled.

APPEAL against the decree of the District Court of Bellary in Appeal Suit No. 59 of 1933, preferred against the decree of the Court of the District Munsif of Bellary in Original Suit No. 484 of 1932.

A. Bhujanga Rao (with him *D. R. Krishna Rao*) for appellant.—In this case the paternal grandmother of the minor is the "lawful guardian" as mentioned in section 21 of the Limitation Act. The endorsement made by her on the promissory note saves the period of limitation.

Under the Hindu law the paternal grandmother is the guardian of the minor in the absence of his other near relations. [Sir Thomas Strange's Hindu Law (1864), Fourth Edition, page 72 (*a*), and a passage in Macnaghten's Principles and Precedents of Hindu Law quoted in *Kristo Kissor Neoghy* v. *Kadermoye Dossee*(2) were referred to.]

[Manu (Sacred Books of East Series, Vol. XXV), page 257, verse 27, Gautama (Sacred Books of the East Series, Vol. II), page 229, verse 48, and Vishnu (Sacred Books of the East Series, Vol. VII), page 20, verse 65, were referred to.]

[LEACH C.J.—In all the text books the king is stated to be the protector and guardian of all minors. There is no reference to the father or mother as guardians of minors.]

[KRISHNASWAMI AYYANGAR J.—They came to be recognized by custom and usage.]

In *Thayammal* v. *Kuppanna Koundan*(3) SADASIVA AYYAR J. recognized that the direct male and female ancestors of the minor are entitled to be lawful guardians. That case was followed in *Seetharamanna* v. *Appiah*(4). In that case VISWANATHA SASTRI J. was of opinion that the father and the mother were not the only lawful guardians. In *Surayya* v. *Subbamma*(1) it was held that the paternal

(1) (1927) 53 M.L.J. 677.
(2) (1878) 2 C.L.R. 583.
(3) (1914) I.L.R. 38 Mad. 1125.
(4) (1925) I.L.R. 49 Mad. 768.

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grandmother is the natural guardian of the grand children in the absence of the father and mother.

[Trevelyan's Hindu Law, Third Edition, page 231, Mayne's Hindu Law, Tenth Edition, page 299 and Mulla's Principles of Hindu Law, Eighth Edition, page 565, were referred to.]

[The following cases were also referred to: *Ranganaiki Ammal* v. *Ramanuja Aiyangar*(1), *Kristo Kisser Neoghy* v. *Kadermoye Dossee*(2), *Musst. Bhikuo Koer* v. *Musst. Chamela Koer*(3), *Mohanund Mondul* v. *Nafur Mondul*(4), *Re Gulbai and Lilbai*(5), *Nagayya* v. *Narasayya*(6), *Ganjayya* v. *Ramaswami*(7) and *Ramaswamy* v. *Kasinatha*(8).]

K. Srinivasa Rao for respondent was not called upon.

JUDGMENT.

LEACH C.J.

LEACH C.J.—This appeal raises the question whether the paternal grandmother of a Hindu minor is his lawful guardian when she happens to be his nearest living relation. From 1917 to 1924 the respondent's father had on various occasions borrowed money from the appellant. On 18th September 1924 an account was taken and it was found that the respondent's father owed the appellant an aggregate sum of Rs. 3,825 for which he executed a promissory note. The instrument was not properly stamped and therefore was not admissible in evidence. Realizing the defect the appellant filed a suit in the Court of the District Munsif of Bellary for relief on the basis of a settled account. The date of the institution of the suit was 16th July 1932 and unless the appellant was entitled to rely on certain endorsements on the promissory note his suit was time-barred. I should mention that the respondent's father had died on 4th October 1924 and the suit was against the respondent as his legal representative. The respondent's

(1) (1911) I.L.R. 35 Mad. 728.
(2) (1878) 2 C.L.R. 583.
(3) (1897) 2 C.W.N. 191.
(4) (1899) I.L.R. 26 Cal. 820.
(5) (1907) I.L.R. 32 Bom. 50.
(6) I.L.R. [1939] Mad. 65.
(7) (1913) 24 M.L.J. 428.
(8) A.I.R. 1928 Mad. 226.

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mother had predeceased his father and on his father's death Neelamma, his paternal grandmother, took charge of his property. On 6th September 1927 she paid to the appellant a sum of Rs. 70 in reduction of the interest due on the loans and made an endorsement to this effect on the promissory note. On 10th November 1927 the District Court of Bellary acting under the provisions of the Guardians and Wards Act appointed one Basappa, the guardian of the minor's property. On 18th February 1928 Basappa paid a sum in reduction of the amount due and made an endorsement on the promissory note recording the fact of payment. On 18th July 1929 Neelamma made another payment in reduction of the debt and this was also followed by an endorsement on the instrument. Basappa was then alive and was still the lawful guardian of the respondent, but he died a month later. The last payment to the appellant was made by Neelamma on 25th August 1929. This was a sum of Rs. 1,000 paid towards the principal. Again she made an endorsement on the promissory note recording the fact of payment. In order to save limitation the appellant has to rely on the endorsements made by Neelamma on 6th September 1927 and on 25th August 1929. The District Munsif and on appeal the District Judge of Bellary held that the suit was time-barred. The appellant then filed this second appeal which has been placed before a Full Bench in view of conflicting decisions of this Court bearing on the question whether Neelamma was under Hindu law the lawful guardian of the minor when she made these particular endorsements.

Section 20 of the Indian Limitation Act states that where interest on a debt is, before the expiration

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of the prescribed period, paid by the debtor or his agent duly authorized in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent, a fresh period of limitation shall be computed from the time when the payment was made; provided that, save in the case of a payment of interest made before 1st January 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by the person making the payment. Section 21 (1) states that the expression "agent duly authorized in this behalf" includes the person's lawful guardian. The fact that Neelamma was the *de facto* guardian of the minor would not help the appellant. It was expressly held by a Bench of this Court (MADHAVAN NAIR and ABDUR RAHMAN JJ.) in *Nagayya* v. *Narasayya*(1) that an acknowledgment of a debt made by a *de facto* guardian of a minor does not prevent the debt from being time-barred. This decision followed a previous decision of this Court to the same effect. The wording of section 20 and section 21 of the Limitation Act leaves no room for doubt that this decision is correct. The appellant, however, says that Neelamma was the lawful guardian of the minor, except during the period when Basappa was acting in pursuance of the order passed under the Guardians and Wards Act.

In support of this contention the learned Advocate for the appellant has relied on a passage in the edition of Strange's "Hindu Law" published in 1864, Fourth Edition, and a passage in Macnaghten's "Principles and Precedents of Hindu Law" quoted in *Kristo Kissor*

(1) I.L.R. [1939] Mad. 65.

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Neoghy v. *Kadermoye Dossee*(1). The passage from Strange is at page 72 (*a*) and reads as follows:—

"The natural guardians of a minor are, first his father, then his mother, elder brother, paternal relatives and maternal relatives."

The passage from Macnaghten is in these words:

"A father is recognized as the legal guardian of his children, when he exists; and when the father is dead the mother may assume the guardianship. In default of her, an elder brother of a minor is competent to assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian and failing such relatives, the office devolves on the maternal kinsmen, according to their degree of proximity; but the appointment of guardians universally rests with the ruling power."

The learned Advocate would have it that these passages must be accepted as authoritative support for the proposition that the legal guardianship devolves upon the nearest paternal relative and in default of a paternal relative on the nearest maternal kinsman. I am not prepared to accept this argument. I consider that it is contrary to principle and accepted authority.

It is common ground that the ancient texts of Hindu law do not provide for the management of a minor's property beyond stating that the guardianship shall rest with the king. The position of the king is now taken by the Court. Custom has, however, recognized that the father of a Hindu minor, and on his death the minor's mother, is entitled to the guardianship of the minor's estate. This has been accepted from time immemorial so universally that the right of the father or of the mother as the case may be cannot now be disputed, but it appears to be equally clear that custom has not extended the rule beyond the

(1) (1878) 2 C.L.R. 583.

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mother. In the case of *Kristo Kissor Neoghy* v. *Kadermoye Dossee*(1), GARTH C.J. referring to the passage from Macnaghten which I have quoted said:

"We do not think that this passage means that all the persons therein mentioned have in turn an absolute right to take upon themselves the guardianship of a minor, without any permission or authority from the ruling power. If it did mean this, the authorities cited would not appear to support it."

GARTH C.J. then went on to point out that Jagannatha, one of the authorities cited, after quoting from Manu this passage,

"The king should guard the property which descends to an infant by inheritance, until he returns from the house of his preceptor, or until he has passed his minority."

and from the Ratnacara this statement,

"Wealth which descends to an infant by inheritance, and becomes the property of the minor, let the king guard; that is, let him protect it from the other heirs."

had proceeded to add these observations of his own:

"Consequently, the meaning is, let him (the king) act in such manner that other heirs may not take the whole, defrauding the infant who is incapable for non-age of conducting his own affairs; or the sense may be, let him commit the share of the minor in trust to any one co-heir or other guardian."

There is here authority that no one in the family is entitled as of right to act as the guardian of the minor. The right to act then depended upon the decision of the king. The judgment in *Kristo Kissor Neoghy* v. *Kadermoye Dossee*(1) is of special importance in the present case as it related to a contest between the paternal grandmother and the paternal uncle on the one side and the maternal grandmother on the other for the custody of a minor. The Court held that none of them was entitled to claim custody as the lawful guardian.

(1) (1878) 2 C.L.R. 583.

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The judgment in *Kristo Kissor Neoghy* v. *Kadermoye Dossee*(1) was accepted as correctly stating the law in *Musst. Bhikuo Koer* v. *Musst. Chamela Koer*(2) which was also decided by the Calcutta High Court. This was a case under the Guardians and Wards Act and the contesting parties were the maternal grandmother and step-sister of a minor who were his nearest relatives. TREVELYAN and STEVENS JJ. held that there was not, even before the Guardians and Wards Act was passed, anyone other than the father or the mother who had an absolute right to the custody of a Hindu minor.

Kristo Kissor Neoghy v. *Kadermoye Dossee*(1) has been cited with approval in two decisions of this Court; *Ranganaiki Ammal* v. *Ramanuja Aiyangar*(3) and *Thayammal* v. *Kuppanna Koundan*(4). In the latter case SADASIVA AYYAR J. following *Kristo Kissor Neoghy* v. *Kadermoye Dossee*(1) and *Musst. Bhikuo Koer* v. *Musst. Chamela Koer*(2) held

"that under Hindu law nobody else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor), is entitled as a matter of natural right to be and to act as guardian of a minor's person and properties. Recourse must, he said, be had to the Court (representing the rights of the king which are paramount) to even the rights of the parents, where there is no natural guardian alive".

It was not indicated how exceptions might arise in favour of the elder brother or the direct male and female ancestors of a minor and the decision cannot be taken as going really beyond what was decided in the two Calcutta cases. In *Seetharamanna* v. *Appiah*(5) VISWANATHA SASTRIYAR J. expressed the opinion that there is nothing in Hindu law

(1) (1878) 2 C.L.R. 583.
(2) (1897) 2 C.W.N. 191.
(3) (1911) I.L.R. 35 Mad. 728.
(4) (1914) I.L.R. 38 Mad. 1125.
(5) (1925) I.L.R. 49 Mad. 768.

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"which limits guardianship only to the father, the mother, and failing them, the king."

This statement cannot be accepted as correctly stating the position. As I have already pointed out, Hindu law, in so far as it is to be gathered from the ancient texts only, provides for the king having charge of a minor's property. There is nothing to be found in the ancient writings which can be interpreted as giving the father or the mother any right to guardianship. Their present rights in this respect are based merely on custom.

In *Surayya* v. *Subbamma*(1) DEVADOSS and JACKSON JJ. went very far and it is this decision which has caused this appeal to be placed before a Full Bench. They decided that under the Hindu law, in the absence of the father and the mother, the paternal grandmother is the natural guardian of the grandchildren. They said that there was no direct authority for the contention that the paternal grandmother was not the natural guardian of her grandchildren in the absence of their father and mother, but they did not consider the bearing of the two Calcutta cases to which I have referred. The basis of their decision that the paternal grandmother is the natural guardian of her grandchildren is to be gathered from this statement in the judgment:

"Considering the habits and customs of the people of this part of the country, there is no reason why the paternal grandmother should not be considered as the natural guardian of her grandchildren in the absence of their father and their mother."

The short answer to this statement is that neither by Hindu law nor by custom is the grandmother recognized as the lawful guardian of the minor. No

(1) (1927) 53 M.L.J. 677.

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member of the family other than the father or the mother has been recognized as having the right of guardianship and this statement receives full support from Mayne, Tenth Edition, page 299; from Mulla's Principles of Hindu Law, Eighth Edition, page 565; and from Trevelyan's Hindu Law, Third Edition, page 231. The Bombay High Court in effect expressed the same opinion in *Re Gulbai and Lilbai*(1). Of course, all other things being equal the nearest relative of the minor should have the position of guardian but if the father and the mother have died no relative can become the lawful guardian without an order of the Court.

I hold that the Courts below were right in refusing to recognize Neelamma as the guardian in law of the minor and in rejecting the claim that her endorsements bound him. It follows that I consider that *Surayya* v. *Subbamma*(2) was wrongly decided and therefore should not be followed.

I would dismiss the appeal with costs.

MOCKETT J.

MOCKETT J.—I entirely agree and am only adding a few words in view of the fact that we are differing from a Bench of this High Court. After the very full investigation into this subject which has been made to-day—the learned Counsel for the appellant referred to all the relevant decisions—I think it is clear that at least at some period of time which it is difficult to fix, the only guardian of a minor was "the king" as he is so described in the texts. But to-day undoubtedly it cannot be argued that the father and in his absence the mother are not the legal guardians. They have been so recognized by usage and custom. Indeed the position of the father is impliedly recognized by statute under section 19 of the Guardians and Wards Act. How all this came about is attractively put in the

(1) (1907) I.L.R. 32 Bom. 50. (2) (1927) 53 M.L.J. 677.

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MOCKETT J.

Tenth Edition of Mayne's Hindu Law, paragraph 231, at page 299. The learned author envisages the natural delegation to the parents by the king of duties so intimately affecting their son, but that idea, as has been pointed out in the authorities to which my Lord has referred, although now having attained the force of law, has never been extended beyond the parents by the Courts, with the exception of the decision in *Surayya* v. *Subbamma*(1). In the case of persons other than the parents, an express delegation or appointment is required and this has been done and is to-day done through the machinery of the Court of Wards. With all respect, I think the learned Judges who decided *Surayya* v. *Subbamma*(1) confused the two positions, namely, a consideration as to who was the most desirable person to be *appointed* as guardian of a minor with a consideration of whether desirability constituted a person a legal guardian automatically. The difference between the two positions is fully recognized by DEVAR J. in *Re Gulbai and Lilbai*(2) and it seems to me that, if these two distinctions are kept apart, this subject presents very little difficulty. Desirability can only be relevant in an application to remove the father or mother or in an application to appoint some one else. I agree that the decision of my learned brothers, DEVADOSS and JACKSON JJ., in *Surayya* v. *Subbamma*(1) is not in conformity with authority and that this appeal must be dismissed with costs.

KRISHNASWAMI AYYANGAR J.

KRISHNASWAMI AYYANGAR J.—It is scarcely necessary for me to add anything after, if I may say so with the utmost respect, the full and elaborate consideration that the matter has received at the hands of

(1) (1927) 53 M.L.J. 677. (2) (1907) I.L.R. 32 Bom. 50.

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KRISHNASWAMI AYYANGAR J.

my Lord. The question in short is whether a paternal grandmother can by reason of her relationship alone be held to be a lawful guardian within the meaning of section 21 of the Indian Limitation Act. She may, in a sense, be regarded as a natural guardian as her relationship to the minor is so close that she may be expected naturally to watch over and guard his interests. It is however better to avoid the use of the expression for the present purpose, as we are not concerned with finding whether in the ordinary course of nature she is or is not a fit and proper person to protect the minors' interests in the absence of a nearer relation. The statute has used the expression lawful guardian and the introduction of the term natural guardian can scarcely elucidate discussion, but on the contrary may divert the attention.

The Act does not define the expression "lawful guardian". But it is obvious that we must resort to the personal law of the minor or to other enactments, if any, to ascertain its meaning. The only enactment having a bearing is the Guardians and Wards Act, 1890, which does no more than define the word guardian simpliciter. We have therefore to fall back on the personal law of the minor, viz., the Hindu law to get at the meaning of the expression with which we are concerned. If a person has been appointed or declared a guardian by Court under the Guardians and Wards Act, he or she is undoubtedly a lawful guardian. The difficulty arises only when no such appointment has been made. A lawful guardian can be no other than a person whom the law invests with the right and duty of protecting the property of the minor. Such a person is generally described as a *de jure* guardian, in contrast to a *de facto* guardian. The law does make a

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real distinction between a *de jure* guardian and a *de facto* guardian. A *de facto* guardian may be a relation or even a mere intermeddling stranger who in fact assumes the management of a minor's property though in law he or she has no authority to do so. It is consequently impossible to regard him as a lawful guardian, notwithstanding the fact that, by reason of the decision of Courts, the acts of a *de facto* guardian bind the estate of the minor, if done under the pressure of necessity or for the clear benefit of his estate.

There is in the texts of Hindu law no warrant for regarding a paternal grandmother or indeed even the parents themselves for that matter, as the lawful guardians of a minor entitled to manage his property as of right. The texts bearing upon the point are few and do not throw any direct light on the point under consideration. They only seem to establish the proposition that it is the king alone who as *parens patriae* is the universal and supreme guardian of all the minors and their estates in the kingdom. He of course has the power to delegate his authority and to appoint guardians, and that power is now vested in the Courts established by law by a process of legislative delegation, if I may so call it. As has been pointed out by my Lord, the parents of a minor have been so long and so consistently regarded as lawful guardians by the Courts no less than by the community that an exception in their favour must be held to have been engrafted on the primeval law of the Hindu text writers. The father and in his absence the mother must accordingly be regarded as lawful guardians, not requiring an appointment for acting as such, and this has now to be treated as an integral rule of the law itself. But such a custom is wholly lacking in the case of other remoter relations not excluding the paternal grandmother

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KRISHNASWAMI AYYANGAR J.

however much they may be interested in the welfare of the minor. In the passages cited from Macnaghten and Strange, there would seem to be at the first look a statement of the order of lawful guardianship which includes other relations besides the father and the mother. It is however clear to my mind that the enumeration was not intended to declare the persons to be recognized as lawful guardians under the Hindu law without reference to an appointment by Court. It seems to me that it will be more in consonance with the spirit of the law to hold that what was intended by the enumeration was but an indication of the order of preference which the Court should bear in mind in making the choice of a guardian among the available relations, the dominant consideration being the welfare of the minor. It follows that neither the paternal grandmother nor any other relations beyond the mother can be regarded as possessing an inherent right to act as lawful guardians for the purposes of section 21 of the Limitation Act. I have the less hesitation in assenting to this view, as I consider that it will tend to the better protection of the minor's properties than if I were to hold that a series of relations commencing from the elder brother and including the paternal and the maternal relations have the inherent right directly and without an appointment by the Court to assume charge of a minor's estate and proceed to keep alive debts on his behalf. Such an expansion of the rule is, it seems to me, fraught with dangerous consequences and, in the absence of binding authority, should not be upheld. I concur in the judgment just now pronounced by my Lord.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

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

1939, October 20.

RAMASUBRAMANYA PATTAR (RESPONDENT—DEFENDANT), APPELLANT,

v.

KARIMBIL PATI AND FOUR OTHERS (PETITIONERS—PLAINTIFFS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908) O. XX, r. 12, sub-cl. 3—"Application" under—If governed by art. 181 of Schedule I of Limitation Act (IX of 1908)—Suit for possession and mesne profits—Dismissal of, by trial Court—Appellate Court allowing in part and directing lower Court to ascertain mesne profits—Application to lower Court three years after appellate Court's decree—If barred by limitation—Proper procedure under O. XX, r. 12, sub-cl. (3).

A suit for the recovery of possession of several items of immovable property and for the payment of mesne profits was dismissed by a District Munsif. On appeal, the District Judge held that the plaintiffs (respondents) were entitled to recover possession of one of the items of property and in respect of that item (by an order, dated 6th November 1930), directed the District Munsif to hold an inquiry as to past and future mesne profits and to pass a decree accordingly. On 30th March 1934 the respondents applied to the District Munsif to ascertain the mesne profits in pursuance of the decree of the District Court.

Held by the Full Bench.—The respondents' application, dated 30th March 1934, was not an application falling within article 181 of Schedule I to the Indian Limitation Act and was not barred by the law of limitation on the ground that it was filed more than three years after the date of the District Judge's decree.

The word "application" in sub-rule (3) added to rule 12 of Order XX, Civil Procedure Code, by the Madras High Court ought not to be read as meaning an application falling within

* Second Appeal No. 149 of 1936.

article 181 of the Limitation Act. The word "application" in that sub-rule should be read as meaning a motion entirely free from the mischief of article 181.

The view of JACKSON J. to the contrary in *Timmaraju* v. *Narasimha Raju*(1) and *Rama Rao* v. *Sreeramamurthi*(2) overruled.

Proper course to be adopted by the Court of first instance on receipt from the appellate Court of the record of a case in which the appellate Court directs the Court of first instance to make an inquiry into mesne profits, pointed out.

Lachmi Narain Marwari v. *Balmakund Marwari*(3) referred to.

Desirability of altering sub-rule 3 of the rule 12 of Order XX, Civil Procedure Code, pointed out.

APPEAL against the decree of the District Court of South Kanara in Appeal Suit No. 327 of 1934 preferred against the order of the Court of the District Munsif of Kasaragod, dated 1st November 1934, and made in R.I.A. No. 554 of 1934 in Original Suit No. 364 of 1926.

P. Govinda Menon for appellant.—The application to the trial Court three years after the decree was passed by the appellate Court is barred by limitation. The order of the District Judge was on 6th November 1930, and the application to the trial Court in pursuance of the order of the District Judge to ascertain the mesne profits was on 30th March 1934. Article 181 of Schedule I of the Limitation Act governs the case. [Order XX, rule 12 and sub-rule 3 added thereto by the Madras High Court were referred to.] After the addition of sub-rule 3 it is essential that an application must be filed by the decree-holder to the lower Court to ascertain the mesne profits. If he does not do so within three years of the order passed by the appellate Court it will be barred by limitation under article 181. The case reported as *Timmaraju* v. *Narasimha Raju*(1) is an authority for that position. That case was followed by BEASLEY C.J. and STODART J. in *Rama Rao* v. *Sreeramamurthi*(2).

(1) (1927) 54 M.L.J. 665. (2) (1936) 71 M.L.J. 388.
(3) (1924) I.L.R. 4 Pat. 61 (P.C.).

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[LEACH C.J.—What is the view of the other High Courts? Has any High Court added the sub-rule which the Madras High Court has added?]

No other High Court has done so. The cases considered by the other High Courts are all under Order XX, rule 12, without sub-rule 3. [*Harakhpan Missir* v. *Jagdeo Missir*(1), *Bhatu Ram Modi* v. *Fogal Ram*(2), *Kumar Kamakhya Narayan Singh* v. *Akloo Singh*(3), *Shankar Appaji* v. *Gangaram Bapuji*(4), and *Narain Das* v. *Bhagwati Prasad*(5) were referred to.]

In all these cases it was held that an application by a decree-holder does not come within article 181. But in Madras sub-rule 3 has been added. The effect of it is that an application must be filed to the lower Court within three years after the preliminary decree. Then only the lower Court can make an inquiry and ascertain the mesne profits. So the application in this case is barred by limitation.

K. Vittal Rao for respondents.—Article 181 does not apply. The addition of sub-rule 3 cannot take away the right which rule 12, sub-rule 2 of **Order XX, Civil Procedure Code**, gives. When an inquiry is directed by an appellate Court to ascertain the mesne profits the lower Court should make an inquiry and pass a final decree in respect of the mesne profits in accordance with the result of such an inquiry; *vide* sub-rule 2 of rule 12. The fact that the decree-holder makes an application to make the inquiry does not make any difference. The Court is bound to make an inquiry and pass a final decree under sub-rule 2 whether an application is made or not. So the application made by the decree-holder does not come within the purview of article 181. Unless it is so viewed a successful client in the appellate Court would be in a worse position than a successful client in the trial Court. The application in this case is not barred by limitation.

Cur. adv. vult.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—In 1926 the respondents filed a suit in the

(1) (1924) I.L.R. 4 Pat. 57.
(2) (1925) I.L.R. 5 Pat. 223.
(3) (1928) I.L.R. 8 Pat. 482.
(4) (1928) I.L.R. 52 Bom. 360.
(5) (1933) 32 A.L.J. 86.

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LEACH C.J.

Court of the District Munsif of Kasaragod for the recovery of possession of several items of immovable property and for the payment of mesne profits. By a decree, dated 2nd December 1927, the District Munsif dismissed the suit. An appeal was then filed to the Court of the District Judge of South Kanara. The District Judge held that the respondents were entitled to recover possession of one of the items of property. In respect of that item he directed the trial Court to hold an inquiry as to past and future mesne profits and to pass a decree accordingly. The order of the District Judge was on 6th November 1930. On 30th March 1934 the respondents applied to the trial Court to ascertain the mesne profits from 31st October 1925, the date on which the appellant became possessed of the property, to 23rd May 1932, when he surrendered possession to the respondents in pursuance of the decree of the District Court. The District Munsif held an inquiry and found that there was due to the respondents Rs. 1,173–4–7, which he directed the appellant to pay to them. The appellant filed an appeal before the District Judge and urged that the application was barred under article 181 of Schedule I of Indian Limitation Act. The District Judge rejected the contention raised by the appellant that the application was barred by the law of limitation. The contention was that, inasmuch as more than three years had elapsed between the date of the District Court's decree and the date of the filing of the application, article 181 of the Limitation Act applied. The District Munsif's finding on the amount of mesne profits was confirmed and the appeal dismissed. This second appeal is the result and it has been placed before this Full Bench as there is a conflict of authority.

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LEACH C. J.

Order XX, rule 12, as it appears in the Code of Civil Procedure reads as follows:

"(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree:

(a) for the possession of the property;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits:

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until—

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree,

whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry."

In 1911 this Court added to rule 12 a third sub-rule which is in these terms:

"Where an appellate Court directs such an inquiry, it may direct the Court of first instance to make the inquiry; and in every case the Court of first instance shall, on the application of the decree-holder, inquire and pass the final decree."

It is said that as the result of the addition of sub-rule 3 it is now obligatory on a decree-holder to file an application asking for an inquiry into mesne profits and for the passing of a final decree, and that article 181 of the Limitation Act requires such an application to be made within three years of the preliminary decree.

In *Timmaraju* v. *Narasimha Raju*(1), JACKSON and SRINIVASA AYYANGAR JJ. expressed divergent opinions

(1) (1927) 54 M.L.J. 665.

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on this question. The facts there were these. A decree for possession with mesne profits was passed on 3rd February 1919 by an appellate Court. On 30th November 1921, the plaintiff applied to the trial Court for an order determining the mesne profits. He paid batta but service of the notice was not effected and, on his failure to pay additional batta, the application was dismissed. On 6th December 1922, more than three years after the date of the appellate Court's decree, he applied again for an inquiry into the question of the amount of the mesne profits. JACKSON J. was of the opinion that the application of 6th December 1922 was an application within the scope of article 181 of the Limitation Act and having been filed three years after the decree, was time-barred, but he considered that the plaintiff could rely on his application of 30th November 1921 on the ground that the Court should not have dismissed that application unless in doing so it expressly stated that it was acting in accordance with the inherent powers reserved by section 151 of the Code of Civil Procedure. SRINIVASA AYYANGAR J. agreed that the application was not barred by the law of limitation, but based his decision on firmer ground, namely, that the suit must be regarded as pending until a final decree was passed. He considered that the rule-making authority intended by adding sub-rule 3 to rule 12 that the inquiry should always be ordered on the application of the decree-holder for the ascertainment of mesne profits, but he was not satisfied that the language of the sub-rule was sufficiently apt for that purpose. In other words, as the rule stood an application could be made for the ascertainment of mesne profits at any time before the passing of the final decree because the suit was pending until a final decree was passed.

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In *Rama Rao* v. *Sreeramamurthi*(1) BEASLEY C.J. and STODART J. accepted the opinion expressed by JACKSON J. in *Timmaraju* v. *Narasimha Raju*(2) that where an application is filed for the ascertainment of mesne profits it falls within article 181 of the Limitation Act. BEASLEY C.J. and STODART J. delivered separate judgments, and although in the judgment of the learned CHIEF JUSTICE no reference is made to the question, inasmuch as in his judgment STODART J. said, "we are clearly of the opinion that article 181 applies", it must be taken that the learned CHIEF JUSTICE concurred in the decision of STODART J. on the point.

In the course of the arguments in the present case the Court has been informed that no other High Court has made the addition which this Court has made to rule 12. The High Courts which have considered the question of the wording of rule 12 as it stands in the Code have decided that the rule does not contemplate an application being made for the ascertainment of mesne profits and if an application is made it is not an application governed by article 181 as it cannot be regarded as an application in execution, but as a part of the suit itself; see *Harakhpan Missir* v. *Jagdeo Missir*(3), *Bhatu Ram Modi* v. *Fogal Ram*(4), *Kumar Kamakhya Narayan Singh* v. *Akloo Singh*(5), *Shankar Appaji* v. *Gangaram Bapuji*(6) and *Narain Das* v. *Bhagwati Prasad*(7). It has not been suggested that these decisions have misconstrued rule 12 as it stands in the Code, nor could it with reason be suggested. Rule 12 unamended provides that where an order is passed directing an inquiry as to mesne profits a final

(1) (1936) 71 M.L.J. 388.
(2) (1927) 54 M.L.J. 665.
(3) (1924) I.L.R. 4 Pat. 57.
(4) (1925) I.L.R. 5 Pat. 223.
(5) (1928) I.L.R. 8 Pat. 482.
(6) (1928) I.L.R. 52 Bom. 360.
(7) (1933) 32 A.L.J. 86.

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decree shall be passed in accordance with the result of such inquiry. The fact that the decree-holder thinks it advisable to move the Court to commence the inquiry does not mean that he is making an application within the purview of article 181. Whenever he moves the Court, the Court is bound by the rule to inquire and grant the decree-holder a final decree. In such circumstances the application is merely in the nature of a reminder of what is still to be done.

Now does the addition of sub-rule 3 make any difference? For the appellant it is said that the words "in every case the Court of first instance shall, on the application of the decree-holder, inquire and pass a final decree" have the effect of making an application necessary even where there has been no appeal. This direction obviously cannot apply in a case where the appellate Court has decided to conduct the inquiry itself. Sub-rule 3 does not say that the appellate Court *shall* remand the case to the trial Court; it says that it *may* do so. It may very well be that the appellate Court considers that the inquiry should take place under its own immediate supervision and, if it does so, obviously an application to the Court of first instance for an inquiry and the passing of a final decree will not lie. The words "and in every case the Court of first instance, shall, on the application of the decree-holder, inquire and pass a final decree" must necessarily be subject to this limitation, irrespective of any other limitation.

I cannot be persuaded to think that in adding this clause the rule-making authority had in mind an application falling within article 181. In the first place, it would be contrary to the provisions of sub-rule 2; in the second place, it would put the litigant who is successful in the appellate Court in a worse

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position than a successful litigant in the Court of first instance. SRINIVASA AYYANGAR J. in *Timmaraju* v. *Narasimha Raju*(1) thought that the rule-making authority had in mind an application to which article 181 applied, though as the result of the use of inappropriate words it had not carried its intention into effect. The intention must be gathered from the words used, and reading rule 12 as it stands amended it seems to me that the intention was to obviate the necessity of the decree-holder having to move the appellate Court to pass a final decree after an inquiry into mesne profits made by the Court of first instance at the direction of the appellate Court. Certainly sub-rule 3 might have been more happily expressed, but I am not prepared to read the word "application" as meaning an application falling within article 181. Before the addition to the rule was made, a person who obtained a preliminary decree, whether in the trial Court or on appeal, had the right to a final decree on mesne profits being ascertained, irrespective of time. To take away a right the words used for the prupose must leave no doubt as to the intention. That is certainly not the case here, and I consider that the word "application" in sub-rule 3 should be read as meaning a motion entirely free from the mischief of article 181.

On an appellate Court directing a Court of first instance to make an inquiry into mesne profits, the proper course for the Court of first instance to adopt on receipt of the record from the appellate Court is to fix a date for the appearance of the parties. If the decree-holder does not appear the Court of first instance has no right to pass a final decree depriving him of the mesne profits awarded by the appellate

(1) (1927) 54 M.L.J. 665.

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decree but should adjourn the matter *sine die*, a course which the Privy Council approved of in *Lachmi Narain Marwari* v. *Balmakund Marwari*(1). In that case the Patna High Court on appeal made an order for a partition upon certain terms and remitted the case to the Court below for disposal under the decree. The plaintiff did not appear on the date fixed by the Subordinate Judge and the suit was dismissed. Their Lordships pointed out that the plaintiff was put into an intolerable position, not being able to go on with his suit and yet not in a position to bring a fresh suit. Their Lordships were fully sensible of the necessity of leaving Judges in India with ample power of discipline, and means to check neglect and delay, but they said that a proper order in a case like the one before them would be an order adjourning the proceedings *sine die* with liberty to the plaintiff to restore the suit to the list on payment of all costs and court-fees (if any) thrown away. I do not read sub-rule 3 as an attempt to place a suit in which there has been a decree for possession with mesne profits to be ascertained on a different basis. At the same time I consider that the attention of the Rule Committee should be called to sub-rule 3 with a view to its being framed in a manner which will leave no scope for any misunderstanding. The appeal fails and is dismissed with costs.

V.V.C.

(1) (1924) I.L.R. 4 Pat. 61 (P.C.).

APPELLATE CIVIL.

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

1939, October 25.

NUNNA GOPALAN (PLAINTIFF), PETITIONER,

v.

VUPPULURI LAKSHMINARASAMMA (FIRST DEFENDANT), RESPONDENT.*

Negotiable Instruments Act (XXVI of 1881), *ss.* 9, 22, 60 *and* 118—*Promissory note—No demand on same made—Maker left same in hands of payee after payment—Payee indorsed same to another who had no knowledge of payment—Liability of maker also to indorsee.*

A maker of a promissory note payable on demand left the promissory note in the hands of the payee after making payment thereon. No demand had been made on the promissory note. After receipt of such payment the payee indorsed the promissory note to another who had no knowledge of the fact of payment. In a suit by the indorsee against the payee and the maker, the question arose as to whether a decree could be passed against the maker also.

Held that such a decree could be passed under the provisions of the Negotiable Instruments Act. The principle laid down in *Lickbarrow* v. *Mason*(1), that whenever one of two innocent persons must suffer by the acts of a third he who has enabled the third person to occasion the loss must sustain it, also applied.

Venkanna v. *Subbayya*(2) overruled.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908), praying the High Court to revise the decree of the Court of the Subordinate Judge of Ellore in Appeal Suit No. 110 of 1935 preferred against the decree of the Court of the District Munsif of Kovvur in Original Suit No. 13 of 1934.

* Civil Revision Petition No. 873 of 1939.

(1) (1787) 2 T.R. 63; 100 E.R. 35. (2) (1932) 64 M.L.J. 240.

V. Parthasarathi for *T. Krishnamurti* for petitioner.

K. Venkataramaraju for respondent.

The JUDGMENT of the Court was delivered by LEACH C.J.—On 10th December 1933 the respondent executed a promissory note in favour of one Maddipati Tattahayi, alias Tata, the second defendant in the suit out of which this petition arises. The respondent says that she paid the amount due on the promissory note two days later, but the instrument was left in the hands of the payee, who the next day indorsed it to the petitioner. The petitioner instituted a suit on the promissory note in the Court of the District Munsif of Kovvur. The District Munsif passed a decree against the respondent and the payee. The respondent then appealed to the Subordinate Judge of Ellore, who confirmed the decree so far as it affected the payee, but dismissed the suit so far as it concerned the respondent. The Subordinate Judge held that the petitioner was a holder in due course, but inasmuch as the respondent had paid the amount due on the promissory note to the payee he was not entitled to recover from the respondent. The petitioner filed a second appeal, but as the amount involved was less than Rs. 500 the appeal did not lie. My learned brother KRISHNASWAMI AYYANGAR J. however, allowed the appeal to be treated as an application for revision under section 115 of the Code of Civil Procedure, and the case has been placed before this Bench for decision.

The opinion of the Subordinate Judge that the petitioner was not entitled to recover is contrary to the provisions of the Negotiable Instruments Act. Section 9 of the Act states that the term "holder in due course" means any person who for consideration became the possessor of a promissory note, bill of

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exchange or cheque if payable to bearer, or the payee or indorsee, if payable to order, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. Section 22 says that the maturity of a promissory note or bill of exchange is the date at which it falls due. It is to be observed that in the case of a promissory note which is payable on demand (as in this case) it does not become payable until demand is made. On demand being made it falls due immediately; see *Glasscock* v. *Balls*(1), *VanIngen* v. *Dhunna Lall*(2) and *D. N. Shaha & Co.* v. *The Bengal National Bank, Ltd.*(3). Section 60 provides that a negotiable instrument may be negotiated (except by the maker, drawee or acceptor after maturity) until payment or satisfaction by the maker, drawee or acceptor at or after maturity but not "after such payment or satisfaction". "Such payment" means at or after maturity. Section 118 says that until the contrary is proved it shall be presumed that every transfer of a negotiable instrument was made before its maturity, and that the holder of a negotiable instrument is a holder in due course. In this case, there is no evidence of any demand having been made on the respondent before she paid the amount to the payee of the instrument and it must therefore be taken that the indorsement to the petitioner took place before maturity. According to the sections of the Act to which reference has been made the petitioner is clearly entitled to recover from the maker.

In *Glasscock* v. *Balls*(1) the Court of Appeal had to consider the position of a person who was a holder

(1) (1889) 24 Q.B.D. 13. (2) (1881) I.L.R. 5 Mad. 108.
(3) (1920) I.L.R. 47 Cal. 861.

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of a promissory note in these circumstances. The payee of the instrument had taken from the maker a further security for the same amount in the shape of a mortgage. The payee transferred the mortgage to another person, receiving on the transfer the amount of the debt. Subsequently the payee indorsed the promissory note which remained in his hands to the plaintiff for value, the plaintiff having no knowledge of the circumstances. It was held that the note, not having been paid or returned to the maker, was still current at the time of the indorsement, and the plaintiff as a *bona fide* indorsee for value was entitled to recover upon it. Lord ESHER said:

> "In this case the plaintiff sues the maker of a promissory note payable on demand as indorsee. It was admitted that the plaintiff was indorsee of the note for value without notice of anything that had occurred. The plaintiff cannot be said to have taken the note when overdue, because it was not shewn that payment was ever applied for, and the cases shew that such a note is not to be treated as overdue merely because it is payable on demand and bears date some time back . . . If a negotiable instrument remains current, even though it has been paid, there is nothing to prevent a person to whom it has been indorsed for value without knowledge that it has been paid from suing"

That is the position here.

The principle laid down in *Lickbarrow* v. *Mason*(1), that wherever one of two innocent persons must suffer by the acts of a third he who has enabled the third person to occasion the loss must sustain it, has also direct application. The respondent had discharged the promissory note on 12th December 1933, but it was indorsed to the petitioner without knowledge of this fact the next day and the respondent as the maker of the note should have insisted on its return

(1) (1787) 2 T.R. 63; 100 E.R. 35.

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to her when she paid the amount. She did not do so and as she left the instrument in the hands of the payee and thus gave him an opportunity to commit a fraud she must suffer in preference to the petitioner. In this connection I may point out that section 81 of the Negotiable Instruments Act provides that any person, liable to pay and called upon by the holder thereof to pay the amount due on a promissory note, is before payment entitled to have it shown and is on payment entitled to have it delivered up to him, or, if the instrument is lost or cannot be produced, to be indemnified against any further claim thereon against him. The respondent, having paid the promissory note without insisting on its return to her or without obtaining from the payee a guarantee, acted at her own risk.

In *Duraisami Reddi* v. *Velu Asari*(1) SESHAGIRI AYYAR J. held that the maker of a promissory note could not plead against a holder in due course that he had paid the money to the payee before the indorsement and relied on the decision in *Nash* v. *De Freville*(2), in which reference to *Lickbarrow* v. *Mason*(3) was made. The same conclusion was arrived at by PANDRANG ROW J. in *Venkataratnam* v. *Kanakasundara Rao*(4). The only dissentient note is that struck by KRISHNAN PANDALAI J. in *Venkanna* v. *Subbayya*(5), on which the respondent relies. There the facts were these. A promissory note was executed by A in favour of B but the note came into the possession of his wife and her nephew who refused to give it up to B. As the result B asked A to give him a fresh promissory note, which A did. The new

(1) (1916) 4 L.W. 34. (2) [1900] 2 Q.B. 72.
(3) (1787) 2 T.R. 63; 100 E.R. 35. (4) (1936) 71 M.L.J. 473.
(5) (1932) 64 M.L.J. 240.

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promissory note was subsequently negotiated by B. Eventually A paid the amount due on the promissory note to the indorsee. After B's death his wife negotiated the original promissory note and the indorsee called upon A for payment. Liability was denied by A and KRISHNAN PANDALAI J. accepted his defence. This decision is clearly wrong. Apart from the provisions of the Negotiable Instruments Act the principle of *Lickbarrow* v. *Mason*(1) applied. The maker of the promissory note gave of his own free will a new promissory note without insisting on the return of the original instrument or obtaining an indemnity. Had he obtained an indemnity it would not of course have precluded the plaintiff from recovering from him, but if he had taken a proper indemnity he would have safeguarded his position. *Venkanna* v. *Subbayya*(2) was wrongly decided and cannot be allowed to stand.

It follows that the petition must be allowed and the decision of the Subordinate Judge so far as it exonerated the respondent must be set aside. The decree of the District Munsif will therefore be restored in its entirety. The petitioner is entitled to his costs in this Court and in the lower appellate Court.

The respondent claims to be an agriculturist and to be entitled to the benefit of the Madras Agriculturists Relief Act, 1938. She must make her application to the trial Court which will hear and decide it.

G.R.

(1) (1787) 2 T.R. 63; 100 E.R. 35. (2) (1932) 64 M.L.J. 240.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Kunhi Raman.

1939, August 28.

R. V. & CO. (APPLICANTS), PETITIONERS,

v.

HINDU RELIGIOUS ENDOWMENTS BOARD, MADRAS, AND TWO OTHERS (RESPONDENTS), RESPONDENTS.*

Madras Hindu Religious Endowments Act (II of 1927), ss. 76 and 34—Former section if an exception to latter—Sec. 76 (1) —Lease lawfully sanctioned by temple committee under, and executed by the trustee and registered—Cancellation of, by the Hindu Religious Endowments Board, under sec. 34 of Act—Power of.

The trustee of a non-excepted temple granted a lease of lands belonging to the temple to the petitioner and the lease was duly sanctioned by the temple committee. A third party feeling aggrieved at the granting of the lease moved the Hindu Religious Endowments Board to cancel it. The Board considered that the resolution of the committee sanctioning the lease was improper and not in accordance with the requirements of the law and made an order calling upon the petitioner to show cause why the lease should not be cancelled. Pursuant to that order the Board called upon the temple committee to submit a report on the action taken by the committee in sanctioning the lease. In passing those orders the Board purported to be exercising powers conferred upon it by section 34 of the Madras Hindu Religious Endowments Act, 1927. On an application by the petitioner for the issue of a writ of *certiorari* with the view to the quashing of the proceedings taken by the Board for the cancellation of the lease,

held: The temple committee had full power under section 76 (1) of the Madras Hindu Religious Endowments Act to sanction the lease and, inasmuch as the lease was lawfully

* Civil Miscellaneous Petition No. 2002 of 1939.

sanctioned by the committee, executed by the trustee and registered, the petitioner obtained a title which could only be taken away from him under the procedure contemplated by section 76 (2) of the Act, namely, an application to the Court. The action of the Board in taking steps with a view to the cancellation of the petitioner's lease under section 34 of the Act was unlawful and the proceedings must be quashed.

Section 76 of the Madras Hindu Religious Endowments Act must be regarded as an exception to section 34 of that Act.

Churchill v. *Crease*(1) relied upon.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court may be pleased to issue an order calling for the records and the order in Original Application No. 121 of 1939 on the file of the Hindu Religious Endowments Board, Madras, and to quash the said proceedings by the issue of a writ of *certiorari*.

Srinivasaraghavan and *Thyagarajan* for petitioner.

V. V. Chowdary and *M. Seshachalapathi* for first respondent.

T. V. Ramiah and *K. Parasurama Ayyar* for second respondent.

N. T. Raghunathan for third respondent.

The JUDGMENT of the Court was delivered by

LEACH C.J.

LEACH C.J.—The petitioner has applied for the issue of a writ of *certiorari* with the view to the quashing of the proceedings taken by the Hindu Religious Endowments Board for the cancellation of a lease granted to him by the trustee of the temple of Sri Adimooleswarar, Agaram, Chidambaram Taluk, South Arcot district. Notice was issued to the Board and the Court has heard the arguments of the learned Advocates who have appeared for the respective

(1) (1828) 5 Bing. 177; 130 E.R. 1028.

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parties. In August 1938 the petitioner applied to the trustee of the temple for a lease for a term of ninety-nine years of certain lands belonging to the temple. His intention was to utilize the lands for salt pans. The trustee granted the lease and it was registered on 29th of August, but it had not been sanctioned by the South Arcot temple committee and therefore admittedly it was invalid. On 30th November 1938 the matter of the lease was considered by the committee which resolved to cancel it, but decided to sanction a new lease for a period not exceeding twenty-five years. In pursuance of the resolution passed by the committee the trustee granted a lease to the petitioner on the same terms as the cancelled lease except that the period was reduced from ninety-nine years to twenty-five years. The resolution of the committee can only be read as sanctioning a lease on the same terms as the previous lease with this modification.

In the neighbourhood of the land covered by the lease are salt pans owned by a salt contractor carrying on business under the style of Sri Sivananaintha Nadar & Co. The proprietor of this firm felt aggrieved at the granting of the lease to the petitioner and moved the Board to cancel it. The result was that the petitioner was called upon to show cause why his lease should not be cancelled. The decision of the Board was embodied in an order, dated 5th April 1939. The Board considered that the resolution of the committee sanctioning the lease was improper and not in accordance with the requirements of the law. The reasons for this opinion are stated and are these: the committee had not shown why a lease for twenty-five years should be granted; when a lease is granted for more than five years, section 76 of the Madras Hindu

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Religious Endowments Act, 1927, requires it to be established that it is necessary or beneficial to the temple and this had not been done; the lease had been given privately and not as the result of public auction; the lease would not be beneficial to the temple and it would change the character of the land, there being on it seventy tamarind trees bearing fruit. The area covered by the lease is twenty-four acres. In pursuance of this order the Board called upon the temple committee to submit a report on the action taken by the committee in sanctioning the lease. It is admitted that in passing these orders the Board purported to be exercising powers conferred upon it by section 34 of the Act. The petitioner says that the section does not vest the Board with power to cancel the lease and that action with a view to its cancellation can only be taken under the provisions of section 76.

Section 34 of the Act reads as follows:

"(1) The resolutions of a committee shall be carried into effect by its President in whom the entire executive power of the Committee shall, save as hereinafter provided, be vested.

(2) (*a*) All the resolutions of a committee shall be notified to the Board within one week after they are passed.

(*b*) The Board may call for any record or proceedings or other document or paper from any committee for the purpose of satisfying itself as to the correctness, regularity or propriety of any order or proceedings recorded or passed by such a committee.

(3) (*a*) The Board shall have the power of staying, for reasons to be recorded by it, the execution of any of the resolutions of the committee and remitting the same to the committee for reconsideration.

(*b*) If the committee upon such reconsideration confirm the said resolutions, the Board may, whenever it deems such

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step necessary in the interests of the temple affected or the proper management of the affairs of the committee, modify or cancel the said resolutions."

Section 76 is in these terms :

"(1) No exchange, sale or mortgage and no lease for a term exceeding five years of any immovable property belonging to any math or temple shall be valid or operative unless it is necessary or beneficial to the math or temple and is sanctioned by the Board in the case of maths and excepted temples and by the committee in the case of other temples.

(2) The trustee of the math or temple or any person having interest may, within one year of the date of the order of the Board or committee under sub-section (1), apply to the Court for modifying or cancelling such order.

(3) The order of the Board or Committee under sub-section (1) when no application is made under sub-section (2) and the order of the Court when such application is made shall be final."

The temple with which this application is concerned is a non-excepted temple and therefore the temple committee had full power under sub-section 1 to sanction the lease.

The learned Advocate for the petitioner contends that inasmuch as the lease was lawfully sanctioned by the committee, executed by the trustee and registered, he has obtained a title which can only be taken away from him under the procedure contemplated by sub-section 2 of section 76, namely, an application to the Court. There can be no doubt that this contention is sound, unless section 76 must be read as being subject to section 34. For the Board it is said that section 76 must be read as being subject to section 34 because all the provisions of section 34, except those of sub-section 1, were added by a later Act, namely, the Madras Hindu Religious Endowments Act of 1930.

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The rule of construction to be applied here was stated by Best C.J. in *Churchill* v. *Crease*(1).

"The rule is, that where a general intention is expressed, and the Act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception."

There has been no modification of this rule by subsequent decisions. Therefore section 76 must be regarded as an exception to section 34. I cannot accept the argument that the fact that sub-sections 2 and 3 of section 34 were inserted later affects the rule. No doubt it was the intention of the Legislature in amending section 34 to invest the Board with large powers and it is the intention of the Act that the Board shall have powers of superintendence, but this does not mean that the Board has the power to interfere with the rights of third parties. That is what the Board is contemplating doing here. The Board would have power to interfere with a resolution of the temple committee before the resolution is carried into effect and in some cases it may have power to interfere after the resolution has been given effect to, but it has not got the power to cancel a lease. The Legislature has placed the power of interference expressly in the Court and if the action of the temple Committee in sanctioning the lease was improper, the Court, and the Court alone, can interfere. The action of the Board in taking steps with a view to the cancellation of the petitioner's lease under section 34 is unlawful and the proceedings must be quashed. This does not mean that the Board will not be able to call for a report from the temple committee with a view to possible action under section 76, but it cannot cancel the lease as it obviously intends to do.

(1) (1828) 5 Bing. 177 ; 130 E.R. 1028.

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I would add that the learned Advocate for the petitioner appeared before the Board before the passing of the order on 5th April 1939 and made representations which he has made to us to-day, but there is no reference in the proceedings to this and action was taken by the Board in spite of the protest against its validity.

The petitioner is entitled to his costs which will be paid by the first and second respondents. The third respondent, the trustee, has not opposed the application.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice Krishnaswami Ayyangar.

1939, August 3.

DUVVADA NANDESAM CHOWDARI (Second defendant-petitioner), Appellant,

v.

DUVVADA BALAKRISHNAMMA CHOWDARI and nine others (Plaintiff and defendants 1, 3, 5, 7, 8, 11, 12, 14 and 15—respondents), Respondents.*

Code of Civil Procedure (Act V of 1908), sec. 2 (d)—Decree—Definition of—Partition—Suit for—Preliminary decree—Subsequent application to allot certain items to certain members—Order on—Appeal from—Incompetency of, order not being a decree within section 2 (d).

An order passed on an application, taken out in a partition suit by a party therein after the passing of the preliminary decree, praying the Court to allot certain items to the share of certain members in order that the applicant's possession

* Appeal No. 174 of 1936.

Nandesam v. Bala-krishnamma.

of those properties might be left undisturbed, does not amount to a decree within the meaning of that term as defined in section 2 (*d*) of the Code of Civil Procedure inasmuch as the matter raised in the application was not a matter in controversy in the suit, and, as such, the order is not appealable.

Appeal against the order of the Court of the Subordinate Judge of Berhampur, dated 3rd December 1935, in Interlocutory Application No. 16 of 1935 in Original Suit No. 47 of 1915.

V. Govindarajachari and *B. V. Ramanarasu* for appellants.

C. Rama Rao for first respondent.

B. Jagannadha Das and *T. A. Anantha Ayyar* for ninth and tenth respondents.

Other respondents were not represented.

JUDGMENT.

Mockett J.

Mockett J.—The second defendant is the appellant. He is the son of Parasuraman who is the brother of one Balakrishnan. Balakrishnan is the father of the first defendant (Harikrishnan) and the first defendant has three sons who are the plaintiff (the first respondent in this appeal), and the fourteenth and fifteenth defendants who were born during the pendency of the suit. That was a partition suit (Original Suit No. 47 of 1915) between the first respondent and the first and second defendants. In that suit a partition deed (Exhibit IV), dated 3rd February 1915, was ultimately found to be good and binding on the plaintiff. Two further dates are material. On 10th February 1922 there was a sale-deed (Exhibit F) by which the first defendant as guardian of the plaintiff and for himself transferred certain properties to the second defendant for Rs. 38,000 and Exhibit S-1, dated 21st April 1925, by which the first defendant,

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this time for himself and as guardian for the plaintiff and the fourteenth defendant, conveyed to the second defendant certain other properties for Rs. 12,000. There was a preliminary decree in that suit, dated 29th December 1928. It has not been explained to us, nor is it material for us to investigate, why it was that a suit of 1915 reached the stage of preliminary decree in December 1928. But that is what happened. That preliminary decree was as follows :—

"This Court doth order and decree that the plaintiff do recover from the defendants half of the properties allotted to the first defendant under Exhibit IV hereto attached, that plaintiff do recover from the second defendant Rs. 10,536-15-2 together with interest thereon at six per cent per annum from date of suit (28th April 1915) till date of payment."

There was an appeal against that decree and it was upheld by the High Court on 7th November 1934 and with a compromise attached. In the ordinary course this matter went before a commissioner for the ascertainment of the half share mentioned in the preliminary decree. On the date that the commissioner was making his return to the Court, an application was filed to the learned Subordinate Judge of Berhampur by the second defendant, the present appellant. His petition is for two reliefs, first, to direct that items 1 to 17 in the schedule may be excluded from the family property of the plaintiff and defendants 1, 14 and 15 and secondly, to direct the allotment of the said lands to the share of defendants 1, 14 and 15. It may be observed that that petition is based on section 151 and Order XX, rule 18 and Order XXVI, rules 13 and 14, of the Code of Civil Procedure. The first relief was abandoned. We are told in this Court it has been abandoned. The second relief was pressed. It was supported by an affidavit of the petitioner's clerk who,

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curiously enough, only asks that the lands referred to in prayer 1 should be excluded and makes no reference to the second prayer. However, that prayer was undoubtedly before the lower Court. A counter-affidavit was put in by the first respondent (the plaintiff) in which he strongly opposed the application; he attacked the alienations mentioned as fraudulent and collusive and alleged that the application was *mala fide* for the purpose of causing delay. The learned Judge dismissed the petition. He says in short that all this should have been raised long ago. He points out that the commissioner was appointed in 1933 and that the report was going to be submitted to him on the day of this order, namely, 3rd December 1935, and he declined to assist the petitioner in any way. Now it is an undoubted fact that, although the two alienations so material to this application are dated February 1922 and April 1925 respectively, it is not suggested that at any time since the filing of the suit, at the hearing of the suit or in the appeal, this all-important question, namely, that the alienated properties should be allotted to defendants 1, 14 and 15 only was ever raised and it seems to me that that is of special importance in a case in which a decree has been passed by the High Court which, in a very large measure, hinges on a compromise. Especially, in such a decree would I be reluctant to take any steps whatever which may have the effect of altering it. Before us there have been two arguments. There was a preliminary point taken by the respondents that this was not an appealable order. If it was an appealable order, the question arises, should we interfere or should we affirm that order? Mr. Govindarajachari has argued before us that, on the authorities which he has cited and with which I propose to deal

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shortly, this is an appealable order and his argument is largely based on the ground that it appears that in certain cases there can be a second preliminary decree; and he also contends that in that second preliminary decree the Court can take into account matters which have arisen since the filing of the suit and since the first preliminary decree. A decree is defined in section 2 (*d*) of the Code. It is a

> "formal expression of adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final".

It seems to me on a plain reading of that definition that this is not a decree—and I am quite content to rest my reasons on this ground—because at no time whatever has any of the matters which came before the learned Subordinate Judge been in controversy in this suit. It seems to me clear that the one objection of the parties was that the question of the allotment of these properties should not be in controversy in the suit because it has been deliberately kept out of every stage. That being so, those cases which have been cited, of which *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh*(1) and *Raja Peary Mohan Mookerjee* v. *Manohar Mookerjee*(2) are examples, are not in point. It seems to me that, in the cases where the second decree takes into account matters not orginally dealt with, it has always been a case where those matters were in controversy, and no authority has been cited to us for the proposition that it is possible to ask a Court by a second preliminary decree to introduce into the adjudication of the case matters that have never been in controversy

(1) (1900) I.L.R. 23 All. 152 (P.C.). (2) (1923) 27 C.W.N. 989.

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at all and which had never even been discussed or in contemplation. On the merits, it is obvious in my view that the order of the lower Court was right. There is no obligation to pass this order in the circumstances, seeing that, as I have elaborated already, this was a totally new aspect raised at the last minute of the eleventh hour and the Court was perfectly entitled to withhold from the appellant any sort of discretionary assistance which lay in it. There are no reasons that I can see why section 151 should have been invoked and no reasons whatever why instructions should have been given to the commissioner at this stage to allot these properties to any particular parties. It may be that the appellant has rights outside this appeal. If he has, it is open to him to agitate them in a proper manner. So far as this appeal is concerned, I consider it fails for the reasons which I have given and should be dismissed with costs of respondents 9 and 10.

KRISHNASWAMI AYYANGAR J.

KRISHNASWAMI AYYANGAR J.—It is not necessary for me to say anything about the merits of this appeal as I think that it fails on the preliminary objection to its maintainability taken by the respondents. The objection is this, that the appeal is directed against an order and not a decree within the meaning of the Code of Civil Procedure. On its face the order appealed against purports to be only an order, but that of course is not conclusive of its real character which has to be determined by reference to its true nature in the light of the provisions of the Civil Procedure Code. The order came to be passed on an application, Interlocutory Application No. 16 of 1935 in Original Suit No. 47 of 1915, which has not been disposed of finally yet. The suit was one for partition instituted by the first respondent against

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his father Harikrishnan and certain other persons of whom it is necessary to mention only his two younger brothers, respondents 9 and 10, born after the institution of the suit. The second defendant was a cousin of the first respondent's father and there was a partition between him and the first respondent's father evidenced by a deed executed between the parties on 3rd February 1915. The validity of that partition was challenged in the suit but it was upheld by the trial Judge who proceeded to pass a preliminary decree on 29th December 1928. There was an appeal against the preliminary decree to this Court which was disposed of on 7th November 1934. The preliminary decree was left untouched, at any rate, in regard to matters having any materiality for purposes of the present appeal. The result was that the first respondent was declared entitled to a half share in those items of family properties which had been allotted to his father under the partition. If the matter had stood there, there was nothing more left than for a commissioner to be appointed with a view to effecting a division by metes and bounds of those items of properties liable to division under the preliminary decree. It appears that a commissioner was actually appointed and he had before the date of the order of the learned Subordinate Judge, completed the work entrusted to him and was going to make his report on the very day on which the learned Judge passed his order. However that may be, the question that arises for consideration is as to whether the order of the learned Judge amounted to a decree within the meaning of that term as defined by section 2 (*d*) of the Civil Procedure Code. The application on which the order came to be passed was filed for the purpose of inviting

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the Court to direct the exclusion of items 1 to 17 from the partition or to allot those items to the share of the first defendant and his two younger sons, namely, respondents 9 and 10. It would appear that, during the pendency of the suit, the first defendant, the father, had sold by two sale deeds, dated 10th February 1922 and 21st April 1925, these 17 items of properties to the appellant. The object of the appellant in making the Application No. 16 of 1935 in the Court below was to see that these items of property were allotted to the shares of the father and his undivided sons, namely, respondents 9 and 10, so that the appellant's possession of those properties might be left undisturbed. The application has been rejected by the learned Judge, and the appeal is directed against this order.

The contention of the appellant is that, though termed an order, it is in effect and according to its legal character a second preliminary decree. It is contended that the view that there can be only one preliminary decree is erroneous and that there is no legal objection to there being in proper cases more than a single preliminary decree. The proposition appears to be warranted by authority and our attention has been drawn to a number of cases where a plurality of preliminary decrees has been held not to be illegal. But this is not enough to sustain the argument, for it is necessary for the appellant to establish that the adjudication contained in the order sought to be appealed against is in law a decree. Section 2 (*d*) defines a decree as

> "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final"

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It seems to me that it is essential to bear in mind that it is not enough that there is a determination, or even a conclusive determination, of the rights of parties, but that that determination must be on matters *in controversy in the suit*. It is quite clear that in this case down to the date of the application the matters in controversy in the suit did not include the question of the allotment of the items of property liable to division in such a way as to give effect to the sales in favour of the appellant. No explanation is forthcoming as to why, during the long period which had elapsed between the dates of the sales and the date of the preliminary decree, this question was not brought before the Court in the proper way. The proper way is to obtain either an amendment of the written statement or file a supplemental one with leave of the Court previously obtained. This has not been done ; and as has been pointed out by my learned brother, it was only at the very last moment that this question was sought to be agitated before the Court.

However that may be, the real question is whether the point raised in the application can be regarded as a matter in controversy in the suit. I understand the expression "matters in controversy in the suit" as meaning such matters as have been brought up for adjudication by the Court by the pleadings in the case so framed as to include them either in the beginning or by amendment made later with the sanction of the Court. Looked at from this point of view, it is impossible to regard the subject-matter of the application as being a matter in controversy in the suit within the meaning of the definition. If this is remembered, it is easy to understand the principle of the decisions that have been cited to us at the

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arguments on behalf of the appellant. If, amongst several matters properly brought into controversy, the preliminary decree covers some only, any subsequent order dealing with such matters as had not been already determined but left over may amount to a decree and be appealable as such. The decision of the Privy Council in *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh*(1) which refers to a later order dealing with the question of mesne profits is consistent with this view, as the question of mesne profits was undoubtedly a matter already in controversy in the suit. So also, the decision of the Calcutta High Court in *Raja Peary Mohan Mookerjee* v. *Manohar Mookerjee*(2) proceeded upon the footing that a later order specifying the manner in which the account was to be taken was a decree as it would appear that that order was one which dealt similarly with a question that had been already raised in the suit. The same observations apply also to *Shankar Appaji* v. *Gangaram Bapuji*(3) and *Ramanathan Chetty* v. *Alagappa Chetty*(4). Our attention was drawn to the decision of PIGGOT J. in *Bharat Indu* v. *Yakub Hasan*(5) in which the learned Judge was inclined to take the view that an order subsequent to a preliminary decree dealing with a new set of facts which had come into existence later may be regarded as a decree for the purpose of appealability. If one examines the facts of that case, it is clear that the question raised related to the share which the plaintiff wanted in a suit for partition which he had instituted. In the first instance there was a preliminary decree which had declared his right in certain items of properties subject

(1) (1900) I.L.R. 23 All. 152 (P.C.). (2) (1923) 27 C.W.N. 989.
(3) (1928) I.L.R. 52 Bom. 360. (4) (1929) I.L.R. 53 Mad. 378.
(5) (1913) I.L.R. 35 All. 159.

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to a charge which the plaintiff was directed to pay and clear. Finding himself unable to find the necessary money for discharging that charge, the plaintiff prayed for the exclusion of the charged items and expressed his willingness to take a share out of the other items in suit. It is therefore plain that the controversy in the suit related to the proper share to be allotted to the plaintiff in the properties in suit, a claim which had been all along before the Court and the observations of the learned Judge in that case should be understood in the light of this fact. The opinion of PIGGOT J. was not accepted by the Bench which heard the case ultimately, though it has been approved by MOOKERJEE J. in the decision already mentioned, namely, *Raja Peary Mohan Mookerjee* v. *Manohar Mookerjee*(1). The order of the learned Subordinate Judge must therefore be held to be one that did not deal with a matter in controversy in the suit and cannot therefore be regarded as a decree. The preliminary objection accordingly prevails. It will not do to bring up new matters by an application and then to contend that those very matters were to be adjudged on the footing that by the application itself they became matters of controversy in the suit. The proposition has only to be stated to be refuted. If such should be the view, there will be no end to new matters being raised at any stage by applications of this kind and this, I think, was never contemplated by the Code. At this stage I do not think I am called upon to say anything about the question whether the point can be raised if and when there should be an appeal from the final decree ; and, speaking for myself, I do not

(1) (1923) 27 C.W.N. 989.

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desire to express any opinion upon this aspect of the matter.

The appeal therefore fails and is dismissed with costs of respondents 9 and 10.

G.R.

APPELLATE CIVIL.

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

1939, August 25.

CHIMALAKONDA RAMASUBBARAYA SASTRI AND TWO OTHERS (PLAINTIFFS 3 TO 5), APPELLANTS,

v.

GANAPATHIRAJU VENKATA APPALANARASIMHA-RAJU AND FORTY-SIX OTHERS (DEFENDANTS 1 TO 14, 16 TO 33, 35, 36 AND 38 TO 49 AND SECOND PLAINTIFF), RESPONDENTS.*

Hindu Law—Partition—Declaration of intention to sever—Alienation by coparcener of his share in whole or part of joint family property—Severance in status, if effected by, at least as regards property alienated — Recovery by other coparceners of their shares in property alienated—Effect of—Suit by coparcener to set aside alienation by another coparcener of item of joint family and to recover his share therein—Evidence of explicit declaration by plaintiff to hold share sought to be recovered in severalty, if—Father or other manager—Sale by, of entirety of items of joint family property as manager and for family necessity—Severance in status, if effected by—Suit by son or other member for declaration that alienation is not binding on him and for recovery of his share in property alienated—Suit for partition, if—Severance in status, if effected by.

Where a suit in substance is not one for partition but to set aside an alienation by the father or a managing member other

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than the father and to recover possession of the plaintiff's share in the property alienated, the inference of an unequivocal intention to separate from the family, which a suit for partition in the technical sense of the term as understood in Hindu law gives rise to, cannot follow. In order that the institution of a suit by a member of a joint Hindu family to set aside an alienation by another member of an item of joint family property as not binding on him and to recover his share therein might be taken as evidence of an explicit declaration by the member to hold the share which he seeks to recover in severalty, there must be a clear indication to that effect in the plaint or there must be some other evidence to show that it was his intention to so hold the share which he seeks to recover. In the absence of any such intention expressed in the plaint, the conduct of the parties either during the course of the litigation or subsequent thereto must be considered in determining this question of intention.

Where a member of a joint Hindu family consisting of himself and his son purports to alienate, not his share in the items of the joint family property, but, the entirety of those items including his son's share therein, as the father and the managing member for family necessity, no question of any severance of status will result from such alienations.

An alienation by a member of a joint Hindu family of his share in the whole of the joint family property or in any part thereof does not sever his status from the family and make him a divided member even in respect of the property alienated and the mere recovery by the other members of their shares therein will not alter the status of the family. It rests on them to signify their intention unequivocally to hold the said shares separate from the alienor. In the absence of such expression of intention, the presumption will be that they intend to hold the shares as joint family property.

Observations of BHASHYAM AYYANGAR J. in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(1) and *Kandasamy Udayan* v. *Velayutha Udayan*(2) relied upon.

Interpretation placed upon the observations of BHASHYAM AYYANGAR J. in *Aiyyagari Venkataramayya* v. *Aiyyagari*

(1) (1902) I.L.R. 25 Mad. 690, 696, 717 (F.B.).
(2) (1926) I.L.R. 50 Mad. 320, 326.

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Ramayya(1) by RAMESAM J. in *Lakshmi Achi* v. *Narayanasami Naiker*(2), disapproved.

APPEAL against the decree of the Court of the Subordinate Judge (Principal) of Rajahmundry in Original Suit No. 31 of 1929.

P. V. Vallabhacharyulu for appellants.

Advocate-General (*Sir A. Krishnaswami Ayyar*) and *P. Satyanarayanaraju* for respondents 1 to 46.

47th respondent was not represented.

Cur. adv. vult.

VENKATA-RAMANA RAO J.

The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—This is an appeal from the judgment and decree of the learned Subordinate Judge of Rajahmundry dismissing the plaintiffs' suit for possession of a half-share in certain immovable properties described in schedule B to the plaint. The said properties admittedly belonged to one Suryanarayanaraju and his son Venkatapatiraju. It is the plaintiffs' case that the said properties were leased in 1868 by Suryanarayanaraju as the father and head of the joint family consisting of himself and his son Venkatapatiraju for a period of fifty years, that subsequent to the said lease the said Suryanarayanaraju and Venkatapatiraju became divided in status, that Venkatapatiraju was entitled in severalty to a half share in the said properties, and that on the death of his widow Butchi Bangarayya on 21st January 1927 the first plaintiff became entitled to the said half-share as the next reversioner. The defendants trace their title to the entirety of the said properties to the father Suryanarayanaraju who alienated the reversion in the said lands. Their case is that there was no

(1) (1902) I.L.R. 25 Mad. 690, 696, 717 (F.B.).
(2) (1929) I.L.R. 53 Mad. 188, 195.

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division in status between the father and the son and on the death of the son the whole of the properties survived to the father by survivorship and he was competent to alienate the same and confer a good title upon them. They also deny the relationship of the first plaintiff to Venkatapatiraju. Two questions fell to be decided by the lower Court: (i) whether the first plaintiff was the next reversioner to Venkataptiraju and (ii) whether there was a division in status between Venkatapatiraju and his father Suryanarayanaraju. On the first question the learned Subordinate Judge held that the first plaintiff had not made out his title as the next reversioner; but on the second question the learned Subordinate Judge held that there was a division in status between Venkatapatiraju and his father Suryanarayanaraju by reason of the judgment and decree in Original Suit No. 8 of 1878 on the file of the District Court of Godavari. As an adverse finding on either of the issues entailed a dismissal of the plaintiffs' suit, the learned Subordinate Judge dismissed the suit.

The first plaintiff died during the pendency of the suit. Plaintiffs 2 and 3 are alienees of a portion of the suit properties from the first plaintiff subsequent to the death of Butchi Bangarayya. Plaintiffs 4 and 5 were brought on record as the legal representatives of the first plaintiff. This appeal is by plaintiffs 3, 4 and 5. There is also a memorandum of objections by the alienee-defendants objecting to the finding as to division in status.

The main point urged by Mr. Vallabhacharyulu on behalf of the appellants is that the learned Judge in the Court below in arriving at the finding regarding relationship has not given due effect to two important documents in the case, namely, Exhibits AA and Z-11.

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He contends that the oral and documentary evidence were not properly appreciated by the learned Judge.

[His Lordship considered the oral and documentary evidence in the case and held, reversing the finding of the Court below, that the title of the first plaintiff as next reversioner to Venkatapatiraju had been made out, and proceeded:]

The learned Advocate-General who appeared for the alienees did not advance any argument which would enable us to come to a different conclusion on this matter but he contended that apart from this finding if he could show that the son died undivided from his father, the plaintiffs would be out of Court and that the finding of the learned Judge that the decree and judgment in the prior litigation operated as a severance in status was wrong. We are inclined to think that this contention is well-founded. It is now settled law that a coparcener can become separate in estate by an unambiguous declaration of his intention to separate himself from the family. It is enough for us to refer to the latest decision of the Privy Council in *Ram Narain Sahu* v. *Musammat Makhna*(1) where Sir GEORGE RANKIN cites with approval the following passage from the judgment of Sir GEORGE LOWNDES in *Bal Krishna* v. *Ram Krishna*(2).

"It is now settled law that a separation may be effected by a clear and unequivocal intimation on the part of one member of a joint Hindu family to his co-sharers of his desire to sever himself from the joint family. This was laid down in *Suraj Narain* v. *Iqbal Narain*(3). The question was further examined in *Girja Bai* v. *Sadashiv Dhundiraj*(4) and the principle was re-affirmed."

(1) I.L.R. [1939] All. 680 (P.C.).
(2) (1931) L.R. 58 I.A. 220; I.L.R. 53 All. 300.
(3) (1912) L.R. 40 I.A. 40; I.L.R. 35 All. 80.
(4) (1916) L.R. 43 I.A. 151; I.L.R. 43 Cal. 1031, 1047.

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In *Girja Bai's* case(1), after pointing out that a separation involving the severance of joint status is distinct from the *de facto* division into specific shares of the joint property, their Lordships proceeded to explain :

"The former was a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status."

Thus the test laid down is the intention to *sever oneself from the joint family*. The question we have therefore to determine is, did the son intend to sever himself from the father ? As pointed out in *Girja Bai* v. *Sadashiv Dhundiraj*(1), the intention to become separate may be evidenced in many different ways, either by explicit declaration or by conduct. If it is an inference drawn from conduct it will be for the Court to determine whether it was unequivocal and explicit. The institution of a suit for partition by a member of a joint family against the other members has always been taken to be a manifestation of an unequivocal intention to separate himself from the other members of the family. As pointed out in *Kawal Nain* v. *Budh Singh*(2), the commencement of a suit for partition would effect a separation from the joint family. Their Lordships found in that case that by the plaint the plaintiff claimed a fifth share in the joint family property and that the claim amounted to an intimation to the co-sharers of the plaintiff of an unequivocal desire for separation from the joint family. Therefore a suit must in substance be a suit for partition with a desire on the part of the plaintiff to hold his

(1) (1916) L.R. 43 I.A. 151 ; I.L.R. 43 Cal. 1031.
(2) (1917) I.L.R. 39 All. 496 (P.C.).

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share in severalty without being subject to the obligations of the joint status. Having these principles in view, we have to see whether the prior litigation was a suit for partition and the decree and judgment therein operated as a severance in status. The prior litigation was commenced by a suit by Venkatapatiraju in the District Court of Godavari in 1878 (Original Suit No. 8 of 1878). A copy of the plaint was not filed in the lower Court because an authentic copy was not available, but, as a printed copy of the said plaint in the said suit which came up in appeal before this Court was available, we had it marked in this appeal. A reference to the plaint shows that the plaintiff sought to set aside several alienations made by his father including the leases which were executed on 1st and 2nd October 1868 in favour of the second defendant and the father of the third and fourth defendants in that suit. The plaint was confined only to the property alienated. No doubt there was an assertion made in the plaint that the alienations comprised the entire joint family property but that was not a correct statement of fact since there was other property which was not alienated but was alienated by the father or the son subsequent to the date of the suit. The plaint alleged that the plaintiff demanded all the defendants to make over his half share in each of the properties and they refused to do so and therefore he claimed possession of a half share therein. The demand for delivery of possession of a half share could only be on the alienees because the father was admittedly out of possession and there was no evidence of any demand made on the father prior to the said litigation. The plaint does not mention whether there was any movable property belonging to the family or whether there were liabilities of the family and it was not framed in the way a plaint in a

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suit for partition would have been framed. In answer thereto, the defendants contended that it was not open to the plaintiff to recover his half share without suing for a partition. The judgment in that suit confirmed all the alienations including the leases and set aside only two gifts of the joint family property made by the father, one made in favour of the plaintiff's sister and the other in favour of the guru of the family. The actual decree in the suit was that the plaintiff as a coparcener with the first defendant be put in possession of a half share of the lands gifted away and in regard to the rest of the properties the suit was dismissed. There was no declaration as in a partition suit that the plaintiff and the first defendant were entitled to equal shares in all the joint family properties and that in regard to lands covered by leases the plaintiff would be entitled to recover possession of a half share on the termination of the leases. No account of joint family property was directed to be taken nor an account of any liabilities and no declaration was given in regard thereto, whereas, if it was intended to be a suit for partition, the Court would have raised an issue as to the assets and liabilities of the joint family and ascertained what they were and effected a division thereof. The case was carried in appeal and the appellate Court confirmed the above decision except in regard to a small item. It is thus clear that the said suit was not a suit for partition. Where a suit in substance is not one for partition but to set aside an alienation by the father or a managing member other than the father and to recover possession of the plaintiff's share in the property alienated, the inference of an unequivocal intention to separate from the family, which a suit for partition in the technical sense of the term as understood in Hindu law gives rise to, cannot follow. But

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it is contended by Mr. Vallabhacharyulu that an alienation by a member of his share in the joint family property operates as a severance in status and he becomes a divided member of the family from the date of alienation and if the alienation relates to a share in a particular item, in respect of that item. A suit for recovery by the plaintiff of his share from the alienee would according to him be a clear indication on his part to hold his share in severalty when recovered; and the first plaintiff must therefore be deemed to have become divided in status from his father by suing to recover his share. Before examining the soundness of this contention it may well be stated that the father did not purport to alienate his share in any item but purported to alienate the entirety of the items including the son's share therein as the father and the managing member for family necessity and no question of any severance of status would result from such alienations, assuming that an alienation would entail the legal consequence of division in status as contended for. But in our opinion an alienation by a member of his share in the whole of the joint family property or in any part thereof would not sever his status from the family and make him a divided member in respect of the property alienated. The preponderance of judicial opinion in this Court has been in favour of this view. In *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(1) BHASHYAM AYYANGAR J. expressed himself thus:

"An undivided member of a family, though he may alienate either the whole or any part of his undivided share, will continue to be an undivided member of the family with rights of survivorship between himself and the remaining members in

(1) (1902) I.L.R. 25 Mad. 690, 696, 717 (F.B.).

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respect of all the joint family property other than what he has transferred."

In the learned Judge's view he would be an undivided member even in respect of the shares of the other members in the property alienated. This is in accord with the strict theory of Hindu law which does not recognize alienation as a mode of severance of a joint family. The notion that it would operate as a severance was based on the analogy of English law where a joint tenancy would be disrupted by an alienation of his share by the joint tenant. But the concept of a joint tenancy and the legal incidents attaching thereto are not the same as in the case of a joint Hindu family. It is wrong therefore to infer the same legal consequences from an act which operates differently under different systems of law. A Bench of this Court in *Lakshmi Achi* v. *Narayanasami Naiker*(1) has taken the view that a member would become divided in respect of the property alienated by him and Mr. Vallabhacharyulu relies on the observations of RAMESAM J. in that case. Referring to the observations of BHASHYAM AYYANGAR J. in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(2), RAMESAM J. remarks as follows :

"If a member of an undivided family sells the whole of his share in some of the family properties or part of his share in such properties but not in other properties, it may be that he continues undivided with the other members in respect of the properties other than those in which the whole or part of his share has been transferred and this is all that the observation at page 717 amounts to. It almost implies that so far as the properties in which the whole or part of the member's share is sold are concerned, he must be regarded as divided from the other members."

(1) (1929) I.L.R. 53 Mad. 188, 195. (2) (1902) I.L.R. 25 Mad. 690 (F.B.).

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With all respect to the learned Judge, the interpretation placed by him on the observations of BHASHYAM AYYANGAR J. does not appear to be correct. In support of his view BHASHYAM AYYANGAR J. referred to *Gurulingapa* v. *Nandapa*(1). On a reference to that case it will be seen that the following observations of the Chief Justice in that case are directly against the view of RAMESAM J :

"It seems to follow from it that the sale of a coparcener's interest in joint family property cannot affect the position of such coparcener in the joint family or alter the rights of the several coparceners *inter se*. . . Basappa's (alientaing coparcener's) rights to succeed to his brother's shares by survivorship were not therefore affected by the sale of his interest in the last item of joint family property to Gurpadappa so long as the purchaser did not proceed to work out his rights by partition."

This is a definite pronouncement that an alienating coparcener continues undivided even in respect of the share of the other members in the property alienated so that on the death of any member he will succeed to his share by survivorship along with the other members. In *Kandasamy Udayan* v. *Velayutha Udayan*(2) a view different from that of RAMESAM J. was expressed by DEVADOSS J :

"When a coparcener brings a suit for a declaration that an alienation by another coparcener is not binding on him and for his share of the property alienated the Court gives him a decree for his share, if it finds that the alienation is not binding on the plaintiff. But his share does not become absolutely his, for, the alienating coparcener still continues a member of the joint family, and on a suit for partition by him the property alienated may fall to his share in which case the alienee would be entitled to get it. . . . When a member of a joint Hindu family sues to set aside an alienation made by another coparcener that suit is not for partition and does not involve necessarily the status of division between him and the other members of the joint family."

(1) (1896) I.L.R. 21 Bom. 797 ,803. (2) (1926) I.L.R. 50 Mad. 320, 326.

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The view of the learned Judge appears to be that the fact that the alienating coparceners recover their shares would not *ipso facto* effect a severance in status in respect of the property alienated because at a final partition the share alienated may be set apart for the alienor's share which would be taken by the alienee. There is authority for the view that the mere recovery by a coparcener of his share in the property alienated would not prevent the alienee from bringing a suit for a general partition and have the property alienated allotted to his share; vide *Hanmandas Ramdayal* v. *Valabhdas*(1). We do not think it necessary to examine the soundness of this view. If the correct principle is that alienation *per se* by a member of his share in joint family property or part thereof does not operate as a severance in status in respect of the property alienated the mere recovery of their shares by the other members would not alter the status of the family. It would therefore rest on them to signify their intention unequivocally to hold the said shares separate from the alienor. In the absence of such expression of intention, the presumption would be that they intend to hold the shares as joint family property. And the same legal consequences do not therefore follow from a suit by a plaintiff to set aside an alienation by his coparcener of a certain item of property as not being binding on him and to recover the plaintiff's share therein, as would follow from a suit for partition, without more. If the institution of such a suit should be taken as evidence of an explicit declaration by the member to hold the share which he seeks to recover in severalty there must be a clear indication to that effect in the plaint or there must be some

(1) (1918) I.L.R. 43 Bom. 17.

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other evidence to show that it was his intention to so hold the share which he seeks to recover. The Court will have to determine if there was any such intention expressed in the plaint and come to a conclusion on the point. In its absence, the conduct of the parties either during the course of the litigation or subsequent thereto will have to be considered in determining this question of intention. The decree in this case provides that the plaintiff as coparcener with the first defendant should recover the share. It would seem to indicate that no severance in status between the plaintiff and his father was effected. The judgment of the learned District Judge in Original Suit No. 8 of 1878 was pronounced on 30th September 1879. One of the alienations which have been set aside by the judgment was, as already observed, a gift made by the father in favour of his daughter Venkayya the plaintiff's sister. On 23rd June 1880, Venkayya executed a mortgage with possession (Exhibit XI) in favour of one Ramayya and this document was attested both by the plaintiff and his father. Therefore though the alienations were set aside the plaintiff confirmed the alienation The appellate judgment in the case is Exhibit N, dated 26th October 1880. On 30th August 1882 the plaintiff in Original Suit No. 8 of 1878, by Exhibit DD effected a sale of the joint family property which was not included in the suit. In that sale the recital is : "the house site which has been acquired by our ancestors and which is continuing in our possession", thus clearly indicating the jointness of the family. In Original Suit No. 8 of 1878, as the decree of the learned District Judge confirmed the leases and dismissed the suit as against the lessees, costs were awarded against the plaintiff. The lessees were executing the decree for costs against the son

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Venkatapatiraju but before execution was completed he died. Thereupon the father Suryanarayanaraju was brought on as his legal representative under the description of "undivided father". In execution the reversion in the suit property was sought to be attached. The objection taken by the father was that as the entire interest of the son devolved on him by survivorship the property could not be attached. This objection was upheld and the execution petition was dismissed. Thus the lessees were unable to recover costs. These proceedings probabilize the contention of the defendants that the prior litigation did not effect a partition, that the son and the father were undivided in status and that the persons whose interest it was to assert that they were divided did not do so. It would be hardly likely that if the son was divided in status from the father, the son's widow would not have been brought on record and the son's separate interest would not have been attached and the money due to the lessees for costs would not have been recovered. In 1890 the father effected an alienation of the reversion in the land but no objection was taken by the widow though she lived up to 1927. The conduct of the widow from the date of the death of her husband up to 1927 for a period of over forty years in not asserting any claim to succeed to her husband's interest renders probable that the son and the father were undivided in status. Exhibit III, dated 28th November 1894, lends support to this view. It is a deed of relinquishment executed by the son's widow in favour of one Ramaraju, an alienee from the father of one of the items which was covered by the suit, Original Suit No. 8 of 1878. What was relinquished under the said document was the "maintenance right" owned by her. Further there is evidence in the case on behalf

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of the defendants that the father and the son continued to live and mess together. We see no reason why we should not act on that evidence as it is consistent with the testimony afforded by the documentary evidence. On a consideration of the entire evidence we have come to the conclusion that by the litigation in the prior suit the father and the son did not become divided in status and that Suryanarayanaraju, after the death of the son, was competent to alienate the reversion in the lands.

In this view the plaintiff's suit fails and the appeal is dismissed with costs.

The memorandum of objections is dismissed. No costs.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Stodart.

1939, August 31.

RUKMANI AMMAL (FIRST DEFENDANT), APPELLANT,

v.

SUBRAMANIA SASTRIGAL AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XLI, r. 6 (2)—Application for stay of sale under—Grant of—Obligatory on Court, if—Stay refused—Sale held—If illegal or irregular only—O. XXI, r. 90—Material irregularity—Sale of lands in small lots rather than in large lots—Propriety of—Question as to—Failure to consider—Material irregularity, if—O. XXI, r. 64—Effect of—O. XXI, r. 66 (2) (e)—Misdescriptions of property sold calculated to mislead purchaser as to its real value—Material irregularity, if and when—Topes containing large number of mango and coconut trees and close to house sites—Description of, as punja land—Effect of.

The sale in execution of the final decree in a suit was fixed for 21st November 1934. On that day the judgment-debtor put in an application under Order XLI, rule 6, sub-rule 2 of the Code of Civil Procedure, praying that the sale might be stayed for two months on the ground that appeals were pending against the final decree and from an order of the Court on the application to set aside the preliminary decree in the suit. The Court dismissed that petition on 28th November 1934 and the sale was held on the same day.

Held that the sale was illegal.

Under Order XLI, rule 6, sub-rule 2, the Court has no option but to grant stay of sale on such terms as to giving security or otherwise as the Court thinks fit.

Harnarain v. *Govind Rai*(1) disapproved.

*Appeal Against Order No. 6 of 1938.

(1) A.I.R. 1932 All. 551.

When the Code says that an executing Court shall not sell in certain circumstances and the Court nevertheless proceeds to sell, the Court has committed what is more than an irregularity. It amounts clearly to an illegality.

Sixty-seven acres of land in one village and twenty-nine acres of land in another village were directed to be sold in execution of a decree. The judgment debtor contended from the beginning of the execution proceedings that the sale ought to be in small parcels. The executing Court, however, failed to consider the question whether it would not be better to sell the lands in small lots rather than in large lots. The whole of the sixty-seven acres was sold as one lot and the whole of the twenty-nine acres was sold in another lot. There was good reason to believe that the sale in two lots instead of a large number of lots caused the prices realized to be considerably less than they otherwise would have been.

Held that the failure of the executing Court to consider the question whether it would not be better to sell the lands in small lots rather than in large lots constituted a material irregularity.

Two items of land sold in execution of a decree were, notwithstanding the objection of the judgment-debtor, described in the proclamation of sale as punja, while as a matter of fact they consisted of topes containing a large number of mango and coconut trees, and alleged to be close to house sites and to be capable of being sold as building sites for a great deal more than their value as mere dry lands.

Held that the said misdescriptions were irregularities which would be very likely to affect the prices realized.

APPEAL against the order of the Court of the Subordinate Judge of Trichinopoly, dated 16th December 1937 and made in Execution Application No. 8 of 1935 in Execution Petition No. 350 of 1933 in Original Suit No. 6 of 1927.

B. Sitarama Rao and *R. Gopalaswami* for appellant.

T. M. Krishnaswami Ayyar and *A. Balasubramania Ayyar* for respondents.

BURN J.

The JUDGMENT of the Court was delivered by BURN J.—This appeal is from an order of the learned

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Subordinate Judge of Trichinopoly in Execution Application No. 8 of 1935 dismissing the appellant's application under Order XXI, rule 90, and section 47, of the Code of Civil Procedure to set aside a sale held in execution of the decree in Original Suit No. 6 of 1927. The final decree in the suit was passed on 23rd February 1933 and the sale was held on 28th November 1934. Several irregularities were alleged on behalf of the judgment-debtor. The learned Subordinate Judge held that no irregularities had been made out and also held that the lands had been sold for reasonable prices and that therefore no substantial loss had been caused. He therefore dismissed the petition.

In appeal Mr. Sitarama Rao for the appellant has pressed before us strongly the contention that the sale was illegal. The sale was fixed for 21st November 1934. On 21st November 1934 the judgment-debtor put in an application under Order XLI, rule 6, sub-rule 2, praying that the sale might be stayed for two months on the ground that appeals were pending against the final decree and from an order of the Court on the application to set aside the preliminary decree in the suit. The learned Subordinate Judge dismissed this petition on 28th November 1934 and the sale was held on the same day. Mr. Sitarama Rao referring to the wording of Order XLI, rule 6, sub-rule 2, contends that the Court has no option but to grant stay of sale on such terms as to giving security or otherwise as the Court thinks fit. We think that this contention is well-founded. Mr. Krishnaswami Ayyar for the respondent has referred us to a decision reported as *Harnarain* v. *Govind Rai*(1). In that case KENDALL J. expressed the opinion that sub-rule 2 of rule 6

(1) A.I.R. 1932 All. 551.

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does not impose on the Court which ordered the sale an obligation to stay the same merely because the property which is to be sold is immovable property. With all respect to the learned Judge we are unable to agree. Sub-rule 2 of rule 6 is quite clear that when an order has been made for the sale of immovable property in execution of a decree and an appeal is pending from such decree, the sale, shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of. We can see no justification for supposing that this rule means anything else than what it says. Mr. Krishnaswami Ayyar points out the danger that the judgment-debtor will be in a position to paralyse the executing Court, that he will be able to lie by until the last moment, then come up just when the sale is going to take place and get it stopped. We think there is sufficient answer to this in the provision that the Court may impose such terms as to giving security or otherwise as it thinks fit. If the Court thinks that the application has been designedly delayed, the Court can deal with it by prescribing conditions. If the judgment-debtor appears only on the morning to which the sale is posted, the Court has a discretion to say, for example, that the sale will be stayed if the judgment-debtor produces the amount for which the sale is going to be held within half an hour or one hour. There is no limit to the discretion of the Court in imposing terms and that the Court is not without power to deal with a vexatious judgment-debtor in this way, if the Court is obliged to stay a sale when such an application is made, is quite clear from the terms of Order XLI, rule 6, sub-rule 2. The learned

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Judge was therefore wrong when on 28th November 1934 he thought he had discretion to stay or refuse to stay the sale. When the Code says the executing Court shall not sell in certain circumstances and the Court nevertheless proceeds to sell, the Court has committed, in our opinion, what is more than an irregularity. It amounts clearly to an illegality. The learned Subordinate Judge ought to have imposed whatever terms he thought fit and if those terms were not complied with he could then have directed the sale to proceed. On this ground alone we think that this appeal must succeed. Moreover, we are of opinion that the learned Subordinate Judge acted unreasonably in declining any postponement of the sale. It was shown that the judgment-debtor had been appealing against earlier orders passed by the executing Court and had been applying to this Court to stay the sale and that her last application for stay had been dismissed on 20th November 1934. In those circumstances it appears to us that the learned Subordinate Judge ought to have realized that there was no chance of selling this property to the best advantage since there must have been considerable uncertainty as to whether the sale would or would not be held at all. It would have been quite easy for the learned Subordinate Judge to prescribe conditions which would have been satisfactory to the decree-holder. It was shown that after the decree was passed the decree-holder realized Rs. 14,000 towards the amount of the decree by consenting to sales by the judgment-debtor to third parties. The learned Subordinate Judge might, for example, have prescribed that the judgment-debtor should pay, say Rs. 20,000 within a month and there seems to be no reason to believe that the judgment-debtor would not have been able to comply

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with some such condition as that. The learned Subordinate Judge was not, we think, justified in holding that the application to stay the sale was devoid of *bona fides* and was designed merely to cause delay.

Another irregularity which undoubtedly occurred in the proclamation of the sale was that the proclamation for the sale of lands in Athikudi was affixed to Survey No. 131-1 which was not an item of land proposed to be sold. In the circumstances of this case we do not consider that it was a material irregularity since there was another sub-division of the same survey number that was intended to be sold and we do not think that any intending bidder could have been misled by the mere affixing of the proclamation to a pole planted in Survey No. 131-1.

A more serious objection that Mr. Sitarama Rao has pressed before us is that the lower Court failed to consider the question whether it would not be better to sell the lands in small lots rather than in large lots. The extent sold was sixty-seven acres in the village of Peruvalanallur (53·12 acres of nanja and 13·93 acres of punja) and twenty-nine acres in Athikudi (21·95 acres of nanja and 7·26 acres of punja). The whole of the land in Peruvalanallur was sold as one lot and realized Rs. 60,000. The whole of the land in Athikudi was sold in another lot and realized Rs. 30,600. The judgment-debtor was contending from the beginning of the execution proceedings that the sale ought to be in small parcels and it appears that in April 1934 the learned Subordinate Judge directed the decree-holder to put in an estimate of the value of each item of the lands to be sold "in case the properties have to be sold in various lots." But when the proclamation came on to be settled in September 1934 the learned Subordinate Judge has recorded that the only point

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for determination was whether the prices given by the decree-holder should be accepted. This, of course, was incorrect because he had also to determine the other point which was still pressed by the first defendant that the properties ought to be sold in small parcels. e think this is a matter of importance because it is obvious that there are not many persons likely to bid for sixty-seven acres of land at a time or for twenty-nine acres. There must be a much larger number of persons who are in a position to bid for parcels consisting of 1, 2, 3, 4 or 5 acres. Mr. Krishnaswami Ayyar for the respondent has endeavoured to persuade us that the learned Subordinate Judge had considered this point but we think it is quite clear from the terms of the order on 18th September 1934 that he did not consider it at all. If he had considered it, it would be difficult to say that the sale in two lots instead of a large number of lots by itself constituted an irregularity. But we think there is good reason to believe that the sale in two lots has caused the prices realized to be less, considerably less, than they otherwise would have been. It is no doubt the case that the value of land was declining between 1929 and 1934. But we do not see reason to believe that it declined by so much as fifty per cent. There was very good evidence to show that nanja lands of similar situation and quality to those sold fetched over Rs. 2,000 per acre in 1929. There was some evidence about the sales of nanja lands both in Peruvalanallur and Athikudi even up to 1933 in which prices of nearly Rs. 2,000 per acre were realized. The prices actually fetched at the sale are approximately Rs. 1,000 per acre. It seems probable that if sold in small lots better prices could have been obtained.

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Another objection taken by Mr. Sitarama Rao for the appellant was with regard to the misdescription of certain items of dry lands. For example, Survey No. 140-1 in Athikudi was described as punja but as a matter of fact it consisted of a tope containing a large number of mango and coconut trees. Survey No. 249-27 was a similar tope. It was alleged that both these topes were close to house-sites and could have been sold as building sites for a great deal more than their value as mere dry lands. Survey No. 22-3, it was shown, contained a large number of clusters of bamboos. The attention of the executing Court was invited to these matters in April 1934 and in September when the terms of the proclamation were being drawn up the judgment-debtor reiterated the contentions raised by her in April. It has often been pointed out that the duty of drawing up the proclamation is the duty of the Court. Therefore it is no answer to these objections to say that the decree-holder is free from blame or has acted *bona fide*. These misdescriptions are clearly irregularities which would be very likely to affect the prices realized. They come within Order XXI, rule 66 (2) (*e*), being matters which the Court should bring to the notice of possible purchasers in order to enable them to judge the probable value of the property.

For these reasons we think this appeal must be allowed and the sale must be set aside. The appellant will recover her costs from the respondent.

In reselling the property we desire to invite the attention of the executing Court in particular to Order XXI, rule 64, from which it is clear that no more of the judgment-debtor's property ought to be sold than is sufficient to realize the amount due under

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the decree. This has a bearing upon the desirability of selling the property in small parcels, a subject we have already dealt with.

N.S.

APPELLATE CRIMINAL.

Before Mr. Justice Burn and Mr. Justice Stodart.

1939, October 17.

IN RE NAINAMUTHU, SON of KANNAPPAN (ACCUSED), APPELLANT.*

Code of Criminal Procedure (Act V of 1898), sec. 164—Statement by accused, after committing the offence, to Magistrate that he killed the deceased and describing the circumstances of the crime—Admissibility—Killing with consent of the deceased—Offence, if murder—Indian Penal Code (Act XLV of 1860) sec. 300, exception 5.

The appellant, after killing his concubine, appeared before a Joint Magistrate and made a statement to him that he (appellant) had killed the deceased and describing the circumstances of the crime. The Magistrate took down the statement in writing and that statement was admitted in evidence at the trial of the appellant for the murder of his concubine. On objection taken to the admission of the statement in evidence on the ground that it was a statement made under section 164, Criminal Procedure Code, and that it had not been recorded after observing the formalities prescribed by that section,

held that the objection was unsustainable.

The Magistrate was not investigating the case or any of the facts connected with the case. On the contrary the information given by the appellant was itself the first information of the crime.

Held further that as the appellant had killed the deceased at her request and with her own consent, the offence committed by him was not murder but was only culpable homicide not amounting to murder.

*Referred Trial No. 107 of 1939 and Criminal Appeal No. 439 of 1939.

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TRIAL referred by the Court of Session of the Coimbatore Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 81 of the Calendar for 1939 on 11th August 1939 and appeal by the said prisoner against the said sentence passed upon him.

M. C. Sridharan for accused.

Public Prosecutor (*V. L. Ethiraj*) for the Crown.

STODART J.

The JUDGMENT of the Court was delivered by STODART J.—The appellant has been convicted of murdering Palaniammal, his concubine, a woman of thirty years and sentenced to death subject to the confirmation of this Court. There can be no doubt about the facts of this case. The parties are Adi-Dravidas. The accused was a married man and he had been keeping the deceased as his concubine for a considerable time. P.W. 2, his wife, lived with her parents in a house adjoining that in which the accused and the deceased lived. Some four or five months before the crime, the accused and his wife removed to another residence, namely, a shed in a garden belonging to P.W. 3. This removal was in order to put a stop to the scandal of the accused living with his concubine while the accused's wife lived in a separate house. But even after this change of residence, the deceased used to visit the accused and even to spend the night with him in the new house. The accused's parents tried to put a stop to this conduct and complained to the owner of the garden with a view to pressure being brought to bear upon the accused, and that was the state of affairs at the time the deceased was killed.

On the night of 13th February this year, the deceased was in the accused's house and had her food there. Appellant and deceased then went to a

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STODART J.

tope which is close by and lay down to sleep in front of the shed occupied by P.W. 4 and her son P.W. 5. P.W. 5 waking in the morning and going out to work saw the accused and the deceased lying asleep. That was in the early morning. A little later, according to P.W. 2, the wife of the accused, the accused returned to his own hut and asked for a drink of water which P.W. 2 gave to him. He then left after telling P.W. 2 that he was going to the Pollachi Court "to tell everything there in person." P.W. 9, the Joint Magistrate of Pollachi, proves that the accused appeared before him at 11-30 in the morning of 14th February and made a statement to him that he had killed the deceased and describing the circumstances of the crime. P.W. 9 took down the statement in writing and that is Exhibit C. The accused then went back to the village accompanied by the Circle Inspector of Police and took him to a place in the tope fifty yards from the hut of P.Ws. 4 and 5. The body was there in a hollow of the ground covered over with coconut leaves. The accused had already told the Joint Magistrate that he had covered the body with a thatti. The cause of death was a cut on the neck which cut through the spinal cord and also involved the trachea and the large blood vessels on either side of the neck. There is also evidence about the weapon with which the throat of the deceased woman was cut. P.W. 5 had purchased an aruval from the accused five or six months before this crime and he kept this aruval in his hut in the coconut tope. On the morning of the crime it was missing from the hut and the accused produced it from his own hut.

It is urged upon us by the learned Counsel for the appellant that the statement made by the appellant to the Joint Magistrate, P.W. 9, was improperly

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admitted in evidence. Learned Counsel argues that this was a statement made under section 164 of the Criminal Procedure Code and since it was not recorded after observing the formalities prescribed by that section, it should not have been put in evidence. We think that that objection would be very just if the Magistrate had been investigating the case but he was not investigating the case or any of the facts connected with the case. On the contrary this information given by the accused was itself the first information of the crime. The ruling cited to us in *Nazir Ahmad* v. *The King-Emperor*(1) does not apply to the facts here. When he was examined in the committing Magistrate's Court, the statement he had made, Exhibit C, to the Joint Magistrate was brought to the notice of the accused and he admitted that he had made it. At the Sessions, however, he denied that he had made it, and said that when he came into the Joint Magistrate's Court, his intention was merely to tell the Magistrate that his concubine had been killed, that thereupon a Head Constable and the Inspector of Police pushed him into the dock and after that he did not remember what he had said to the Joint Magistrate. There is no doubt in our minds that the appellant did make this confessional statement, Exhibit C, and the facts of the crime correspond in all material details with that statement. The facts proved against the appellant, therefore, establish that he killed Palaniammal.

The question however remains whether in the circumstances of the case, the offence was one of murder or whether it comes within the fifth exception to section 300. The learned Public Prosecutor does

(1) (1936) I.L.R. 17 Lah. 629 (P.C.).

NAINAMUTHU, *In re.*

STODART J.

not support the finding of the learned Sessions Judge that the offence proved against the appellant was murder. The evidence in the case is that the accused and the deceased were on affectionate terms and there was no motive whatever for the accused to encompass the death of the deceased. In his confession to the Joint Magistrate, the appellant stated that he killed the deceased at her own request and with her glad consent. He stated that on the night in question, after some talk, she declared that she would sever her connexion with him and go away and then, in the alternative, she suggested that both of them might commit suicide, and that in the morning he killed her at the place where her body was found. This version of the crime apparently has been accepted from the beginning by the prosecution and it clearly amounts to this, that Palaniammal suffered death at the hands of the appellant with her own consent. There were two contusions on the body besides the fatal wound on the neck which look as if they were caused by blows with a stick. But the accused was not asked about these marks. It was not suggested to him that the said marks were inconsistent with the statement which he had made to the Magistrate that the deceased had consented to be killed. There may be an explanation of these marks consistent with the story given by the appellant. In these circumstances, we set aside the conviction for murder and convict the appellant of culpable homicide not amounting to murder. We sentence him to transportation for life.

APPELLATE CIVIL—FULL BENCH.

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

IN RE A PLEADER, RESPONDENT.*

1939, December 5.

Legal Practitioners Act (XVIII of 1879), *sec.* 13—*High Court directing District Judge to hold an inquiry—District Judge delegating his power to Additional District Judge—Legality of—Madras Civil Courts Act (III of* 1873), *sec.* 3-*A—Applicability of.*

On receipt of a complaint against the respondent, a pleader, for professional misconduct, the High Court directed the District Judge to hold an inquiry into the allegations, the case falling within section 13 of the Legal Practitioners Act. Without making any reference to the High Court, the District Judge directed the Additional District Judge to hold the inquiry, which he did, and his report was submitted to the High Court.

Held, that the District Judge had no power of delegation as he had been directed by the High Court to hold the inquiry himself, and that the findings of the Additional District Judge could not be accepted *ex post facto* and should be set aside.

When the High Court directs a District Judge to hold an inquiry into a charge of professional misconduct, the District Judge does not hold the inquiry under the Legal Practitioners Act but under the order of the High Court. He has no authority under section 3-A of the Madras Civil Courts Act, 1873, to transfer that duty to the Additional District Judge.

NOTICE under section 13 (*b*) of the Legal Practitioners Act issued to a First-Grade Pleader, Coimbatore, calling upon him to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court for grossly improper conduct in the discharge of his professional duty.

T. R. Venkatarama Sastri (with him *M. Krishna Bharathi*) for respondent.—I take a preliminary objection that the

* *In re* a Pleader.

A PLEADER, *In re.*

inquiry held is illegal and this Court cannot take action on it. This case falls under section 13 of the Legal Practitioners Act. The High Court directed the District Judge to hold the inquiry. The District Judge delegated his power to the Additional District Judge. This is illegal. Under the section where a High Court names a particular person to hold the inquiry, he alone has the power. He has no authority to delegate his power to another person. When a person other than the one named by the High Court has held the inquiry, the High Court cannot approve of it. When a case is sent for a finding to the District Judge, he alone must inquire and submit the findings; *Salri* v. *Ganeshi*(1), *Ali Sher Khan* v. *Ahmad Ullah Khan*(2) and *Labh Singh* v. *Ram Lal*(3) On the analogy of those cases I submit that, when the District Judge is directed to hold the inquiry by the High Court, he alone must conduct it. The inquiry made by a different person is illegal and his report cannot be considered. Section 3-A of the Madras Civil Courts Act applies to the functions he has to discharge under that Act, viz., hearing of civil suits and appeals. That power cannot be availed of for this purpose. It does not apply to a matter like the present which comes up to him by delegation. The proceedings under the Legal Practitioners Act are not of a civil nature. The District Judge has no authority to delegate his power and the inquiry made by the Additional District Judge is illegal and cannot be considered.

The Advocate-General (*Sir A. Krishnaswami Ayyar*) for the Crown.—The respondent has not taken this objection in the lower Court. On the other hand he acquiesced and took part in the proceedings. So he cannot be allowed to raise the objection now. The words "after such inquiry as it thinks fit" in section 13 of the Legal Practitioners Act are wide enough to permit the High Court to give approval to the inquiry made by the Additional District Judge when the High Court thinks that the inquiry is proper. If the High Court is satisfied with the present inquiry, it can act on it though not made by the District Judge. The District Judge has got authority to delegate his power under section 3-A of the Madras Civil Courts Act. The words "any other law

(1) (1891) I.L.R. 14 All. 23. (2) (1907) I.L.R. 29 All. 660.
(3) (1924) I.L.R. 5 Lah. 252.

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for the time being in force" include the Legal Practitioners Act. The inquiry to be held by the District Judge is a function assigned to him as a Court. The normal incidents of that Court are therefore attracted. If the High Court has the power to direct the District Judge to make the inquiry under section 13 of the Legal Practitioners Act, then it becomes a function of the District Court by law, and the District Judge can transfer the case to the Additional District Judge by virtue of section 3-A of the Madras Civil Courts Act. [Sections 3-A, 12 and 13 of the Madras Civil Courts Act were referred to.]

[LEACH C.J.—This is neither a civil suit nor a civil appeal. Under what law can the District Judge transfer the inquiry which the High Court directed him to hold ?]

The Letters Patent authorises the High Court to remit cases. On remittal it becomes the function of the District Judge and he can assign the duty to another person under section 3-A of the Madras Civil Courts Act. The Legal Practitioners Act is included in the words "any other law for the time being in force" mentioned in section 3-A. So the delegation of the power by the District Judge to make the inquiry is legal and the High Court can consider the report sent by the Additional District Judge. At best it is a question of procedure. It is not a question of inherent incompetency. Even if the procedure followed is irregular, the party submitted himself to the inquiry made and acquiesced in it. No injustice is caused to the party and there is no allegation to that effect. In these circumstances the inquiry by the Additional District Judge is legal and his report can be considered by the High Court. [*National Telephone Company, Limited* v. *Postmaster-General*(1) was referred to.]

T. R. Venkatarama Sastri in reply.—The words "any other law for the time being in force" in section 3-A apply to special Acts such as the Indian Divorce Act, Indian Companies Act, Indian Succession Act, etc., and does not apply to the Legal Practitioners Act, the proceedings of which are not of a civil nature. The power delegated to the District Judge is personal and not a duty which he has to discharge under the Madras Civil Courts Act. The power to conduct the inquiry does not come under section 3-A and it is

(1) [1913] A.C. 546 at 562.

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a function delegated to him by the High Court to discharge it personally and he has no authority to transfer his power to another person. So the inquiry is illegal and the High Court cannot consider the report.

Cur. adv. vult.

ORDER.

LEACH C.J.

LEACH C.J.—The respondent is a pleader practising in the Coimbatore District. In February 1937 one G. Thimmappa, a merchant, residing and carrying on business in Bellary, presented a petition to this Court in which he charged the respondent with professional misconduct. The Court considered that the charges made called for inquiry and passed an order directing the District Judge of Coimbatore to hold the inquiry, the case falling within section 13 of the Legal Practitioners Act. When the matter came before the District Judge the petitioner filed a statement in which he said that he was satisfied that the respondent, who had been his pleader for a considerable time, had not acted *mala fide*, and that his claim had been settled by the respondent, and he wished to withdraw the petition. In the circumstances, the District Judge thought it unnecessary to proceed with the inquiry and submitted the record to this Court with his remarks. This Court considered that the District Judge should have proceeded with the inquiry, notwithstanding that the petitioner had expressed a desire to withdraw the petition. Where the Court has reason to believe that a practitioner may have been guilty of professional misconduct it cannot allow proceedings to be dropped as the result of an agreement between the complainant and the practitioner or even if the complainant without any agreement does not wish to proceed with the matter.

By an order dated 7th March 1939 the Court remanded the case to the District Judge with direction

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LEACH C.J.

to proceed. Without reference to this Court the District Judge directed the Additional District Judge to hold the inquiry, which he did, and his report is now before us. Mr. Venkatarama Sastri on behalf of the respondent has raised a preliminary objection. He says that, inasmuch as the inquiry has been conducted not by the District Judge, who was directed to hold the inquiry, but by the Additional District Judge, it is unlawful and the Court cannot take action on it. In other words, he says that the District Judge, having been ordered to hold the inquiry, could not delegate his power to the Additional District Judge and that this Court is precluded from giving approval *ex post facto* to the inquiry conducted by the Additional District Judge. The learned Advocate-General has contended that if the Court is satisfied with the report it can take action on it. He has also contended that the District Judge had full power by reason of section 3-A of the Madras Civil Courts Act, 1873, to transfer the matter to the Additional District Judge. Further he has said that, inasmuch as the respondent did not take objection to the Additional District Judge holding the inquiry when the matter was in the District Court but appeared and took part in the proceedings throughout, he cannot now be allowed to raise the objection.

I will deal first with the argument advanced by the learned Advocate-General that the finding of a tribunal of inquiry can be accepted notwithstanding that the tribunal was not appointed by the Court for the purpose. The opening clause of section 13 of the Legal Practitioners Act is in these words:

"The High Court may also, after such inquiry as it thinks fit, suspend or dismiss any pleader or mukhtyar holding a certificate as aforesaid."

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It is said that the words "after such inquiry as it thinks fit" leave it open to the Court to give approval *ex post facto*. I am unable to accept this argument. The Act contemplates the High Court directing an inquiry before action is taken. The Court has duties to perform under the Act and the first duty is to nominate a person or persons to hold the inquiry into the alleged misconduct. Unless the tribunal is constituted beforehand, the inquiry, in my opinion, cannot be lawful. I regard the suggestion that approval of a tribunal may be given *ex post facto* as being repugnant to the spirit of the Act and the wording of section 13.

The argument that, because no objection was raised in the District Court to the Additional District Judge conducting the inquiry, he cannot be allowed to raise the objection now is also one which I cannot accept. If the tribunal which conducted the inquiry was not validly constituted, acquiescence in the proceedings would not turn it into a lawful tribunal. If illegal in its inception, illegal it would remain.

The only argument which calls for serious consideration is the argument that section 3-A of the Madras Civil Courts Act gave the District Judge power to direct the Additional District Judge to conduct the inquiry. That section reads as follows:

"When in the opinion of the High Court, the state of business pending before the Judge of any District Court (hereinafter called the District Judge) so requires, the Local Government may appoint one or more Additional District Judges to that Court for such period as they may deem necessary. The Additional District Judges so appointed shall discharge all or any of the functions of the District Judge, under this Act or any other law for the time being in force which the District Judge may assign to them, and, in the discharge of those functions, they shall exercise the same powers as the District Judge."

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Therefore an Additional District Judge may lawfully deal with matters which come within the province of the District Judge under the Act or any other law for the time being in force. The Civil Courts Act only refers to civil suits and appeals from Judges subordinate to the District Judge. The matter now before us is neither a suit nor an appeal. The learned Advocate-General has, however, said that the present case falls within the words "or any other law for the time being in force". I consider that the Legislature had here in mind Acts such as the Indian Companies Act, the Indian Divorce Act and the Succession Act, which confer upon a District Judge jurisdiction in specified matters. If there were a clause in the Legal Practitioners Act which directed the District Judge to hold the inquiry in a case like the present one he certainly would have power under section 3-A of the Madras Civil Courts Act to assign the inquiry to the Additional District Judge, but there is nothing in the Legal Practitioners Act which directs the District Judge to hold the inquiry. The Act leaves the matter entirely in the hands of the High Court. The High Court and not the Act nominates the tribunal. Therefore when the High Court directs a District Judge to hold an inquiry into a charge of professional misconduct the District Judge does not hold the inquiry under the Act but under the order of the High Court. Before a District Judge can be allowed to pass on his duty to some one else there must be very clear authority for his action. Certainly the Madras Civil Courts Act does not provide it. In my opinion, the District Judge having been directed by this Court to hold the inquiry he had no power of delegation. No doubt he thought that he had authority under section 3-A of the Madras Civil Courts Act to transfer the duty to

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the Additional District Judge, but I consider that in so doing he erred. It would have been a different matter if he had received the sanction of this Court beforehand, but he directed the Additional District Judge to hold the inquiry without making any reference to this Court.

It follows from what I have said that I am not prepared to read section 3-A of the Madras Civil Courts Act in the way suggested by the learned Advocate-General and I feel bound to uphold the preliminary objection raised on behalf of the respondent. The findings of the Additional District Judge will be set aside and the District Judge directed to hold a fresh inquiry into the allegations made against the respondent and present his own report to this Court in due course. In order to prevent any misunderstanding I would add that this Court has not considered the findings of the Additional District Judge and will deal with the charges against the respondent merely on the report of the District Judge when it is submitted.

GENTLE J.—I agree.

KRISHNASWAMI AYYANGAR J.—I agree.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Wadsworth and Mr. Justice Patanjali Sastri.

1939, November 15.

P. R. S. A. R. PERIAKARUPPAN CHETTIAR (PETITIONER), PETITIONER,

v.

P. S. A. R. A. R. ARUNACHALAM CHETTIAR BY AGENT SIVARAMAN CHETTIAR AND THREE OTHERS (NIL, RESPONDENTS AND NIL), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), ss. 35 and 37—Adjudication order passed on the ground of fraudulent preference—Decision by Court later that there was no fraudulent preference—Adjudication, if can be annulled under sec. 35 of the Act—Failure of debtor to object to the order of adjudication—Whether bar to application for annulment—Disposal of assets on annulment—Power of Court under sec. 37.

On a creditor's petition an order of adjudication was passed on the ground that the debtors had executed a mortgage by way of fraudulent preference. The debtors did not appear and oppose. On a subsequent application by the petitioning creditor to set aside the said mortgage under section 54 of the Provincial Insolvency Act, it was finally decided that there was no act of fraudulent preference. The insolvents thereupon filed an application for the annulment of the adjudication. The Subordinate Judge annulled the same, but the District Judge reversed the order. On revision,

(i) *held* that the Court was bound to annul the adjudication under section 35 of the Provincial Insolvency Act. When an adjudication has taken place under the Provincial Insolvency Act and it has been shown that no act of insolvency has been committed, the Court has no discretion in the matter. It must annul the adjudication. The fact that a debtor does not object to an order of adjudication being passed against him is no bar

* Civil Revision Petitions Nos. 572, 573, 720 721 1005 and 1006 of 1936.

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to the granting of an application for an order setting aside the adjudication under the provisions of section 35.

Gopu China Jogayya v. *Satyanarayana*(1) disapproved.

After the above order of adjudication was passed but before it was annulled, the insolvents paid Rs. 3,600 to *P*, one of the creditors. On an application by the Official Receiver, *P* was directed to refund the money to the Official Receiver, which he did. After the order of adjudication was annulled, *P* asked the Court to direct that the money should be paid back to him.

(ii) *Held* that it would be improper to direct the Official Receiver to pay the money to *P* or to the insolvents as they were parties to a gross fraud on the Court and the fellow-creditors of *P*; and that the money should be vested in the Official Receiver, not as Official Receiver, but as a person appointed by the Court under section 37 of the Act, and that he should take steps to distribute the money rateably amongst the creditors who had proved in the insolvency proceedings.

Veerayya v. *Sreenivasa Rao*(2) followed.

PETITIONS under section 75 of Act V of 1920, praying the High Court to revise the decree of the District Court of Coimbatore in (i) Civil Miscellaneous Appeal No. 126 of 1935 preferred against the order of the Court of the Principal Subordinate Judge of Coimbatore, dated 30th March 1935 and made in Interlocutory Application No. 343 of 1935 in Insolvency Petition No. 242 of 1927; (ii) Civil Miscellaneous Appeal No. 134 of 1935 preferred against the order of the Court of the Principal Subordinate Judge of Coimbatore, dated 15th July 1935 and made in Interlocutory Application No. 283 of 1935 in Insolvency Petition Nos. 242 and 258 of 1927; (iii) Civil Miscellaneous Appeal No. 127 of 1935 preferred against the order of the Court of the Principal Subordinate Judge of Coimbatore, dated 30th March 1935 and made in Interlocutory

(1) (1939) 2 M.L.J. 753. (2) (1935) I.L.R. 58 Mad. 908 (F.B.).

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Application No. 334 of 1935 in Insolvency Petition No. 258 of 1927; (iv) Civil Miscellaneous Appeal No. 140 of 1935 preferred against the order of the Court of the Principal Subordinate Judge of Coimbatore, dated 15th July 1935 and made in Interlocutory Application No. 402 of 1935 in Insolvency Petition No. 242 of 1927 and (v) Civil Miscellaneous Appeal No. 141 of 1935 preferred against the order of the Court of the Principal Subordinate Judge of Coimbatore, dated 15th July 1935 and made in Interlocutory Application No. 403 of 1935 in Insolvency Petition No. 258 of 1927.

K. Rajah Ayyar for *M. Krishna Bharati* for petitioner.—The ground on which Palani Goundan and his son were adjudicated as insolvents is that they have executed a mortgage by way of fraudulent preference. The Courts later on found that there was no fraudulent preference. As the ground of insolvency ceases to exist the Subordinate Judge was right in annulling the adjudication. Section 35 of the Provincial Insolvency Act does not put any restriction on the power of the Court to annul the adjudication. If it is established that the order of adjudication ought not to have been passed it must be set aside. The order of the District Judge reversing the decision of the Subordinate Judge is wrong on the plain construction of the section. He adopts the interpretation that for annulling an adjudication it must be shown that at the time when the adjudication order was first made it ought not to have been passed on the materials available then. There is no warrant for such construction. It is opposed to all principles of justice. When the alleged act of insolvency disappears even at a later stage the adjudication order must be annulled. [Baldwin on Insolvency, Ninth Edition, page 168, and Halsbury's Laws of England (Hailsham Edition), Vol. II, page 127, were referred to.]

[*In re Hester. Ex parte Hester*(1). *Ex parte Learoyd. In re Foulds*(2). *Ex parte Geisel. In re Stanger*(3). *Jagmohan*

(1) (1889) 22 Q.B.D. 632 638. (2) (1878) 10 Ch.D. 3, 8.
(3) (1882) 22 Ch. D. 436.

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Narain v. *Grish Babu*(1) and *Karuthan Chettiar* v. *Raman Chetty*(2) were also referred to.]

The fact that a debtor did not object to the order of adjudication when it was passed is not a bar to annul it later; *Re Helsby*(3). The word used in section 35 of the Provincial Insolvency Act is "shall." So the Court is bound to set aside the adjudication order when the ground of insolvency ceases. In the corresponding section 21 of the Presidency Towns Insolvency Act the word used is "may." The Court has no discretion in the matter under section 35 of the Provincial Insolvency Act. The Courts found that there was no fraudulent preference. That decision is binding on the insolvent, the creditors and the mortgagee. As there is no act of insolvency the Court is bound to annul the adjudication. So the order of the District Judge is illegal.

Since the order of adjudication is annulled the money that was directed to be paid to the Official Receiver by Periakaruppan Chettiar, a creditor, must be returned to the creditor. [Sections 35, 37 and 43 of the Provincial Insolvency Act were referred to.] A debtor is entitled to prefer any creditor and his act cannot be questioned except in insolvency proceedings. Now that the insolvency is annulled the creditor Periakaruppan Chettiar is entitled to get back the money Rs. 3,600 which was paid to him by the insolvent. The other assets in the hands of the Official Receiver should be directed to be handed over to the debtors, since the insolvency has been annulled. There is no allegation of fraud regarding these other assets.

T. M. Krishnaswamy Ayyar, N. Sivaramakrishna Ayyar, A. C. Sampath Iyengar, K. Kuttikrishna Menon and *S. Ramaswami Ayyar* for respondents.—At the time when the adjudication order was passed there was fraudulent preference. No doubt at a later stage it was found that there was no fraudulent preference. But that cannot be a ground for annulling the adjudication. Unless it is found that at the time when the adjudication order was passed there was no fraudulent preference, under section 35 of the Provincial Insolvency Act, the Court cannot annul the adjudication order. The fact that the ground for adjudication ceases to exist at

(1) (1920) I.L.R. 42 All. 515. (2) (1926) 24 L.W. 486.
(3) (1893) 69 L.T. 864.

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a later stage cannot be considered. If the facts, when the adjudication order was first passed, justify the passing of that order and the ground of insolvency existed then, it cannot be annulled.

[LEACH C.J.—You want to read something into section 35 of the Provincial Insolvency Act which is not there.]

[*Ex parte French*; *Re Trim*(1) and *Gopu China Jogayya* v. *Satyanarayana*(2) were referred to.]

When an adjudication order is passed it is binding only on the petitioning creditor and the insolvent: it is not a judgment *in rem*; *Official Assignee of Madras* v. *O. R. M. O. R. S. Firm*(3).

If your Lordships are not with me, the adjudication order goes. What then should be the consequential orders? A sum of Rs. 3,600 was paid by the insolvent to Periakaruppan Chettiar, a creditor, after the order of adjudication but before its annulment. The insolvents and the creditor were parties to a gross fraud. He should not be allowed to enjoy the fruits of that fraud. Justice requires that this sum of Rs. 3,600 should be distributed amongst all the creditors. Under section 37 (1) of the Provincial Insolvency Act the Court has got power to appoint a receiver and to vest the property in him; See *Veerayya* v. *Sreenivasa Rao*(4).

The other assets of the insolvent debtors also should be distributed amongst the creditors.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—These six civil revision petitions deal with three different matters arising out of the adjudication in insolvency of one Palani Goundan and his son Kandaswami Goundan by the Subordinate Judge of Coimbatore, but they may all be conveniently dealt with in one judgment. The order of adjudication was passed on 26th September 1928 on a petition filed by P. S. A. R. A. R. Arunachalam Chettiar, who alleged that the insolvents had fraudulently preferred

(1) (1882) 47 L.T. 339. (2) (1939) 2 M.L.J. 753.
(3) (1926) I.L.R. 50 Mad. 541. (4) (1935) I.L.R. 58 Mad. 908 (F.B.).

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another Chettiar, Somasundaram by name, by executing in his favour on 2nd June 1927 a mortgage of immovable property. The insolvents did not enter an appearance and the order of adjudication was passed without opposition. On 14th October 1929 the petitioning creditor applied to the Court for an order, under the provisions of section 54 of the Provincial Insolvency Act, setting aside the mortgage in favour of Somasundaram. The Subordinate Judge held that the fraudulent preference alleged had been established and set aside the transaction. An appeal followed to the District Judge of Coimbatore, who allowed it. The petitioning creditor then asked this Court to restore the order of the Subordinate Judge in the exercise of its revisional powers. This Court, however, agreed with the District Judge that there was no fraudulent preference and consequently refused to interfere with his order. On 25th March 1935, as the result of this Court's decision the insolvents applied to the Subordinate Judge for the annulment of the adjudication and a similar application was filed by a creditor, P. R. S. A. R. Periakaruppan Chettiar. These petitions were allowed and the adjudication was set aside under the provisions of section 35 of the Act. On appeal the District Judge reversed this decision and three of the petitions now before the Court, namely, Nos. 572, 720 and 721, ask this Court to revise the Judge's order.

Section 35 of the Provincial Insolvency Act says that where in the opinion of the Court a debtor ought not to have been adjudged insolvent, the Court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication. The Subordinate Judge held that the Court had an unrestricted power to set aside the adjudication where

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it was established that the order of adjudication ought not to have been passed. The District Judge considered that the power of the Court was restricted to a case where it could be shown that on the materials before it at the time of the adjudication the order ought not to have been passed. Although at a later stage it becomes apparent that the order of adjudication would not have been passed if the Court had been in possession of the whole of the facts the Court has, in the opinion of the District Judge, no power to set aside the adjudication.

The section contains no restriction on the power of the Court to set aside the adjudication where it is shown that the debtor ought not to have been adjudged insolvent. The District Judge has read something in the section which is not there and moreover his decision is opposed to principle. In the words of JAMES L.J. in *Ex parte Learoyd. In re Foulds*(1),

> "a man cannot be 'duly' adjudged a bankrupt unless the great requisite of all exists, that he has committed an act of bankruptcy. That is the capital offence of which he must have been guilty before he can be 'duly' adjudged a bankrupt."

If no act of insolvency has been committed the estate cannot be administered under the provisions of the Provincial Insolvency Act and section 35 has been inserted in the Act to give the Court power to set aside an adjudication which ought not to have been made. Section 35 of the Provincial Insolvency Act corresponds to section 35 of the Bankruptcy Act of 1883. *In re Hester. Ex parte Hester*(2), a case which was decided under the Bankruptcy Act of 1883, CHARLES J. said:

> "Is it a case in which, if he had been adjudged bankrupt, the Court would say that he ought not to have been so

(1) (1878) 10 Ch.D. 3. (2) (1889) 22 Q.B.D. 632.

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adjudged? These words are undoubtedly very wide, and many grounds can be conceived upon which the Court might come to the conclusion that a debtor ought not to have been adjudged bankrupt. For example, if there was no sufficient petitioning creditor's debt, or no act of bankruptcy, or if it turned out that the adjudication had been obtained for some sinister purpose, that is, some purpose foreign to the administration of bankruptcy law; all these are grounds on which the Court might be of opinion that the debtor ought not to have been adjudged bankrupt."

There is here express authority for the statement that where it is shown that no act of insolvency has in fact been committed the Court can set the adjudication aside on the ground that the debtor "ought not to have been adjudged insolvent."

In the Bankruptcy Act of 1869 which remained in force until the Bankruptcy Act of 1883 was passed there was no corresponding section to section 35, but the Court of Appeal held that in a proper case the Court had power to annul an adjudication; see *Ex parte Geisel. In re Stanger*(1). In that case the petitioning creditor alleged that his debtor had committed an act of bankruptcy by departing from his dwelling house with intent to defeat and delay his creditors. He had failed to show that the debtor was alive in some other place at the time. An order of adjudication was passed, but it was set aside by the Court of Appeal on the ground that the Court was not satisfied that the man was alive at the time. Probate had in fact been granted of the alleged bankrupt's will.

The fact that a debtor does not object to an order of adjudication being passed against him is no bar to the granting of an application for an order setting aside the adjudication under the provisions of section 35. In *Re Helsby*(2) a married woman was

(1) (1882) 22 Ch. D. 436. (2) (1893) 69 L.T. 864.

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adjudged bankrupt on the ground that she was carrying on a business of her own with her own capital. She offered no opposition when the adjudication was made and she allowed it to stand until criminal proceedings for alleged offences against the bankruptcy law had been instituted against her and other members of her family. She then applied to have the adjudication set aside and it was held by the Divisional Court that she was entitled to the order asked for because it had become apparent that she was not carrying on a business of her own with her own capital.

In support of his contention that the order of the District Judge is right Mr. T. M. Krishnaswami Ayyar has quoted to us two cases, *Ex parte French*; *Re Trim*(1) and *Gopu China Jogayya* v. *Satyanarayana* (2). In the first of these cases, a trader having committed an act of bankruptcy, a petition was presented against him by two creditors and an adjudication followed. Subsequently, the debtor moved the Court to annul the adjudication on the ground of the insufficiency of the petitioning creditors' debts. BACON C.J. held that the debtor ought to have appealed against the order of adjudication within the twenty-one days limited for that purpose, and that not having done so, the publication in the Gazette was, under section 10 of the Bankruptcy Act, 1869, conclusive evidence of the validity of the adjudication. The fact that the petitioning creditors' debt was not of the amount on which a petition could be based was not a sufficient reason for the annulment of the adjudication. The judgment in this case was delivered on 13th November 1882, four days before the judgment of the Court of Appeal in *Ex parte Geisel. In re Stanger* (3) where it was held that section 10 of the Bankruptcy

(1) (1882) 47 L.T. 339. (2) (1939) 2 M.L.J. 753. (3) (1882) 22 Ch.D. 436.

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Act, 1869, had no application and an adjudication could be annulled even after the time for appealing had elapsed. Therefore *Ex parte French*; *Re Trim*(1) must be taken to have been overruled. It certainly has no application in the case before us.

In *Gopu China Jogayya* v. *Satyanarayana*(2) a creditor applied to have an order of adjudication annulled on the ground that the petitioning creditor's debt was a bogus one. KUNHI RAMAN J. said that there was no doubt that but for the petition the adjudication would not have taken place but he added:

"Once an adjudication takes place all the other creditors of the debtor become interested in the matter and unless the appellant here is able to show that the debtor did not owe any other debts or that the debtor was not really insolvent at the time of the order of adjudication by the lower Court, it is not open to him to contend that it is a case in which the order of adjudication ought not to have been made."

These observations cannot be accepted as a correct statement of the law. When an adjudication has taken place under the Provincial Insolvency Act and it has been shown that no act of insolvency has been committed the Court has no discretion in the matter. It must annul the adjudication. The word used is "shall" and the section in this respect differs from section 21 of the Presidency Towns Insolvency Act where the word "may" is used.

In the present case the judgment of this Court upholding the decision of the District Judge that there was no fraudulent preference is conclusive on the question whether an act of insolvency had taken place. The decision was that there had been no fraudulent preference and this decision is binding on all, the insolvents, the creditors and the mortgagee. As there was no act of insolvency the Court is bound to annul the

(1) (1882) 47 L.T. 339. (2) (1939) 2 M.L.J. 753.

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adjudication. Therefore the order of the District Judge will be discharged and the order of the Subordinate Judge restored with costs in favour of the petitioners in Petitions Nos. 572, 720 and 721 of 1936 (one set throughout). The costs will be paid by the petitioning creditor.

Civil Revision Petition No. 573 of 1936 arises out of an application filed by the Official Receiver in these circumstances. After the adjudication but before its annulment, the insolvent paid to P. R. S. A. R. Periakaruppan Chettiar a total sum of Rs. 3,600. There were five payments altogether and they were made between 9th September 1928 and 22nd September 1931. There is no doubt here that the insolvents and Periakaruppan Chettiar were parties to a gross fraud. The Official Receiver applied to the Court to direct Periakaruppan Chettiar to refund a sum of Rs. 2,700 which the Official Receiver understood was the total amount which had been paid by the insolvents to this creditor. The Subordinate Judge held that the creditor had received only Rs. 1,200 during the period of adjudication, but as the order of adjudication had been annulled he dismissed the Official Receiver's petition. An appeal followed to the District Judge, who held that Periakaruppan Chettiar had in fact received Rs. 3,600 and directed him to pay it over to the Official Receiver, which he did. It is common ground that the total amount received by Periakaruppan Chettiar was the Rs. 3,600 found by the District Judge. Periakaruppan Chettiar now asks this Court to revise the order of the District Judge and direct that the money be paid over to him. Section 37 (1) of the Provincial Insolvency Act reads as follows:—

"Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts

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theretofore done, by the Court or receiver shall be valid, but subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint or in default of any such appointment, shall revert to the debtor to the extent of his interest therein on such conditions (if any) as the Court may, by order in writing, declare."

In *Veerayya* v. *Sreenivasa Rao*(1) a Full Bench of this Court held that under this section the Insolvency Court retains full power to give directions as to the realization and disposal of the debtor's assets. The power ought not to be used arbitrarily but used in the interests of the general body of creditors, which meant that the proper order for the Court to pass was that the appointee should continue to realize and distribute the debtor's property in accordance with the provisions of the Act. The person appointed had not all the statutory powers of an Official Receiver but only such powers as the Court conferred upon him.

Section 37 gives the Court a wide discretion. The annulment of the adjudication does not mean that the debtor who is adjudicated is necessarily to be placed in possession of the property which is in the hands of the Official Receiver at the time the adjudication is set aside. The directions of the Court must depend on the circumstances in each case. In this case it would not be proper to allow Periakaruppan Chettiar, who has been guilty of a gross fraud on the Court and on his fellow creditors, to enjoy the fruits of his fraud. When the money was in his hands it was not his. It was money which was vested in the Official Receiver and he only got possession of it as the result of the fraud. When the adjudication was set aside the Official Receiver was not as such entitled to the money. It then belonged to the insolvents, as Mr. Rajah Iyer

(1) (1935) I.L.R. 58 Mad. 908 (F.B.).

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concedes. The money is now in the hands of the Official Receiver and is still the property of the debtors. In view of their participation in the fraud we consider that it would also be improper to direct the Official Receiver to pay it over to them. We are of the opinion that the proper course in the circumstances of this case is to direct that the money be vested in the Official Receiver, not as Official Receiver, but as a person appointed by the Court under the section, and we direct accordingly. The Official Receiver will in due course take steps to distribute the Rs. 3,600 rateably amongst the creditors who have proved in the insolvency proceedings. He will be entitled to the usual commission and charges. This petition has been opposed by the petitioning creditor and the Official Receiver. They are entitled to their costs (one set throughout).

The remaining petitions are Nos. 1005 and 1006. The petitioning creditor here asks that certain other assets in the hands of the Official Receiver should be distributed by him amongst the creditors. There are no special circumstances which justify an order of this nature. The Official Receiver will be directed to deliver the assets, other than the Rs. 3,600, to the debtors two months hence. The properties will be handed over to them then, subject, of course, to any order of the Court which may be passed in the meantime. There will be no order as to costs in these petitions.

The Official Receiver will be allowed one set of costs out of the estate throughout in respect of petitions Nos. 572, 720 and 721, and one set in petitions Nos. 1005 and 1006.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

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

1939, November 16.

GUNDAVARAPU SESHAMMA (PLAINTIFF-APPELLANT), APPELLANT,

v.

KORNEPATI VENKATA NARASIMHARAO AND TWENTY OTHERS (DEFENDANTS—RESPONDENTS), RESPONDENTS.*

Hindu law—Adoption—Widow—Madras Presidency—Husband died leaving widow, divided agnates and daughter's sons and without giving power to widow to adopt—Adoption by widow with consent of divided agnates and without consulting daughter's son—Validity of—Practice—Opinion of single Judge on question of law—If binding on another single Judge—Opinion of a Bench of two Judges on question of law—Binding nature of, on another Bench—One Bench not satisfied with opinion of another Bench on a question of law—Procedure to be adopted.

Held by the Full Bench: In the Madras Presidency, where a Hindu dies leaving a widow, divided agnates and daughter's sons, without giving his widow power to adopt, and the widow makes an adoption, it is valid if she has obtained the consent of the divided agnates; she is not bound to consult the daughter's sons as well, though they may be of age.

Held further: (i) A Judge of the High Court sitting alone is not bound on a question of law by the decision of another Judge sitting alone.

(ii) A Division Bench is the final Court of Appeal in an Indian High Court, unless the case is referred to a Full Bench, and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law, and

(iii) if a Division Bench does not accept as correct the decision on a question of law of another Division Bench, the

* Second Appeal No. 174 of 1936.

only right and proper course to adopt is to refer the matter to a Full Bench.

APPEAL against the decree of the Court of the Subordinate Judge of Guntur in Appeal Suit No. 25 of 1935, preferred against the decree of the Court of the District Munsif of Guntur in Original Suit No. 568 of 1930.

This appeal was referred to a Full Bench by ABDUR RAHMAN J.

ON THE REFERENCE:

V. Govindarajachari and *M. Harisarvothama Rao* for appellant.—The widow of a divided co-parcener, who died without giving his widow power to adopt, made an adoption with the consent of the nearest agnatic sapindas and without consulting her daughter's son who was of age. The question for decision is whether the adoption is valid. There is no text of Hindu law directly bearing on the point. The law in this Presidency was developed from the *Ramnad* case (*The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*)(1) and from the principle of Hindu law that a woman is under perpetual tutelage to some one or other of her relations as could be gathered from the following text, viz.,

पिता रक्षति कौमारे भर्ता रक्षति यौवने ।

पुत्रो रक्षति वार्धक्ये नस्त्रीस्वातन्त्र्यमर्हति ॥

In the *Ramnad* case(1) it was held that, in a case where the husband had died divided, the consent of her husband's nearest kinsman should be obtained. In *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*(2) the family was an undivided family and the widow had obtained power from her husband to adopt and there was no necessity for the Court to go into the question underlying the theory of consent of sapindas, yet their Lordships held that she must look to her husband's family for counsellors and protectors. In the *Guntur* case (*Vellaki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*)(3) the Privy Council held that the assent of her husband's "kindred" and "sapindas" should be obtained.

(1) (1868) 12 M.I.A. 397.
(2) (1876) L.R. 3 I.A. 154; I.L.R. 1 Mad. 69.
(3) (1876) L.R. 4 I.A. 1; I.L.R. 1 Mad. 174.

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The word "sapindas" would mean "sagotra sapindas" and "bhinnagotra sapindas" (bandhus). In *Venkamma* v. *Subramaniam*(1) the widow obtained the consent of one of the agnatic kinsmen of her husband. The adoption was held to be invalid. This was an appeal from *Subrahmanyam* v. *Venkamma*(2) where BENSON and BASHYAM IYENGAR JJ. held that the nearest presumptive reversioners must also be presumed to be the advisers of the widow. The daughter's son comes under this category. In *Veerabasavaraju* v. *Balasurya Prasada Rao*(3) the Privy Council, after referring to the *Ramnad* case(4) and the *Guntur* case(5), held that the widow was dependent on persons who were united closely by blood. In the line of succession the daughter's son comes as sixth and the husband's brother as ninth. In *Kristnayya* v. *Lakshmipathi*(6) the word "sapinda" was used but the decision does not deal with the point under discussion. In *Balasubrahmanya* v. *Subbayya*(7) the Privy Council were not prepared to hold on the authorities that the only kinsmen to be consulted were agnates. No rule of Hindu law or decided case could be cited which says that in the matter of giving consent a daughter's son can only come in after the remotest samanodakas are exhausted. In the latest edition of Mayne's Hindu law the learned author states that in *Amarendra Mansingh* v. *Sarafan Singh*(8) the Privy Council laid stress on the theory of spiritual benefit as the decisive factor. Judged by this test also the place of the daughter's son is very much higher up in the list of persons conferring spiritual benefit than the husband's brother. The daughter's son offers oblations to his maternal grandfather direct and also to the husband but the husband's brother does not even offer oblations to the husband but only to the husband's ancestors. Though it is not obligatory on a daughter's son to perform sraddha it is certainly meritorious if he does so. Even in the case of the husband's brother there is no obligation on him to perform sraddha to the husband. In

(1) (1907) L.R. 34 I.A. 21; I.L.R. 30 Mad. 50.
(2) (1903) I.L.R. 26 Mad. 627, 635.
(3) (1918) L.R. 45 I.A. 265; I.L.R. 41 Mad. 998; 1010.
(4) (1868) 12 M.I.A. 397.
(5) (1876) L.R. 4 I.A. 1; I.L.R 1 Mad. 174.
(6) (1920) L.R. 47 I.A. 99; I.L.R. 43 Mad. 650, 653.
(7) (1938) L.R. 65 I.A. 93; I.L.R. [1938] Mad. 551.
(8) (1933) L.R. 60 I.A. 242 I.L.R. 12 Pat. 642.

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this view also the daughter's son confers greater spiritual benefit. The decision in *Viswasu dara Row* v. *Somasundara Rao*(1) requires reconsideration in view of the erroneous assumption therein that a daughter's son does not confer any spiritual benefit and also for the reason that it has not given due consideration to *Veerabasavaraju* v. *Balasurya Prasada Rao*(2). In *Anne Brahmayya* v. *Chelasami Rattayya*(3) RAMESAM J. differed from *Viswasu dara Row* v. *Somasu dara Rao*(1) and held that the word "sapindas" means cognates and agnates and the word gnatis included cognates also and that temporal considerations should have as much weight as spiritual considerations. But JACKSON J. differed from the view of RAMESAM J. In *Kesar Singh* v. *Secretary of State for India*(4) the view of RAMESAM J. was accepted. But *Murahari Brahma Sastri* v. *Sumitramma*(5) followed *Viswasundara Row* v. *Somasundara Rao*(1).

Further, a daughter's son possesses particles of the blood of the husband while the husband's brother has not got any particle of the blood of the husband. According to Dharma Sindhu, Nirnaya Sindhu and Vaidhyanathiyam the place of a daughter's son is higher than the husband's brother in the matter of performance of religious obsequies such as the performance of funeral ceremonies and monthly and annual ceremonies. *See* also Sarvadhikari's Law of Inheritance, Second Edition, pages 351, 662 and 663. From the point of view of inheritance also a daughter's son comes earlier than the husband's brother. Judged by every one of the tests known to Hindu law, viz., (i) propinquity, (ii) spiritual benefit, and (iii) proprietary interest, the consent of the daughter's son should not be ignored.

P. Satyanarayana Rao, *V. Subrahmanyam* and *V. Satyanarayana* for respondents.—The preferential right of a daughter's son in the matter of inheritance is due to special considerations and could be traced to the "practice of an appointed daughter". Yagnavalkya did not give him a place among the agnates. But Vignaneswara took hold of the word एव (eva) and brought him in after the daughter. The normal Hindu

(1) (1920) I.L.R. 43 Mad. 876.
(2) (1918) L.R. 45 I.A. 265; I.L.R. 41 Mad. 998.
(3) (1924) 20 L.W. 503.
(4) (1926) I.L.R. 49 Mad. 652. (5) (1933) I.L.R. 57 Mad. 41

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family is an agnatic family. It is this type of family that is spoken of by the Privy Council in the *Ramnad* case(1). The position given to the father-in-law, even in a divided family, in the *Ramnad* case(1) gives the real clue to the nature of the family, i.e., the agnatic family, which they had in mind when they used the words "kinsmen" and "kindred". Three conclusions emerge from the *Ramnad* case(1). They are (i) that the fundamental conception of the family is the agnatic family, (ii) that religious considerations are paramount and (iii) that proprietory considerations are secondary. The background of *Veerabasavaraju* v. *Balasurya Prasada Rao*(2) is the *Guntur* case(3) and *Venkamma* v. *Subramaniam*(4). In the *Guntur* case(3) the essentials, namely, agnatic family and sapindaship, are emphasised. In *Venkamma* v. *Subramaniam*(4) the Privy Council was considering the agnatic relations, granduncle's grandsons. They were held to occupy an important position in the family. *Veerabasavaraju* v. *Balasurya Prasada Rao*(2) takes the matter a step further. There, it was held that, in a divided family, after the father-in-law's death the brothers-in-law took the position of the father-in-law as the widow's guardian and venerable protector. In the matter of observing pollution a daughter's son is not an agnatic sapinda. He observes pollution only for three days while an agnatic kinsman observes pollution for ten days. Gharpuri, relying on two texts of Manu, states that a "gnati" is a sagotra sapinda as opposed to 'sambhandi" or "bandhu". A daughter's son is not considered as a sapinda for all purposes. For the rights of a daughter's son as regards funeral ceremonies, *see* Sarvadhikari's Law of Inheritence, page 81. Nirnaya Sindhu and Dharma Sindhu are of great authority in the Andhra country and Vaidhyanatha Dikshitiyam in the Tamil country. A page 574, Vaidhyanatha Dikshitiyam, the persons who have got to perform funeral ceremonies, whether they inherit property or not, are mentioned. The daughter's son is not in the list of such persons. A daughter's son who takes the property performs the funeral ceremonies.

V. Govindarajachari replied.

Cur. adv. vult.

(1) (1868) 12 M.I.A. 397.
(2) (1918) L.R. 45 I.A. 265; I.L.R. 41 Mad. 998.
(3) (1874) L.R. 4 I.A. 1; I.L.R. 1 Mad. 174.
(4) (1907) L.R. 34 I.A. 21; I.L.R. 30 Mad. 50.

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JUDGMENT.

LEACH C.J.—The question which the Court is called upon to decide in this appeal is whether an adoption by a Hindu widow is valid when the family is divided and she has obtained the consent of the nearest sagotra sapindas of her husband, but has not consulted a daughter's son, he being of age. In other words, does the Hindu law demand that the daughter's son shall be consulted, if he is of age, before the widow can adopt, notwithstanding that the proposed adoption has received the approval of her husband's nearest agnates ?

In this case one Kornepati Lakshminarayana died divided from his brothers. He was survived by his wife, Subbamma, and his two daughters, the appellant and one Rathamma who is now dead. The appellant has four sons who have not been made parties to this litigation. Rathamma had two sons, the fifth and sixth respondents. In the year 1916, about forty years after her husband's death, Subbamma adopted a boy named Narasimha Rao, the son of the third respondent. Before the adoption took place Subbamma obtained the consent in writing of her husband's nearest agnates, the second, third and fourth respondents, who are the sons of her husband's brothers. The adopted boy died and Subbamma then adopted with the like consent the first respondent, the son of the second respondent. It is common ground that the adoption ceremony was duly performed and that the appellant's sons, all of whom were majors, were present. Subbamma died on 23rd April 1930, and after her death the appellant instituted in the Court of the District Munsif of Guntur the suit, out of which this appeal arises, for a declaration that the adoption was invalid and for possession of her

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father's estate. Various pleas were raised, but for the purposes of the appeal it may be taken that her only ground for challenging the adoption was that one of her sister's sons, the sixth respondent, who was a major at the time of the adoption, was not consulted and that he had not intimated his consent to the adoption taking place. Why the appellant did not join her sons as parties to the suit is explained by the fact that they were present at the adoption ceremony and she was unable to contend that they were not consenting parties. The position then is this. The nearest sagotra sapindas gave their express consent to the adoption, the appellant's own sons impliedly gave their consent, but the major son of the appellant's sister was not consulted and did not signify his acquiescence. The Court has been given to understand that the other son of Rathamma was a minor at the time. The District Munsif held that the adoption was valid and on appeal the Subordinate Judge, Guntur, concurred in his decision. The appellant then filed this second appeal which has been placed before a Full Bench for decision as there is a conflict of authority in this Court on the question whether it is necessary to consult a daughter's son when the widow of a member of a divided Hindu family adopts a son to her husband without authority to adopt having been given by her husband.

The position of a daughter's son under Hindu law is a special one. While he is not a sagotra sapinda but a bandhu, he is given the right of succession to his maternal grandfather's estate after the death of his maternal grandmother and his mother when the maternal grandfather has left no son, grandson or great grandson through the male line. According to the Mitakshara law of succession the agnatic

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kindred are as a general rule preferred to all cognates, irrespective of proximity of relationship. In the absence of a direct descendant in the male line down to three degrees, the widow, however, inherits the estate, and after her, the daughter and the daughter's son. These three come in before all other agnates except the three descendants in the direct male line. The precedence of the widow is due to the theory that she is the surviving half of her deceased husband, and the daughter comes in next because she equally with the son proceeds from the limbs of the father. The special position of the daughter's son is based on ancient texts. Vishnu says :

> "In regard to the obsequies of ancestors, daughter's sons are considered son's sons",

and Manu :

> "Between a son's son and the son of a daughter there exists in this world no difference ; for even the son of a daughter saves him (who has no sons) in the next world, like the son's son."

It is clear that the priority given to the widow, the daughter and the daughter's son over agnates not in the direct male line of descent can only be regarded as an exception to the general rule.

There is no textual authority bearing directly on the question raised in this appeal, at least none has been quoted to us, and in the course of the argument the Court has been given to understand that none exists. The question admittedly falls to be decided on the principles to be gathered from the decisions of the Privy Council relating to the widow's right to adopt under the Mitakshara law as applied in the Madras Presidency, but the question whether the daughter's son has the right to be consulted before the widow adopts a son to her deceased husband without authority from the husband has not been

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raised directly before the Judicial Committee. Four Division Benches of this Court have considered the judgments of the Privy Council in cases relating to the widow's right to adopt and there has been a marked divergence of opinion as to their effect in a case like the present one. In order that there may be some finality so far as this Court is concerned on the question of the meaning to be attached to the decisions of the Judicial Committee it is necessary that they should again be examined and that this Full Bench should decide their bearing in this connection.

In *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*(1), which is known as the *Ramnad* case, the Privy Council definitely laid down that, according to the Mitakshara law as administered in the Madras Presidency, a Hindu widow, not having her husband's authority to adopt, could lawfully adopt a son to him, if the adoption was authorized by the consent of his "kinsmen". With regard to the question, who are the kinsmen whose assent will supply the want of positive authority from the deceased husband, their Lordships in that case observed:

"Where the husband's family is in the normal condition of a Hindoo family, i.e., undivided, that question is of comparatively easy solution. In such a case the widow, under the law of all the schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorize an adoption by her, yet, if there be no father, the consent of all the brothers, who, in default of adoption, would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener

(1) (1868) 12 M.I.A. 397.

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against their will. Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband, there is greater difficulty in laying down a rule. The power to adopt when not actually given by the husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindoos. Their Lordships do not think there is any ground for saying, that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think, that the consent of the father-in-law, to whom the law points as the natural guardian and 'venerable protector' of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive."

So far as the divided family is concerned it will be observed that the Board here held that (i) the assent of "kinsmen" is required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption, (ii) the consent of the father-in-law, the "venerable protector" of the widow, would be sufficient; and (iii) when the father-in-law is dead it is not easy to lay down an inflexible rule; every such case must depend upon the circumstances of the family, and there should be such evidence of the assent of "kinsmen" as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither

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capriciously nor from a corrupt motive. In the *Ramnad* case(1) the nearest agnates were the mother-in-law of the widow and the natural brother of the adopted boy, and it was held that their consent was sufficient. No cognate was consulted. In all the decisions of the Privy Council bearing on this question, except one, there were agnates living. In the one exception there was no evidence as to what agnates were in existence, and so far as the main claimant was concerned the case turned, not on the consent of cognates, but whether there was an implied authority to adopt independently of any consent. I shall make further mention of this case later.

In *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*(2) the Judicial Committee made the following observations, which have an important bearing on the matter under discussion, notwithstanding that, there, the family was undivided :

"The Hindu wife upon her marriage passes into and becomes a member of that family. It is upon that family that, as a widow, she has her claim for maintenance. It is in that family that, in the strict contemplation of law, she ought to reside. It is in the members of that family that she must presumably find such counsellors and protectors as the law makes requisite for her."

The daughter's son is not of the family. He is a member of his father's family and therefore clearly does not come within this statement. Their Lordships in this case also observed :

"It may be the duty of a Court of Justice, administering the Hindu law, to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property, and, it may be, in the case of collateral succession,

(1) (1868) 12 M.I.A. 397. (2) (1876) I.L.R. 1 Mad. 69 (P.C.).

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as in the present instance, the rights of parties in actual possession, dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property."

Here emphasis is placed on the necessity for advice in order to prevent the widow acting capriciously or from corrupt motives.

In *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(1) the Privy Council considered the passage in the *Ramnad* case(2) immediately following the statement that it was not easy to lay down an inflexible rule for the case in which no father-in-law was in existence and said :

"Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband."

There is no reason to suppose that the word "family" was here used in a sense different from the strict sense in which it was used in the passage which I have quoted from the judgment in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*(3).

A Hindu widow having no authority to adopt cannot ignore the nearest sapindas. If she does and acts only with the consent of remote sapindas the adoption is invalid. This was the decision of

(1) (1876) I.L.R. 1 Mad. 174 (P.C.). (2) (1868) 12 M.I.A. 397.
(3) (1876) I.L.R. 1 Mad. 69 (P.C.).

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the Privy Council in *Veerabasavaraju* v. *Balasurya Prasada Rao*(1). The widow there adopted without the consent of the nearest agnates and the adoption was held to be invalid. The judgment of the Board was delivered by Mr. Ameer Ali, who said that the *Ramnad* case(2) established the proposition that under the Dravidian branch of the Mitakshara law, in the absence of authority from her deceased husband, a widow may adopt with the assent of her "male agnates" (page 1004 of the report). At page 1009 Mr. Ameer Ali said:

"The decision in the *Ramnad* case (*The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*)(2) was followed and explained in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(3) which established the following proposition: That the requisite authority in the case of an undivided family is to be sought by the widow within that family; that it is in the members of that family that she must presumably find such counsellors and protectors as the law makes requisite for her; and that she cannot at her will travel out of that undivided family and obtain the authorization required from separated and remote kinsmen of her husband. This being the position of a widow in an undivided family, what are the conditions imposed on her if her husband happens to die in a state of separation from his kindred? Division does not affect her personal dependence or give her an independent status to alter by her own authority the succession to the estate which she takes as the widow of her husband. She is still dependent for counsel and protection upon the nearest sapindas of her husband, who are the most closely united to him by ties of blood, or, to use the language of Hindu lawyers, by 'community of corporal particles'. The father of the deceased, if still alive, continues to be her 'natural guardian and venerable protector'. He has furthermore a direct interest in the protection of the estate, for in case of her death without leaving her surviving a daughter or the mother of her deceased husband, he has a right to the reversion. His

(1) (1918) I.L.R. 41 Mad. 998 (P.C.). (2) (1868) 12 M.I.A. 397.
(3) (1876) I.L.R. 1 Mad. 174 (P.C.).

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authorization is, therefore, essentially requisite to the validity of an adoption by her to her husband. If there is no father the divided brothers take his place by virtue of the tie of blood as her husband's nearest sapindas; they become her natural guardians and protectors of her interests. They also have an interest in the protection of the inheritance. In the absence, then, of the father, the assent of the divided brothers is equally requisite for the validity of the widow's adoption. If a majority assent and one refuses, his objection may be discounted. But the absence of their consent, or in case there is only one, of his consent, cannot be made good by the authorization of distant relatives remotely connected whose interest in the well-being of the widow or the spiritual welfare of the deceased, or in the protection of the estate, is of minute character, and whose assent is more likely to be influenced by improper motives."

We have here a reiteration of the principle stated in the *Ramnad* case(1) that the consent of the father-in-law, if still alive, is essential to a lawful adoption and the equally positive statement that in the absence of the father-in-law the consent of the divided brothers of the deceased husband is requisite. The daughter's son in the matter of succession excludes the deceased's father and his brothers, but this judgment clearly lays down that they come before all others when it is a question of advising the widow on a proposed adoption. In my opinion the judgment does not confine the priority to the father and the brothers. The words,

"she is still dependent for her counsel and protection upon the nearest sapindas of her husband, who are the most closely united to him by ties of blood, or, to use the language of Hindu lawyers, by 'community of corporal particles'",

indicate that the priority extends to all the agnates, the nearer, of course, excluding the more remote. But if there were any doubt it would be eliminated

(1) (1868) 12 M.I.A. 397.

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by the following statement at page 1011 of the report :

"The reasons which make the assent of divided brothers a requisite condition apply *mutatis mutandis* to the case of the nearest sapindas other than brothers."

The word "sapindas" can only be read here as denoting agnates.

It is true that in *Veerabasavaraju* v. *Balasurya Prasada Rao*(1) it was said that the decisions in the *Ramnad* case(2) and in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(3) show clearly that the rights to property cannot be left out of consideration in determining who should be consulted before a widow of a separated brother makes an adoption. But this statement was made in connexion with the rule which was being laid down that in the absence of the father-in-law the brothers should be consulted. In the absence of a daughter's son they would be the nearest reversioners and their contingent right to the property was given as an additional reason why the brothers should be consulted. I am unable to read into the judgment in *Veerabasavaraju* v. *Balasurya Prasada Rao*(1) an indication that the right to property is to be the governing factor; in fact, when the authorities are considered as a whole it seems to me that the indication is all the other way.

In *Kristnayya* v. *Lakshmipathi*(4) Viscount CAVE, after reference to the *Ramnad* case(2) and to the case of *Veerabasavaraju* v. *Balasurya Prasada Rao*(1), said :

"The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. It must, however, be added that, save in exceptional cases such as those mentioned above (where the near agnate is a minor or lunatic or actuated by corrupt or malicious motives)

(1) (1918) I.L.R. 41 Mad. 998 (P.C.). (2) (1868) 12 M.I.A. 397.
(3) (1876) I.L.R. 1 Mad. 174 (P.C.). (4) (1920) I.L.R. 43 Mad. 650 (P.C.).

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the consent of the nearest sapindas must be asked, and if it is not asked, it is no excuse to say that they would certainly have refused."

There could be nothing plainer than this statement. The nearest agnates who are capable of forming an intelligent and honest judgment have to be consulted in the matter of a proposed adoption by a widow. It will be observed that the word "sapindas" is used in this passage and that the context demands that it be read as meaning "agnates".

In *Sri Krishnayya Rao* v. *Surya Rao Bahadur Garu*(1) the Privy Council observed :

"The sapindas are to be regarded as a family council, *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(2), the natural guardians of the widow, and the protectors of her interests, *Kristnayya* v. *Lakshmipathi*(3). In giving or withholding their consent, it is their duty, in this capacity, to form an honest and intelligent judgment on the advisability or otherwise of the proposed adoption in, and with reference to the widow's branch of the family . . . Their Lordships have no hesitation in holding that where a sapinda, whose consent to an adoption is sought, is actuated by motives such as these (personal loss to himself and enmity), his dissent may be disregarded, and they think it follows that, if only the other sapinda in the same degree accords a *bona fide* consent, the adoption will be valid."

The judgment in *Kristnayya* v. *Lakshmipathi*(3) was referred to in this judgment and it is to be presumed that the word "sapinda" was used in the same sense.

On behalf of the appellant great stress has been laid on a short passage in the judgment of the Privy Council in *Balasubrahmanya* v. *Subbayya*(4). This is the only case in which there were no agnates living and the decision turned on the question whether there was implied authority to adopt, independently of

(1) (1935) 69 M.L.J. 388 (P.C.). (2) (1876) I.L.R. 1 Mad. 174 (P.C.).
(3) (1920) I.L.R. 43 Mad. 650 (P.C.). (4) I.L.R. [1938] Mad. 551 (P.C.).

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consent by sapindas. The passage on which reliance is placed by the appellant is this :

"Their Lordships would not be prepared to hold on the authorities that the only kinsmen whose assent need be sought are the agnates."

It is said that this means that in using the words "kinsmen", "kindred", or "family council", the Privy Council must have had in mind both agnates and cognates. In view of the very definite statements in *Veerabasavaraju* v. *Balasurya Prasada Rao*(1) and in *Kristnayya* v. *Lakshmipathi*(2) this argument cannot be accepted in respect of cases where there are agnates living. I consider that the statement in *Balasubrahmanya* v. *Subbayya*(3) can only be taken as an indication that in their Lordships' opinion consultation is still necessary when the only surviving relatives are cognates. No assent of "kinsmen" was alleged in that case, but it was contended that, as there were no agnates in existence at the time of the adoption whose assent could be sought, the widow had an inherent right to adopt of her own volition. An issue was raised as to this in the trial Court, but the contention was subsequently abandoned. It was not raised in the argument on appeal and was not referred to in the printed case, but the contention was sought to be revived before the Board. The argument was rejected and it was in this connection that their Lordships made the observation on which the appellant places so much stress.

In my opinion the judgments of the Privy Council are to be read as deciding that the widow of a divided brother, not having received from her husband authority to adopt a son to him, can only do so when she

(1) (1918) I.L.R. 41 Mad. 998 (P.C.). (2) (1920) I.L.R. 43 Mad. 650 (P.C.).
(3) I.L.R. [1938] Mad. 551 (P.C.).

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has received the consent of her father-in-law, if alive. If the father-in-law is dead she must receive the assent of her husband's brothers. If there are no brothers living, the nearest agnates are her proper advisers. If consent is improperly withheld she may nevertheless lawfully adopt with the consent of the next nearest agnates. If there are no agnates she must look for advice to the cognates, it having been definitely laid down that she is not competent in law to decide on an adoption for herself. The same rule of priority will naturally apply in the case of cognates. In view of the emphatic statement with regard to the position of the father-in-law in the *Ramnad* case(1), the equally emphatic statements in *Veerabasavaraju* v. *Balasurya Prasada Rao*(2) with regard to priority (first the father-in-law, then the brothers, and after them the nearest agnates), and the express mention of the nearest agnates in *Kristnayya* v. *Lakshmipathi*(3), I fail to see how any other construction can be reasonably placed on the judgments of the Board dealing with this question. And to read them in this sense accords with the Hindu idea of the family. The agnates are the only true members of the family according to the Hindu idea.

In adopting a son to her husband the widow is only acting in accordance with the tenets of her religion. The happiness of her husband's soul may depend on there being a son to carry out the religious duties imposed upon a son by the Hindu religion. In *Amarendra Mansingh* v. *Sanatan Singh*(4) the Judicial Committee referred to the well-established doctrine as to the religious efficacy of sonship and their Lordships felt that great caution should be observed in

(1) (1868) 12 M.I.A. 397. (2) (1918) I.L.R. 41 Mad. 998 (P.C.).
(3) (1920) I.L.R. 43 Mad. 650 (P.C.). (4) (1933) I.L.R. 12 Pat. 642 (P.C.).

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shutting the door upon any authorized adoption by the widow of a sonless man. The judgment in that case recognizes the importance of an adoption from a spiritual point of view and indicates that the matter of succession to property is a secondary consideration. The only ground on which a daughter's son can really claim to be consulted is his interest in the property. He is not a member of the family and is only regarded as a sapinda for purposes of succession. He may if he cares to do so perform the religious duties which would fall upon the grandfather's descendants in the male line if there were such descendants, but admittedly there is no obligation upon him to perform them. If he neglects to carry out the ceremenies he commits no sin, but neglect in this respect by a son involves the commission of sin. The insistence on the widow seeking advice is based on her own incapacity to form a proper opinion for herself, and obviously the person least likely to give proper advice in such a matter is the son of her daughter who is a member of another family and will lose the whole estate if the adoption takes place. Moreover, he is likely to be a very young man, although he cannot be ruled out on this ground. While interest in the estate has been regarded as a factor in the choosing of advisers, the judgments of the Privy Council show that it cannot be regarded as the governing factor. Sound advice to the widow is the most important consideration in the performance of an act which may be regarded as a religious duty, certainly an act which according to the Hindu religion will confer spiritual benefit on her deceased husband. The best advice is obviously to be expected from the dead husband's agnates, and it seems to me that the Privy Council has clearly indicated that, if there are agnates, they and they alone are the proper advisers

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of the widow. In the present case the widow received the consent of her husband's nearest agnates and I hold that the fact that the major son of Rathamma did not consent does not invalidate the adoption.

The conclusion that the daughter's son is not entitled to be consulted is the conclusion which was arrived at by OLDFIELD and PHILLIPS JJ. in *Viswasundara Row* v. *Somasundara Rao*(1), by JACKSON J. in *Anne Brahmayya* v. *Chelasami Rattayya*(2) and by MADHAVAN NAIR and JACKSON JJ. in *Murahari Brahma Sastri* v. *Sumitramma*(3), and I may add that the same opinion is expressed in Mayne's Hindu Law, Tenth Edition, pages 223 to 225. In *Anne Brahmayya* v. *Chelasami Rattayya*(2) RAMESAM J., who formed the Division Bench with JACKSON J., held that the widow was bound to consult the daughter's son, and SPENCER and VENKATASUBBA RAO JJ. agreed with him in *Kesar Singh* v. *Secretary of State for India*(4). RAMESAM J. considered that there was nothing in the decisions of the Privy Council to show that cognates were not included in the rule with regard to the consultation of kinsmen and said that the word "sapindas", whatever its meaning in the *smritis* may be, can include agnates as well as cognates, referring in this connection to the judgment of the Judicial Committee in *Ramachandra Martand Waikar* v. *Vinayek Venkatesh Kothekar*(5). The question does not depend on whether the word "sapindas" may or may not be taken to include agnates as well as cognates speaking generally, but on the principles to be gathered from the judgments of Privy Council and as I have indicated I can see no reason whatever for supposing that

(1) (1920) I.L.R. 43 Mad. 876.
(2) (1924) 20 L.W. 503.
(3) (1933) I.L.R. 57 Mad 411.
(4) (1926) I.L.R. 49 Mad. 652.
(5) (1914) I.L.R. 42 Cal. 384 (P.C.).

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the Judicial Committee ever intended to lay down that cognates shall be consulted when there are agnates alive. In *Kesar Singh* v. *Secretary of State for India*(1) SPENCER J. observed that agnates should as a rule be consulted first, if there are agnates, because the principal agnates are the nearest kinsmen, but he saw no authority for limiting the class of *gnatis* and sapindas to agnates except the judgment of OLDFIELD and PHILLIPS JJ. in *Viswasundara Row* v. *Somasundara Rao*(2). VENKATASUBBA RAO J. expressed the opinion that if the judgments of the Privy Council did not embrace cognates as well as agnates a widow could not adopt if there were no surviving agnates, but he did not consider whether the judgments might be taken to apply to agnates in the first place and to indicate that cognates should be consulted in the absence of agnates. I have sufficiently indicated my opinion of the effect of the ruling of the Privy Council and it follows that I consider the judgments of RAMESAM, SPENCER and VENKATASUBBA RAO JJ. are erroneous and ought not to be followed.

It is a great pity that this question was not referred to a Full Bench for decision when the question was raised for the second time in *Anne Brahmayya* v. *Chelasami Rattayya*(3). While a Judge of the High Court sitting alone is not bound on a question of law by the decision of another Judge sitting alone, this principle goes no further. The Division Bench is the final Court of appeal in an Indian High Court, unless the case is referred to a Full Bench, and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law. In England, where there is the Court of Appeal, Divisional

(1) (1926) I.L.R. 49 Mad. 652. (2) (1920) I.L.R. 43 Mad. 876.
(3) (1924) 20 L.W. 503.

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Courts follow the decisions of other Divisional Courts on the grounds of judicial comity; see *The Vera Cruz* (No. 2)(1), *Harrison* v. *Ridgway*(2), *Ratkinsky* v. *Jacobs*(3) and *Phillips* v. *Copping*(4). If a Division Bench does not accept as correct the decision on a question of law of another Division Bench the only right and proper course to adopt is to refer the matter to a Full Bench, for which the rules of this Court provide. If this course is not adopted, the Courts subordinate to the High Court are left without guidance. Apart from the impropriety of an appellate Bench refusing to regard itself bound by a previous decision on a question of law of an appellate Bench of equal strength and the difficulty placed in the way of subordinate Courts administering justice, there are the additional factors of the loss of money and the waste of judicial time. There must have been a considerable waste of money and judicial time as the result of the question under discussion not having been referred to a Full Bench when the correctness of the decision in *Viswasundara Row* v. *Somasundara Rao*(5) was first questioned.

For the reasons given I consider the decisions of the Courts below in this case were right. Consequently I would dismiss the appeal with costs and fix the Advocate's fee at Rs. 200.

KRISHNASWAMI AYYANGAR J.

KRISHNASWAMI AYYANGAR J.—I concur in the conclusion reached by my Lord, which appears to my mind to interpret the decisions of the Privy Council more in accordance with the spirit of the Hindu law than the opinions of some of the learned Judges who have had to consider the point in the past. I am

(1) (1884) 9 P.D. 96. (2) (1925) 133 L.T. 238.
(3) [1929] 1 K.B. 24. (4) [1935] 1 K.B. 15.
(5) (1920) I.L.R. 43 Mad. 876.

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unable to find in the pronouncements of their Lordships a sufficient basis for assigning to the daughter's son a position of superiority over the agnatic kindred in the matter of consultation. Considerations of proximity, of religious merit, or of the proprietarp interest of the persons to be consulted, have no doubt been mentioned. But it will be found on scrutiny that such considerations were adverted to more by way of additional support for the recognized position of the agnatic group than as furnishing in themselves independent criteria in making the choice.

SOMAYYA J.

SOMAYYA J.—I agree with the judgment which has just been pronounced by my Lord the Chief Justice, but having regard to the importance of the question I wish to add a few words.

When a Hindu dies leaving a widow, divided agnates and daughter's sons, and his widow desires to make an adoption is it enough if she gets the consent of the divided agnates or is she bound to consult the daughter's sons as well?

In this case Subbamma, the widow of Lakshmi Narayana, the last male holder, obtained the consent of her husband's divided brother's sons under Exhibit G and adopted the first defendant who is the son of the second defendant. The second, third and fourth defendants are the husband's nephews who gave the consent under Exhibit G. Subbamma did not consult at least one of her daughter's sons. The question is whether the adoption is valid. The question has to be decided on a few texts of Hindu law and on judicial decisions. Under the Hindu law an adoption is always made to the husband. While the husband is alive he alone can adopt a son. He may associate his wife or one of his wives, if he has more than one wife, in the

act of adoption; but he need not associate any one of them and can make the adoption by himself.

The wife's capacity to make an adoption is based on the fact that adoption is an act which confers great spiritual benefit on her husband. But when can she make an adoption?

The text of Vasishta which is often quoted is:

"Nor let a woman give or accept a son unless with the assent of her lord."

This text is accepted by the various commentators but has been interpreted by them in different ways. One extreme view which has prevailed in the Mithila School is that "this consent of the husband must be given at the time of the adoption itself" so that no adoption is possible after the husband's death. Thus no adoption by a widow is possible under the Mithila School of law. The other extreme view is that which prevails in Bombay where it is held that adoption being an act conferring great spiritual benefit on the husband, his consent is presumed in the absence of a prohibition by him and a widow can therefore adopt except where the husband has prohibited it.

Between these two extreme views there are other views propounded by other schools of Hindu law. The Dayabhaga School of law of Bengal holds that, if the husband gives the authority to his wife to make an adoption to him, the authority may be exercised after his death. But if there is no such authority given by the husband during his lifetime, his widow cannot adopt. The Benares School of law agrees with the Bengal view. Yet another view has been advanced and accepted in the Dravida country that, even where the husband did not give the requisite authority, his widow can make an adoption with the consent of her husband's sapindas. The presumed incapacity of a

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woman to act independently is said to be the reason why she cannot make an adoption except with the husband's authority or his sapindas' consent.

The text which is generally relied on in this connexion is that of Yagnavalkya, Ch. I., pl. 85:

रक्षेत् कन्यां पिता विन्नां पतिः पुत्रास्तु वार्धके ।
अभावे ज्ञातयस्तेषां स्वातन्त्र्यं न क्वचित् स्त्रियाः ॥

"Let her father protect a maiden; her lord a married woman; sons in old age; if none of these other *gnatis*. She is not fit for independence."

This supposed want of independence of a woman to act for herself is said to be cured by the consent of her husband's ज्ञातयः (Gnathayah).

This expression ज्ञातयः in ordinary parlance is certainly confined to agnatic sapindas. But it is said that it may also include cognates as well, i.e., sapindas in general.

The smrithis and the commentaries do not contain any indication as to who is to be consulted by a widow in the absence of the authority of the husband. But in Strange's Hindu law there are set out a number of cases decided by this Court in which the widow's power of making an adoption with the consent of sapindas was upheld.

The matter came up in the *Ramnad* case(1) before the Judicial Committee. After referring to Strange and Colebrooke their Lordships recognized the power of a Hindu widow to adopt a son with the husband's kinsmen's consent. In later cases the Judicial Committee expressed the same view in different language.

The question now before us has to be decided mainly on the judicial decisions. In a case of this

(1) (1868) 12 M.I.A. 397.

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kind we have primarily to see what the Judicial Committee has laid down in the several cases which went up for decision.

In the *Ramnad* case(1) there was a very distant agnate of the husband and the mother of the husband. The widow adopted with the consent of both. The Judicial Committee held that the adoption was valid. The reference to the consent of the mother-in-law may be left out because it is on account of the presumed incapacity of a woman to act independently that the advice of the sapindas is enjoined on a widow. A person who is herself under an incapacity to act independently cannot supply the requisite advice or authority to another incapacitated person. It is conceded before us that female sapindas need not be consulted. In this very case the plaintiff, the daughter, was not consulted and the adoption is not attacked on that ground.

Then comes the question as to who among the husband's sapindas are entitled to be consulted and whose authority it is that has to be obtained by a widow desirous of making an adoption.

Adoption introduces a stranger into the husband's family and *prima facie* it is the members of that family that have to decide on the advisability of introduction of a stranger into that family.

The Privy Council observe in the *Ramnad* case(1) as follows:—

"The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption."

Then they say at page 443 that the Courts in India rightly found the members to be consulted in the

(1) (1868) 12 M.I.A. 397, 442.

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Tevar's family and refer to the printed pedigree which is in fact a pedigree of his agnatic sapindas.

In *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(1) the Judicial Committee laid down that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration by what may be called the family council of the expediency of substituting an heir by adoption to the deceased husband.

Taking these two cases, it is clear that the "family" spoken of is the husband's family and it is his kinsmen, i.e., the members of his family that are referred to in the above decisions.

So far, there is no indication that a daughter's son who is not a member of his family is a person who should be consulted by the widow. Then the next question is whether all the sapindas are to be consulted, if not, who among them are to be consulted, and in what order. This question was answered in three decisions of the Judicial Committee; *Venkamma* v. *Subramaniam*(2), *Veerabasavaraju* v. *Balasurya Prasada Rao*(3) and *Kristnayya* v. *Lakshmipathi*(4). It is clear from these decisions (i) that it is enough if she obtains the consent of the nearest sapindas and that, if she gets their consent, she need not go further and seek the consent of the remoter sapindas, (ii) that she is bound to consult all the nearest sapindas and failure to consult even one of them will be fatal, and (iii) that even if it be certain that the nearest sapindas would refuse to give their assent, still she is bound to consult them. In dealing with this question the Judicial

(1) (1876) I.L.R. 1 Mad. 174 (P.C.). (2) (1907) I.L.R. 30 Mad. 50 (P.C.).
(3) (1918) I.L.R. 41 Mad. 998 (P.C.). (4) (1920) I.L.R. 43 Mad. 650 (P.C.).

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Committee has used in *Veerabasavaraju* v. *Balasurya Prasada Rao*(1) language which is relied on by Mr. V. Govindarajachari in support of his case. In that case the nearest sapinda was not consulted at all; and the widow obtained the consent of the remoter sapindas and made the adoption. The Judicial Committee held that the adoption was invalid. Several passages on pages 1010 and 1011 were relied on by Mr. V. Govindarajachari as supporting his contention. His contention is that in that case the Judicial Committee definitely laid down three tests: (i) who confers greater spiritual benefit on the deceased? (ii) who is more closely related to the deceased according to the Mitakshara theory of propinquity? and (iii) who is the person whose proprietary rights are affected by the adoption? Mr. V. Govindarajachari urges that the Judicial Committee approved the opinion of Golupchandar Sirkar Sastri extracted on page 1011 of the report, while referring to the analogy of the sapinda whose consent will validate an alienation by the widow. He urges further that, whatever test is applied, the daughter's son comes first and that the brother's sons of the deceased come after the daughter's son. For the first test, he refers to Dharma Sindhu and Nirnaya Sindhu which give preference to the daughter's son in the performance of funeral ceremonies. For the second, he relies on the fact that the daughter's son is treated by the Mitakshara School of law as being more closely related to the deceased than the brother's sons according to the doctrine of propinquity. As for the third, he relies on the fact that a daughter's son succeeds in preference to a brother's son, and where the two co-exist it is the daughter's son whose proprietary rights are affected.

(1) (1918) I.L.R. 41 Mad. 998 (P.C.).

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The second and third points go together. The preferential right of the daughter's son is based upon specific texts of Manu and Vishnu. The preference given to the daughter's son is to be traced to the practice of an appointed daughter, in which case her son was considered to be in all respects equal to that of a son's son. Though this practice had become obsolete even by the time of Manu, the texts which give the preferential right to the daughter's son in general is traceable to the theory of the appointed daughter's son. When one daughter was not treated with a preferential right, sons of all daughters came to be regarded alike, but the position that was given to the appointed daughter's son in the scheme of succession is maintained and the Smrithi writers embodied in their Smrithis special texts giving the daughter's son in general a preferential right and making him inherit next after the widow and the daughter and before the father and the mother; *see* Manu, Ch. IX, pl. 127 to 136 and Vishnu, Ch. XV, pl. 46. As for the first ground urged it is not clear that in fact on the true principle of Hindu law relating to the efficacy of the funeral oblations, the daughter's son is in any way superior to a brother's son; *see* Sarvadhikari's Law of Inheritance, Second Edition, pages 662 and 663. He sums up the position thus on page 663 as to performance of *parvana sraddha*:

> "In the case of maternal ancestors, the daughter's son should also celebrate these rites as an act of moral obligation although not legally bound to do so."

He also points out that it is legally obligatory on a person to perform these rites as regards his *paternal ancestors*. Thus a brother's son is legally bound to offer pindas at *parvana sraddha* to the deceased's father and grand-father to whom the deceased also was

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offering pindas. But a daughter's son is not legally bound to offer any pindas to his maternal ancestors. Further, what a daughter's son offers are termed secondary pindas whereas the pindas offered by agnates are called primary pindas and the latter are supposed to be superior to the former.

After all, what has to be decided is whether an adoption was proper in the circumstances of any given case. As pointed out by the Judicial Committee, she is not to make an adoption with a view to spite this or that sapinda but on the expediency of substituting an heir by adoption to the deceased husband. In this task the Courts do not take upon themselves the duty of finding out whether in any particular case it is expedient and proper to introduce an heir by adoption to the husband. This duty is cast upon the widow's advisers and natural protecters. As an adoption introduces a new member into the husband's family, it is the members of that family that have to be approached by the widow to get the necessary consent. The right is the peculiar right of the members of that family. It is their right to judge whether a new member by adoption should be introduced into that family. As the Judicial Committee said in the *Ramnad* case(1), the Courts in India rightly found the members to be consulted in the Tevar family, i.e., his own agnatic family. In the decision in *Veerabasavaraju* v. *Balasurya Prasada Rao*(2) the observations at page 1009 are decidedly in favour of the view that the father and the brothers at any rate are entitled to be consulted in every case. As expressly laid down there, the father-in-law when alive is entitled to be consulted as the head of the family and as the

(1) (1868) 12 M.I.A. 397, 443.
(2) (1918) I.L.R. 41 Mad. 998 (P.C.).

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venerable protector and, in his absence, the brothers are said to take his place and they are entitled to be consulted.

Stopping here, if the view that is propounded by Mr. Govindarajachari for the appellant is correct, then the brothers at any rate are postponed to a daughter's son in the matter of consultation. Mr. Govindarajachari states that the father stands on a peculiar footing but he would ascribe it to a special text of Vidyaranya Swami extracted in the judgment of the Judicial Committee in the *Ramnad* case(1). Mr. Govindarajachari says that it is on account of the special text that the father of the deceased or the father-in-law of the adopting widow is given that peculiar position and he argues that even the brothers are not entitled to be consulted in preference to a daughter's son. But the passage in *Veerabasavaraju* v. *Balasurya Prasada Rao*(2) at page 1009 leaves no room for doubt that, in the absence of the father, the brother is placed in the same position which the father occupied. The Judicial Committee says that the brothers are as much interested in the protection of the inheritance and in the spiritual welfare of the deceased as the father-in-law was and the two are placed in the same position so far as this matter is concerned. If therefore we read the passage at page 1009 of the above report, it is clear that the Judicial Committee treats the father and the brothers as standing on the same footing. When the father is alive, he is to be consulted and when he is dead, the brothers are entitled to be consulted. Their consent is an essential requisite and it is enough if their consent is got. The passages occurring in pages 1010 and

(1) (1868) 12 M I.A. 397, 443.
(2) (1918) I.L.R. 41 Mad. 998, 1008 (P.C.).

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1011 are therefore to be understood as dealing with practical rules to be applied as to who, among the various agnatic sapindas, are to be consulted, and in what order. So understood, the passages at pages 1010 and 1011 become easy of application among the agnatic sapindas. Those who are nearer in degree, those who offer greater spiritual benefit, those who would succeed in preference to others, are the persons entitled to be consulted first. Indeed, if they are not consulted, the mere fact that she gets the consent of a larger number of remoter sapindas does not cure the defect. Further, Mr. AMEER ALI who delivered the judgment of the Board in *Veerabasavaraju* v. *Balasurya Prasada Rao*(1) refers at page 1004 to the decision in the *Ramnad* case (2) as having laid down that a widow may adopt with the consent of *male agnates*. Whatever doubts there might have been if the judgment in *Veerabasavaraju* v. *Balasurya Prasada Rao*(1) stood alone, the later pronouncement of the Judicial Committee in *Kristnayya* v. *Lakshmipathi*(3) leaves no room for doubt that throughout it is the agnatic sapindas that are referred to in all these decisions. In *Kristnayya* v. *Lakshmipathi*(3) the Judicial Committee referred to the *Ramnad* case(2) and to the case of *Veerabasavaraju* v. *Balasurya Prasada Rao*(1) and then said as follows :—

"The consent required is that of a substantial majority of those *agnates* nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. It must however be added that, save in exceptional cases such as those mentioned above (where the nearer *agnate* is a minor or a lunatic or actuated by corrupt and malicious motives), the consent of the nearer sapindas must be asked and if it

(1) (1918) I.L.R. 41 Mad. 998, 1009 (P.C.).
(2) (1868) 12 M.I.A. 397. 443.
(3) (1920) I.L.R. 43 Mad. 650 (P.C.).

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is not asked it is no excuse to say that they would certainly have refused."

Coming after the decision in *Veerabasavaraju* v. *Balasurya Prasada Rao*(1), and that within two years of that decision, the above passage leaves no room for doubt that it is the agnatic sapindas who are nearest in degree and who are capable of forming an honest opinion on the question of the expediency of introducing an adopted son that are entitled to be consulted.

We are now not concerned with the question whether in the absence of agnates the widow might adopt with the consent of cognates. If both agnates and cognates co-exist the agnates must certainly be consulted in preference to cognates. In *Kesar Singh* v. *Secretary of State for India*(2) SPENCER J. lays down the rule that, when both cognates and agnates exist, the agnates are entitled to preference in the matter of consultation. It is not necessary to say much about the observations of the Judicial Committee in the recent *Uthumalai* case(3) (*Balasubrahmanya* v. *Subbayya*). As pointed out in the judgment of my Lord just delivered the question did not arise for decision. The point had been mooted in the trial Court but had been given up in the trial Court. This was not urged in the High Court or in the printed case before the Judicial Committee. The Judicial Committee was not prepared under the circumstances to allow the appellant to raise that question at all. Having said so, there is the observation relied upon by Mr. Govindarajachari. This cannot be taken to be a definite pronouncement on the question. At any rate

(1) (1918) I.L.R. 41 Mad. 998 (P.C.). (2) (1926) I.L.R. 49 Mad. 652.
(3) I.L.R. [1938] Mad. 551 (P.C.).

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it does not deal with the question which we have now to decide.

I therefore concur in the opinion pronounced by my Lord, the learned CHIEF JUSTICE.

G.R.

APPELLATE CIVIL—FULL BENCH.

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

1939. November 20.

RAJAH SRIMATHU MUTHU VIJIYA RAGHUNATHA DURAISINGAM *alias* GOWRI VALLABHA THEVAR AVARGAL, ZAMINDAR OF SIVAGANGA THROUGH THE ESTATE COLLECTOR, SIVAGANGA (PLAINTIFF), APPELLANT,

v.

PERIYASAMI PILLAI (DEFENDANT), RESPONDENT.*

Madras Estates Land Act (I of 1908), *ss.* 187 (1) (*e*) *and* 24—*Meaning of—Agreement between landholder and tenant commuting rent, if valid—Consent statements by tenant agreeing to pay money rent instead of rent in kind—Stamping and registration, if necessary—Indian Stamp Act (II of* 1899), *article* 35—*Indian Registration Act (XVI of* 1908), *sec.* 17.

The Madras Estates Land Act, 1908, does not prevent a landholder and his tenant agreeing to change the basis of the rent, i.e., from a rent in kind to money rent, provided it does not lead to an enhancement of the rent. Section 187 (1) (*e*) of the Act means that when rent is payable in kind a tenant shall not be bound by a contract which prevents his applying for an order under section 40.

Where, therefore, under the provisions of the Act before its amendment in 1934 and 1936, a landholder filed suits against his tenants for recovery of money rent on the footing that there had been a valid commutation based on two different

* Second Appeals Nos. 146 to 175, 178 to 192, 194 and 195 of 1934.

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kinds of consent statements and followed up in some cases by exchange of pattas and muchilikas and in others by mere tender of pattas, and the tenants filed suits against the landholder contesting his right to distrain or to sell on such basis,

held: (i) Consent statements of a kind which amount to mere undertakings by tenants to accept pattas, if pattas be drawn up in accordance with the terms mentioned therein, are only offers and not completed agreements and do not require stamping or registration. Nor do pattas tendered or accepted in accordance with such statements require stamping or registration, as they do not purport to create tenancies for more than one year and as agricultural leases which do not exceed the term of one year are exempt from stamping and registration. The fact that a patta contains statements which are intended to bind the tenant if he happens to remain in occupation for a longer period will not turn the patta into a lease for more than one year. Accordingly, where such pattas have been tendered to or accepted by tenants, the landholder is entitled to decrees for money rent against the tenants, provided the money rent does not exceed the value of the grain rent ruling before the commutation. The tenants are not entitled to contest the landholder's right to distrain or to sell for arrears of rent in such cases.

(ii) Consent statements of a kind which amount to agreements to pay rent in money instead of in grain and contemplate permanent tenancies at definite money rent require stamping and registration and are inadmissible in evidence without them. Where such consent statements or no consent statements at all have been signed by tenants the landholder cannot rely on mere presentation of pattas and is not entitled to decrees or to distrain or to sell for recovery of money rent without actual exchange of pattas and muchilikas.

(iii) Even in cases where pattas and muchilikas are exchanged, the landholder is not entitled to the above reliefs if the money rents claimed exceed the value of the grain rents ruling before the commutation. Such arrangements for increased rent are illegal under section 24 of the Act.

APPEALS against the decrees of the District Court of Ramnad at Madura in Appeal Suits Nos. 124 and 275 of 1930, 58, 78, 107, 108, 109, 176, 131, 183, 288,

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289, 290, 201, 202, 205, 216, 217, 224, 225, 228, 242, 246, 276, 277, 263, 264, 295, 296, 364, 366, 282, 365, 291, 292, 330, 331, 332, 333, 334, 363, 370, 413 and 414 of 1931, 137 and 138 of 1932, respectively, preferred against the decrees of the Court of the Additional Special Deputy Collector of Manamadura in Summary Suits Nos. 2667 of 1929, 3830 of 1928, 871, 2888, 1765, 2851, 3353, 4115, 2707 and 2865 of 1930, 6692 of 1928, 2019 and 2863 of 1929, 2835, 2861, 1657, 1340, 1510, 4405 and 4416 of 1930, 3528 of 1927, 3604, 2300 and 2555 of 1929, 6695, 6709, 6614 and 6919 of 1928, 2269, 3627 and 3030 of 1929, 2340 of 1930, 2077 of 1929, 1992 of 1930, 3507 of 1929, 1656 of 1930, 2023, 2017, 2869, 2874 and 2876 of 1929, 1655 and 2282 of 1930, 3631 of 1929, 4894 of 1930, 3720 and 3250 of 1931, respectively.

The Advocate-General (*Sir A. Krishnaswami Ayyar*) for *K. Subramaniam* for appellant.

B. Sitarama Rao for *V. Ramaswami Ayyar* and *K. Desikachari* for respondents 1, 3, 7, 8 and 9.

Other respondents were not represented.

The facts of the case and the arguments of Counsel appear fully from the Judgment of the CHIEF JUSTICE.

Cur. adv. vult.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—These appeals raise a number of questions of importance to landholders and ryots in the Madras Presidency. The appellant is the Zamindar of Sivaganga which is one of the important zamindaris of Southern India. Before 1922 it was the custom of the tenants to pay their rent in kind, but in that year the Court of Wards, which was then in charge of the estate, formulated a scheme for the permanent commutation of rent in kind to rent in

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money. The scheme provided for the tenants signifying their acceptance in writing of the proposal and for the exchange of pattas and muchilikas drawn up on the new basis. At the time the scheme was viewed with favour by the tenants. Practically all of them signed consent statements and many of them accepted pattas which stipulated for the payment of the rent in money, but owing to the large number of tenants it was not possible to complete the arrangement by the issue of pattas to all of them while grain prices remained stable, and some tenants refused to accept the pattas tendered when their turns came because prices had fallen. In 1928 the appellant filed a number of suits for the recovery of money rents on the footing that there had been a valid commutation. Some of the suits were defended on the ground that the appellant was not entitled in law to payment of rent in money. In other cases the appellant had distrained and had taken proceedings for the sale of the holdings for the non-payment of rent in money. The question of the legality of the demand for rent in money having been raised, some of the tenants filed suits contesting the right of the appellant to distrain or to sell. In September 1930 there were pending in the Revenue Court 2,310 suits in which the appellant or tenants were the plaintiffs. These suits were tried by three Deputy Collectors, but for the purposes of this appeal it is only necessary to refer to the judgment of one of them, namely, that of Mr. Amritaswami Pillai, which was delivered on 15th September 1930. In 94 cases, appeals were filed in the Court of the District Judge of Ramnad who dealt with them in one judgment. Second Appeals were filed in 50 cases and 47 of these appeals are now before us. The learned Counsel engaged in the appeals have agreed that this

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Court can also conveniently deal in one judgment with all the questions raised.

Before referring to the judgments below it is necessary to examine the terms of the consent statements signed by the tenants, the terms of the pattas which were issued in pursuance of those statements and certain of the provisions of the Madras Estates Land Act, 1908. There were two forms of consent statements. These have been marked as Exhibit A and Exhibit A-1 respectively. Exhibit A reads as follows :—

"When the Settlement Officer inspected the said lands for the levying of cash theerva for the undermentioned nanjas and punjas relating to division by waram which pertain to my patta aforesaid and which are in my enjoyment in the said village, I was also present. As regards those lands I have agreed to the tharamwar division having regard to the nature of the lands set out below. I consent to the levying of compound theerva cash theerva per acre per annum for both crops inclusive of the winter and summer crops according to the rate fixed against them. As regards the bundle of sheaves *kaichai* (alms) and mason and carpenter bundles to be given usually to the village servants, I shall give them personally. Besides these, I agree to pay the rate fixed per rupee in respect of the undermentioned cash theerva, *magamai*, *swathantharam*, and road cess in connection with the melvaram due to the zamindar. If cash theerva is fixed in that manner, I am willing to obtain patta."

The word *Magamai* means contribution for charity and the word *Swathantharam* the charge made on tenants in respect of services rendered by village officers. While this statement clearly contemplates the fixing of rent on a cash basis, it cannot, by reason of the concluding sentence, be read as being anything more than an undertaking by the tenant to accept a patta if a patta be drawn up in accordance with the terms mentioned in the statement signed by him. In other

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words, it is merely an offer by the tenant and not a completed agreement. The agreement could only be completed by the tender to the tenant of a patta drawn up in accordance with his offer.

The consent statement in the form of Exhibit A-1 is very differently worded. It says :—

"In view of the advantage resulting from the conversion of waram, varisai, etc., taxes, fixed for my lands in my holding and specified in the schedule below, into cash tax, the Estate Officer has inspected the said lands to fix a reasonable and proper cash theerva having regard to the nature of the land and the facilities and otherwise thereof and fixed the tharam and also the rate against each land; and I have agreed to the same being satisfied with the fairness thereof. Hence I agree to pay for ever from fasli 133 to the landholder the theerva due according to the same in each fasli.

Further I agree to pay to the landholder, *magamai*, *swathantharam*, etc., at pies . . . per rupee and land-cess and stone tax, etc., and sheaves, alms, covil virappu, mason and carpenter bundles, etc., usually due to the village servants. As regards the theerva due for each land now, I have hereby agreed to pay, for ever, the same in each fasli whatever kind of crop is raised and whatever may be the number of crops raised in each fasli. Exchange of patta and muchilika as soon as they are prepared as shown in the reverse hereof, is hereby agreed to."

This goes far beyond an offer. It constitutes a definite agreement to pay rent for ever in accordance with the figures set out in the document.

The Madras Estates Land Act, 1908, was amended in 1934 and again in 1936, but all these cases arose before the amendment in 1934, and, with the possible exception of section 187, regard can only be had to the sections of the Act as they stood in 1908. Therefore unless otherwise mentioned in this judgment the statements of the various provisions of the Act do not embody the amendment. Section 50 (2) states that every ryot shall be entitled to call upon his landholder

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to grant him a patta for any current revenue year and every landholder shall be entitled to call upon his ryot to give him a muchilika for any current revenue year in exchange for a patta. Section 51 sets out what the patta and the muchilika shall contain. Section 52 says that pattas and muchilikas may be exchanged for periods of one or more revenue years, but no landholder shall be bound to render, and no ryot to accept, a patta for a period of more than one revenue year. Pattas and muchilikas accepted, exchanged or decreed for any revenue year shall remain in force until the commencement of the revenue year for which fresh pattas and muchilikas are accepted, exchanged or decreed; provided that where a patta or muchilika has continued in force for more revenue years than one, no fresh patta or muchilika for the same holding shall take effect until the commencement of the revenue year next succeeding that in which it is tendered, accepted, exchanged or decreed. Section 53 states that no landholder shall have power to proceed against a ryot for the recovery of rent by distraint and sale of his moveable property or by sale of his holding unless he shall have exchanged a patta and muchilika with the ryot or tendered him such a patta as he was bound to accept or unless a valid patta or muchilika continues in force. Section 55 provides that when a landholder, for three months after demand, fails to grant a patta in such terms as the ryot is entitled to receive, it shall be lawful for the ryot to sue for a patta before the Collector. Section 56 gives the landholder the same right to sue for the acceptance of a patta by a ryot when the ryot for one month after tender fails to accept the patta tendered to him and to give a muchilika in exchange. In suits arising under section 55 or section 56 the Collector is given by section 57

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the power to settle the terms of the patta and the muchilika. Therefore where a patta has expired the tenant, if he remains in occupation, continues to hold under the terms embodied in the expired patta unless a new patta is granted by the landholder or settled by the Collector under section 57.

Section 40 of the Act provides that where a ryot pays rent in kind or on the estimated value of a portion of the crop, or at rates varying with the crop, 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 sue before the Collector to have the rent commuted to a definite money rent. Section 187 (I) (*e*) states that nothing in any contract between a landholder and a ryot made before or after the passing of the Act shall take away the right of a landholder or an occupancy ryot to sue for a commutation of rent under section 40. By the Madras Estates Land (Amendment) Act, 1934, the word "apply" has been substituted for the word "sue" in section 187 (I) (*e*). Inasmuch as this section applies to a contract before and after the passing of the Act it has been suggested that the amended section applies to the present appeals. But the question is not of importance because nothing really turns on whether the right is "to sue" or "to apply" for commutation of rent. The main question is whether an agreement between the appellant and a tenant for the commutation of a grain rent to a money rent is rendered unlawful by reason of section 187 (I) (*e*). The appellant says that where a tenant has agreed to pay rent in money instead of in kind section 40 has no application. For the tenants it is said that section 187 (I) (*e*) renders the agreement void and the tenant is entitled

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to apply at any time under section 40 for commutation of rent payable in grain to a definite money rent.

The Revenue Court's findings may be summarised as follows: (i) A consent statement whether in the form of Exhibit A or of A-1 does not require to be stamped or registered, and this applies also where a patta and a muchilika have been exchanged; (ii) the mere tender of a patta by the appellant to a tenant in pursuance of the terms of a consent statement does not amount to a completed agreement and the appellant is not entitled to sue for rent on the basis of a mere tender of patta; (iii) where a patta has been accepted and a muchilika exchanged the arrangement for the payment of a money rent is binding on the tenant who is not entitled to apply for commutation of rent under section 40; and (iv) a patta which has been accepted, exchanged or decreed continues in force by virtue of section 52 (3) notwithstanding that the period for which it was issued has expired. On these findings the Revenue Court held that the appellant was only entitled to file rent suits in cases where pattas and muchilikas were exchanged and that the tenants were entitled to have the proceedings by way of distraint or for sale of holdings set aside in all cases where the landholder had relied merely on the signing of consent statements or on the signing of such statements followed only by the presentation of pattas.

The findings of the District Judge were these: (i) There is a right to contract apart from the Act, but this right does not affect the force of section 187 (1) (*e*) and in spite of a completed agreement for the payment of rent in money the tenant has the right of applying to the Revenue Court for the fixing of a money rent under section 40; (ii) the appellant had taken advantage of the trust of his tenants; he had created

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new tenancies under new rates and upon new terms which were entirely unfavourable to the tenants and he had been guilty of "legal fraud"; (iii) even where pattas and muchilikas had been exchanged the appellant had not regarded himself as being bound by their terms; and (iv) inasmuch as the consent statements had not been stamped there could be no contract, even where a patta and a muchilika had been exchanged.

I will first deal with the questions of stamping and registration. A consent statement in the form of Exhibit A obviously does not call for stamping or registration, being merely an offer, and the position is not altered by the presentation of a patta in accordance with the offer or the exchange of a patta for a muchilika. None of the pattas tendered was for more than one year. Agricultural leases which do not exceed the term of one year are exempt from stamp duty and registration (*see* article 35 of the Stamp Act and section 17 of the Registration Act). A consent statement in the form of Exhibit A-1 is, however, on a different footing, as it amounts to an agreement to pay rent in money instead of in grain and contemplates a permanent tenancy at a definite money rent. An agreement which varies the rent payable by the lessee requires registration; See *Subramanian Chettiar* v. *Arunachalam Chettiar*(1) and *Durga Prasad Singh* v. *Rajendra Narain Bagchi*(2) affirmed on appeal to the Privy Council in *Durga Prasad Singh* v. *Rajendra Narayan Bagchi*(3). Therefore in those cases in which the consent was in the form of Exhibit A-1 stamping and registration were necessary before the statement could be put in evidence and as the requirements of

(1) (1902) I.L.R. 25 Mad. 603 (P.C.) (2) (1909) I.L.R. 37 Cal. 293.
(3) (1913) I.L.R. 41 Cal. 493, 506 (P.C.).

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the Stamp and Registration Acts were not complied with, the statement could not be proved. In such a case the appellant could not rely on the mere presentation of a patta and the agreement could only be proved if a patta and a muchilika were actually exchanged. If they were exchanged they could be put in evidence without stamping or registration because they did not purport to create a tenancy for more than one year. It has been contended that, as the pattas actually issued stated that the rents were not liable to any alteration except for reasons contemplated in section 41 of the Madras Estates Land Act and as the pattas were intended to bind the tenants, their heirs and assigns, registration was necessary. But this contention cannot be accepted. The governing factor is that each patta was for one year only. The fact that a patta contains statements which are intended to bind the tenant if he happens to remain in occupation for a longer period will not turn the patta into a lease for more than one year.

There is no justification whatever for the findings of the District Judge that the new arrangement in all cases had resulted in enhancement of rent and that the landholder had acted unfairly. The District Judge based these sweeping statements upon an examination of one case. Section 24 of the Act provides that the rent shall not be enhanced except as provided by the Act, but on the printed record there is no indication that there has been general enhancement. The arrangement for the payment of rent in money was made while the estate was under the control of the Court of Wards. As a preliminary to the introduction of the system a survey was carried out by the Madras Survey Department. The lands were classified and the money rents were based on the average

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income for a number of years. While there is no reason to suppose that the calculations were not fairly made the Act does not permit of a standard rent being charged where it would mean an increase in the rent. Therefore each case will have to be considered on its merits. If it is shown that in any particular case the rent fixed is higher than before, the tenant will not be bound to pay it, even where a patta has been accepted and a muchilika exchanged, because the arrangement would be illegal under section 24.

The finding of the District Judge that the appellant has not regarded himself as being bound, even where pattas and muchilikas have been exchanged, also cannot be accepted. His finding here was based on his view of the evidence in two suits only. In each case the suit was for the waram because the pattas and muchilikas had been lost. There is no justification whatever for the District Judge's opinion that the appellant has resiled from agreements made by him or on his behalf.

Turning now to the question whether section 187 (1) (*e*) renders an agreement to pay rent in money instead of in kind unlawful it is to be observed that this Court has recognized the right of the landholder and the tenant to agree to the permanent commutation of a grain rent into a money rent. In *Varada Reddi* v. *Srinivasa Mudaliar*(1) it was held that a landholder was entitled to revert to the *waram* system unless the tenants established that it had been superseded permanently as the result of a contract, express or implied, for the payment of rent in money. Similar decisions were given in *Ayyaperumal Odaiyan* v. *Ramasami Chettiar*(2) and in *Muthiah Chettiar* v.

(1) (1923) 45 M.L.J. 199. (2) (1915) 29 M.L.J. 362.

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Periyan Kone(1). In none of these cases, however, was the question of the effect of section 187 (1) (*e*) considered. As I have pointed out, section 40 gives the right to the landholder or the ryot to apply to the Collector to have rent payable in kind commuted to a money rent. Mr. Sitarama Rao has conceded that where a permanent arrangement for the payment of rent in money was entered into before the Act, a tenant would not have the right to apply under section 40, but he says that section 187 (1) (*e*) prevents him from entering into any such contract after the passing of the Act. If before the Act a tenant could agree to change the *waram* for a money rent I fail to see how section 187 (1) (*e*) alters the position. Section 187 expressly applies to contracts made before and after the passing of the Act. Therefore, if the section has the effect which the respondents say it has, it would render void any contract of this nature made before the Act came into force, but it is admitted that it does not apply to contracts entered into before the Act was placed on the statute book. The Act does not prohibit the landholder and the tenant agreeing to change the basis of the rent, provided that it does not lead to an enhancement of the rent, and I consider that section 187 (1) (*e*) means that where rent is payable in kind a tenant shall not be bound by a contract which prevents his applying for an order under section 40. He can agree to pay his rent in money and if he does so there is no need for an order of commutation. The position contemplated by section 40 no longer exists. If the money rent agreed upon turns out to be unfair to the tenant he is not without his remedy. Sections 55 and 57 provide ample safeguards.

(1) (1919) 11 L.W. 311.

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The suits out of which the appeals have arisen and are now before us will be remanded to the Revenue Court for reconsideration and decision in accordance with the following directions :—

Rent suits filed by the appellant.

The appellant will, subject to a qualification which follows, be entitled to decrees for rent in those cases in which the tenants have signed consent statements in the form of Exhibit A and to whom pattas have been presented in accordance with such statements. The appellant will also be entitled to decrees in suits in which pattas and muchilikas have been exchanged and have remained in force. He will not be entitled to decrees in those suits in which consent statements in the form of Exhibit A-1 have been signed unless pattas and muchilikas have been exchanged. But in no case will he be entitled to a decree where the money rent exceeds the value of the grain rent which applied before the new system was introduced. Where the appellant cannot claim rent in money he will be entitled to the grain rent provided he amends his plaint.

Suits by tenants for setting aside distraints and proceedings for sales.

The tenants will be entitled to decrees in cases where there were no consent statements signed unless they accepted pattas. In cases where the consent statement was in the form of Exhibit A and pattas were tendered the suits will not lie. Where pattas were accepted the tenants will still be entitled to succeed if the money rents exceeded the value of the grain rents ruling before the commutation.

These directions will only apply to the suits in which decrees have been passed and are now under appeal. Where no appeal has been filed the decree

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of the Revenue Court or of the District Court as the case may be must stand.

The appellant having succeeded in the main, he is entitled to his costs, and we fix the Advocate's fee in each case at Rs. 10.

The appellant is entitled to the refund of the Court fee paid on the memoranda of Second Appeals under section 13 of the Court Fees Act.

N.S.

APPELLATE CIVIL—FULL BENCH.

Sir Lionel Leach, Chief Justice, Mr. Justice Krishnaswami Ayyangar and Mr. Justice Patanjali Sastri.

1939, October 11, and November 24.

SIVAPRASAD SOWCAR (PLAINTIFF), APPELLANT,

v.

SEKHARAMANTRI NARASIMHAMURTHY (DEFENDANTS), RESPONDENTS.*

Madras Survey and Boundaries Act (IV of 1897), ss. 11 and 12—Order of survey officer or appellate authority under—Effect of, on continuity of adverse possession held by unsuccessful party—Unsuccessful party remaining in possession of disputed area after adverse order—Effect.

An order of a survey officer under section 11 of the Madras Survey and Boundaries Act (IV of 1897) or of the appellate authority under section 12 of the Act, in itself has not the effect of causing a break in the continuity of the adverse possession held by an unsuccessful party so as to preclude his making use of the period of his prior possession to make up the period of twelve years required by the Indian Limitation Act to complete his title. If the unsuccessful party remains in

* Second Appeal No. 863 of 1935.

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adverse possession of the disputed area for over twelve years his title is good irrespective of any order passed under the Act.

The majority decision in *Ramamurthi* v. *Gajapatiraju*(1) overruled and the observations in *Achutharamayya* v. *Soorappayya*(2) disapproved.

APPEAL against the decree of the Court of the Subordinate Judge of Vizagapatam in Appeal Suit No. 203 of 1934 preferred against the decree of the Court of the District Munsif of Vizagapatam in Original Suit No. 174 of 1931.

The appeal came on for hearing when the Court (KRISHNASWAMI AYYANGAR and SOMAYYA JJ.) referred the following question for the opinion of a Full Bench:

"Whether the order of a survey officer under section 11, or of the appellate authority under section 12, of the Madras Act (IV of 1897) has the effect of causing a break as on the date of the order, in the continuity of the adverse possession held by the unsuccessful party, so as to preclude his making use of the period of his prior possession to make up the period of twelve years required by the Limitation Act to perfect a title by adverse possession?"

B. V. Ramanarasu for appellants.

Y. Suryanarayana for first respondent.

Other respondents were not represented.

Cur. adv. vult.

OPINION.

LEACH C.J.

LEACH C.J.—A person named Kantimahanti Appalanarasayya obtained a decree against one Sekharamantri Appalaswami and in execution of that decree attached immovable property belonging to the latter in Allipuram, a suburb of Vizagapatam. The

(1) (1932) I.L.R. 56 Mad. 366. (2) (1938) 2 M.L.J. 894.

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property was sold at a court-auction on 7th January 1916 and the decree-holder became the purchaser, the sale certificate being issued to him on 2nd July 1920. Appalanarasayya took no steps to gain possession of the property which remained with the judgment-debtor. In the year 1922 a re-survey of all the properties lying within the boundaries of Vizagapatam took place. The property which was the subject of the court-auction was registered as Survey No. 967. Notwithstanding that Appalanarasayya had made no attempt to obtain possession of this property, he claimed it as his, and although the survey officer's order has not been produced, it would appear that he was registered as the owner and Appalaswami as the owner of an adjoining area marked as Survey No. 999. The Court has been given to understand that before the sale Appalaswami was the owner of both the areas. The survey officer's order was passed under the provisions of section 11 of the Madras Survey and Boundaries Act, 1897. An appeal from the order was preferred under the provisions of section 12 of the Act and the appellate authority passed an order in these terms:

"The complaint in respect of Survey Nos. 967 and 999 relate to wrong registration and as such does not fall within the scope of the Boundary Dispute Act IV of 1897. The present registry in the names of Kantimahanti Appalanarasayya and Sekhara Mahanti Appalaswami, respectively is confirmed."

It is common ground that there was no dispute as to the boundaries of the respective properties. The only dispute was whether Appalanarasayya or Appalaswami's name should be registered as the owner of Survey No. 967.

In 1926 Appalanarasayya mortgaged Survey No. 967 to the appellant in the appeal out of which this

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reference arises. The appellant filed Original Suit No. 299 of 1927 of the Court of the District Munsif of Vizagapatam to enforce his mortgage. He obtained a decree and the property was sold by the Court on 6th July 1929, the purchaser being the appellant to whom a sale certificate was granted on 10th October 1929. Appalaswami, who was in possession and had remained in possession throughout, refused to deliver the property to the appellant and Appalaswami's possession having been established the appellant's application was dismissed. Within one year of the order of dismissal the appellant instituted the present suit in the Court of the District Munsif of Vizagapatam for a decree for possession. At the date of the suit Appalaswami had been in adverse possession of the property continuously for fifteen years, unless the orders passed under the Madras Survey and Boundaries Act, 1897, operated to create in law a break. The District Munsif dismissed the suit holding that the orders passed in the survey proceedings did not disturb the continuity of Appalaswami's possession. On appeal the Subordinate Judge concurred in this decision. A second appeal was then filed to this Court and came before KRISHNASWAMI AYYANGAR and SOMAYYA JJ. In view of the conflict which exists in the authorities the learned Judges have referred the following question to a Full Bench :—

"Whether the order of a Survey Officer under section 11, or of the appellate authority under section 12, of the Madras Act (IV of 1897) has the effect of causing a break as on the date of the order, in the continuity of the adverse possession held by the unsuccessful party, so as to preclude his making use of the period of his prior possession to make up the period of twelve years required by the Limitation Act to perfect a title by adverse possession ?"

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This Bench has been constituted to answer the question.

Before turning to the authorities it is necessary to examine in some detail the provisions of the Madras Survey and Boundaries Act, 1897. That Act has been replaced by the Madras Survey and Boundaries Act, 1923, but as the survey proceedings took place under the old Act regard can only be had to the provisions of the former Act. I may in passing mention that, so far as this case is concerned, there is no material difference between the two Acts. The Act of 1897 was an Act relating to survey of lands and settlement of boundary disputes and its provisions can only have application to such matters. Section 11 (1) provided that if, at the time of survey, a boundary was undisputed the survey officer might order that the boundary should be laid down as pointed out by the registered holder or his agent. Sub-section 2 said that, if the registered holder was not present, or if the boundary was disputed, the survey officer should order it to be laid down, as nearly as might be, in accordance with the village records, or as ascertained from the village officers and from such other evidence as the survey officer might be able to procure. Sub-section 3 said that the order passed by the survey officer in the case of any dispute under sub-section 2 should be recorded in writing and the purport thereof communicated forthwith to the parties to the dispute, a copy of the order being furnished to them on their application and at their cost. Sub-section 4 said that, when the survey of a village or other defined local area forming part of the land under survey had been completed in accordance with the orders passed under sub-sections 1, 2 and 3, the survey officer should notify the fact as soon as practicable thereafter.

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Section 12 provided for appeals against orders under section 11. Sub-section 3 of that section said that the order of the survey officer, or, in the event of an appeal being filed, the decision of the appellate authority should be final, and there should be no further appeal from such decision. But section 13 allowed the matter to be carried further by a suit. It said that any party to a boundary dispute before the survey officer, and any party to an appeal preferred under section 12 or to whom notice of such appeal was given, and any person claiming under any such party who deemed himself aggrieved by the order of the survey officer, or by the decision of the appellate authority, as the case might be, might, subject to the provisions of the Indian Limitation Act, institute within a period of one year from the date of such order or decision, a suit to establish the right which he claimed "in respect of the boundary of the property surveyed", provided that, subject to the result of the suit, if any, the order or decision should be conclusive. To this section was added an explanation in these words:

"Where parties litigate *bona fide* in respect of boundaries of property claimed in common for themselves and others, all persons interested in such boundary dispute shall, for the purpose of this section, be deemed to claim under the parties so litigating."

There was no provision in the Act for the decision of any question of title unless it was in respect of land involved in a boundary dispute. If there was a boundary dispute the Act provided the machinery for its settlement and the survey officer's order demarcating the boundaries was final subject to an appeal under section 12 or to the decision in a suit under section 13. When it was a matter of a boundary dispute the survey

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officer had to decide where the boundary should lie and if he decided that the piece of land in dispute fell within the boundary of one of the opposing parties his order did affect the title to that particular piece of land. Where there was no boundary dispute, but in making the survey the survey officer found that two persons were claiming title to the same holding, he would for the purposes of the register have to decide whose name should be inserted therein as the owner, but this in itself did not mean that the Act empowered the survey officer or the appellate authority to decide who was in law entitled to the property under survey. I can find no provision in the Act which can be read as operating in such circumstances to prevent A, when B had been registered as the owner of a holding, from instituting a suit in a Court of competent jurisdiction to establish his title as the true owner.

In *Kuppuswami Iyer* v. *Venkataswami*(1) COUTTS TROTTER and RAMESAM JJ. held that, where the survey officer had found that the plaintiffs were in possession and no suit had been filed under section 13 of the Act of 1897, the plaintiffs were entitled to a decree for possession, even though the defendants had as a matter of fact been in possession for over the statutory period of twelve years, part of which was before and the remainder was subsequent to the decision of the survey officer. COUTTS TROTTER J. had no doubt that the survey officer's order was wrong, but he considered that the case was governed by the decision of the Full Bench of this Court in *Muthammal* v. *The Secretary of State for India*(2). I am unable to share the opinion that the Full Bench decision had application. In the Full Bench case WALLIS C. J. and AYLING

(1) (1922) 16 L.W. 99. (2) (1914) I.L.R. 39 Mad. 1202.

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and SESHAGIRI AYYAR JJ. applied the doctrine of *res judicata* in these circumstances. A boundary settlement officer had decided under the Boundaries Act of 1860 that certain land did not fall within the boundaries of a mitta and had never formed part of the mitta. No suit was brought by the mittadar to contest this finding under section 25 of the Act. The Full Bench considered that the ground of the decision as well as the actual decision was *res judicata* in a subsequent suit instituted by the mittadar to recover the lands as having formed part of the mitta or in the alternative for a deduction of the *peshkash* of the mitta. This dispute can only be regarded as a boundary dispute and the decision of the Full Bench is not in point in the present case, nor was it in point in *Kuppuswami Iyer* v. *Venkataswami*(1). The Privy Council in *Radhakrishna Ayyar* v. *Sundaraswamier*(2) held, in a case arising out of the Madras Estates Land Act of 1908, that the doctrine of *res judicata* did not apply to a suit under that Act, although the Board recognized that a statute might embody a special rule which operated as a bar to the same question being re-agitated in subsequent proceedings, and some day *Muthammal* v. *The Secretary of State for India*(3) may have to be reconsidered in the light of the ruling of the Privy Council in the case under the Madras Estates Land Act, but it is not necessary to dwell on the question here. Before leaving *Kuppuswami Iyer* v. *Venkataswami*(1) I may mention that in his judgment in that case RAMESAM J. indicated that in his opinion the decision in *Muthirulandi Poosari* v. *Sethuram Aiyar* (4), to which I shall next refer, did not

(1) (1922) 16 L.W. 99.
(2) (1922) I.L.R. 45 Mad. 475 (P.C.).
(3) (1914) I.L.R. 39 Mad. 1202.
(4) (1919) I.L.R. 42 Mad 425. (F.B.).

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prevent a plea of adverse possession being raised subsequent to the decision of the survey officer.

In *Muthirulandi Poosari* v. *Sethuram Aiyar*(1) WALLIS C.J. and AYLING and KUMARASWAMI SASTRI JJ. held that an order passed by a survey officer under section 11 of the Act of 1897 on a dispute arising between two parties with regard to the boundary of a certain property was conclusive as to the rights of the parties if not set aside either on appeal or by a suit brought within the year and it was none the less so, because the unsuccessful party who was in possession on the date of the order was not subsequently ousted from possession. The dispute merely related to the boundary of the two holdings and therefore fell within the four corners of the Act. The statement that the decision was none the less conclusive as to the rights of the parties because the unsuccessful party who was in possession at the date of the order was not subsequently ousted from possession carried the decision no further. The Court was not considering whether one of the parties had obtained a title to an area by adverse possession.

In my opinion the correct view of the scope of the Act was taken by REILLY and ANANTAKRISHNA AYYAR JJ. in *Azhagaperumal Pillai* v. *Rasa Pillai*(2). There it was said that the decision of a survey officer for the planting of stones for the demarcation of the boundary does not *ipso facto* dispossess any party, nor make any legal break in existing possession so as to render ineffective for purposes of limitation any adverse possession running at the date of the decision. In that case it was argued that the judgment in *Muthirulandi Poosari* v. *Sethuram Aiyar*(1) ran contrary,

(1) (1919) I.L.R. 42 Mad. 425 (F.B.).
(2) (1931) 62 M.L.J. 399.

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but this argument was rejected by the learned Judges and the opinion of RAMESAM J. in *Kuppuswami Iyer* v. *Venkataswami*(1) was accepted as supporting their decision.

There are two cases which conflict with the decision in *Azhagaperumal Pillai* v. *Rasa Pillai*(2). The first is *Ramamurthi* v. *Gajapatiraju*(3) and the second is *Seetharamaraju* v. *Narayanaraju*(4). In the first case, in the course of a survey a dispute arose whether a certain field lying wholly within the boundaries of a zamindari should be demarcated as an inam or as part of the ryoti land of the zamindari. The zamindar claimed the land as ryoti land and the inamdar as his mirasi inam. The survey officer demarcated the land as mirasi inam and his decision was upheld on appeal. The zamindar did not file a suit under section 13 of the Act but in a suit brought subsequently by the inamdar against the zamindar the question of title was raised. The appeal was heard by WALLER and KRISHNAN PANDALAI JJ. WALLER J. was of the opinion that the dispute was a boundary dispute within the meaning of the Act, that the survey officer had jurisdiction to decide the dispute and that as the zamindar did not file a suit within a year under section 13 to get the decision set aside it had conclusively decided that the land was Government service inam and not part of the zamindari. KRISHNAN PANDALAI J. held that the Act did not preclude the institution of the suit. He observed:

"In my opinion when two people dispute title to an ascertained and definite piece of land or to subordinate interests therein, the dispute cannot in any proper sense be described as a boundary dispute though, as a result of the disputed

(1) (1922) 16 L.W. 99.
(2) (1931) 62 M.L.J. 399.
(3) (1932) I.L.R. 56 Mad. 366.
(4) (1934) 40 L.W 536.

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title being settled, the boundaries of the property of one or other of the disputants may be accordingly shifted. If there was a real boundary dispute I can understand that a question of title depending solely on the boundary may become concluded—as a necessary logical consequence but not by virtue of the Act. But, if there was no such dispute, it cannot be inferentially introduced into a dispute about title and then held to be inferentially decided under the Act so that the question of title becomes concluded by a further inference. There was, in my opinion, no boundary dispute in the proper sense before the Assistant Superintendent of Survey and his order, Exhibits G and XXIII, being one on a matter beyond his jurisdiction could not become conclusive under the Madras Survey and Boundaries Act.

As the result of the disagreement the appeal was referred to a third Judge, WALLACE J., who agreed with WALLER J. WALLACE J. refused to accept the argument that there could not be a boundary dispute unless there was a dispute between two estates or between Government and an estate regarding the physical boundary of some piece of land contiguous to both, that is, a dispute as to "when, where and how" the boundary between both should run, but that, if the dispute involved on one side or the other the whole of the contestant's property, there could not be any boundary dispute, because the boundary of the disputed portion was not itself in dispute. The learned Judge said that he could see no principle in such a contention. I cannot agree. In my opinion the judgments of WALLACE and WALLER JJ. are contrary to the scheme and the provisions of the Act. The Act was never intended to vest in the survey officer or in the appellate authority power to decide a pure question of title when the boundaries were accepted by both sides, which was the case in *Ramamurthi* v. *Gajapatiraju*(1).

(1) (1932) I.L.R. 56 Mad. 366.

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The decision in *Seetharamaraju* v. *Narayanaraju*(1) was given by BUTLER J. who followed *Ramamurthi* v. *Gajapatiraju*(2). These two cases, therefore, stand or fall together.

The only other case which calls for mention is *Achutharamayya* v. *Soorappayya*(3). There, WADSWORTH J. endeavoured to reconcile the two conflicting views but I consider that they are too divergent for reconciliation. The learned Judge read the judgment of the Full Bench in *Muthirulandi Poosari* v. *Sethuram Aiyar*(4) as laying down the rule that the survey officer's decision under section 11 of the Act of 1897 is conclusive as to the rights of the parties, but he said that it was apparent that the survey officer's decision could only be final to the extent to which it purported to decide those rights. If the survey officer decided that the unsuccessful claimant was not in possession, the learned Judge considered that it would not be open to the unsuccessful claimant to contend that he had acquired a title by adverse possession. On the other hand, if the survey officer merely on a consideration of the documentary evidence of ownership gave an adverse finding regarding title, WADSWORTH J. saw no reason why that finding should bar the unsuccessful claimant from contending in subsequent proceedings that at the time of the survey officer's order he had trespassed successfully on the land in question and that his unlawful possession continued and was openly hostile to the real owner, taking into consideration possession before and after the survey officer's order. The governing factor was what the survey officer actually decided; the unsuccessful claimant could not go behind that. I have already indicated what

(1) (1934) 40 L.W. 536. (2) (1932) I.L.R. 56 Mad. 366.
(3) (1938) 2 M.L.J. 894. (4) (1919) I.L.R. 42 Mad. 425 (F.B.).

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my reading of the Act is and I cannot regard these statements of WADSWORTH J. as embodying a correct interpretation of the law.

The answer which I give to the reference is that an order of the survey officer under section 11, or of the appellate authority under section 12 of the Act, in itself had not the effect of causing a break in the continuity of the adverse possession held by the unsuccessful party so as to preclude his making use of the period of his prior possession to make up the period of twelve years required by the Limitation Act to complete his title. If the unsuccessful party remained in adverse possession of the disputed area for over twelve years his title was good irrespective of any order passed under the Act. As my learned brothers are in agreement with me, the majority decision in *Ramamurthi* v. *Gajapatiraju*(1) and the decision of BUTLER J. in *Seetharamaraju* v. *Narayanaraju*(2) must be overruled. It follows that the observations of WADSWORTH J. in *Achutharamayya* v. *Soorappayya*(3) which are in conflict with the answer given to the reference should also be disregarded.

The costs of the reference will be made costs in the appeal.

PATANJALI SASTRI J.

PATANJALI SASTRI J.—I agree with the judgment of my Lord and have nothing material to add.

KRISHNASWAMI AYYANGAR J.

KRISHNASWAMI AYYANGAR J.—After the fuller and more elaborate discussion of the question before the Bench as now constituted, I feel that the opinion expressed by my Lord is the better and sounder one. In the order of reference I had expressed an inclination in favour of the other view which on further consideration, I agree, is not maintainable on general principles

(1) (1932) I.L.R. 56 Mad. 366. (2) (1934) 40 L.W. 536.
(3) (1938) 2 M.L.J. 894.

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no less than on the language of the statute. It is difficult to support a view of the law which attributes to the decision of a survey authority a higher efficacy than that which is annexed to the decision of a civil Court of competent jurisdiction as per *Subbaiya Pandaram* v. *Mahammad Mustapha Marcayar*(1). To have this consequence, language must be much more clear than what we have. I may add that my former inclination towards the opposite construction was in a large measure the outcome of the limitation imposed on me as a member of a Division Bench, bound by the opinions expressed by other Benches and the legal consequences which might be regarded as flowing out of them. I now feel no doubt that the correct decision is the one now given expression to by my Lord, and I have no hesitation in preferring it to the other.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Burn and Mr. Justice Mockett.

1939, December 15.

IN RE ANNAMALAI MUDALI (PRISONER), ACCUSED.*

Code of Criminal Procedure (Act V of 1898), ss. 342 and 537—Duty of Court to put questions to accused under section 342—Omission to comply strictly with the provisions of that section—If Illegal under section 537 of the Code.

It is the duty of the Court under section 342, Criminal Procedure Code, to be satisfied either by the statements of the accused or by his answers to questions or by both, that he explains or has an opportunity to explain circumstances from which hostile inferences may be drawn against him. When

(1) (1923) I.L.R. 46 Mad. 751 (P.C.).
* Referred Trial No. 140 of 1939.

ANNAMALAI In re.

an accused person in answer to a general question, or even one or two questions, gives a reply or replies which show that he is well aware of all the circumstances appearing in evidence against him and their implications, and attempts to explain them, the Sessions Judge may be going beyond his province if he questions him further in detail. He may be open to the criticism of cross-examining the accused and attempting to elicit contradictory answers. This is more particularly the case when the accused is represented by his own Counsel.

No omission to comply strictly with section 342 of the Code can render a conviction liable to be set aside, unless it has in fact occasioned a failure of justice (Section 537, Criminal Procedure Code).

In re Sangama Naicker(1) and *Dwarkanath Varma* v. *The King-Emperor*(2) distinguished.

TRIAL referred by the Court of Sessions of the South Arcot Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 34 of the Calendar for 1939 on 9th October 1939.

Nugent Grant for *K. S. Jayarama Ayyar* and *G. Gopalaswami* for accused.

Public Prosecutor (*V. L. Ethiraj*) for the Crown.

Cur. adv. vult.

BURN J.

The JUDGMENT of the Court was delivered by BURN J.—The accused, Annamalai Mudali, has been convicted of murder by the learned Sessions Judge of South Arcot, and has been sentenced to death. The case against him was that he murdered his wife Dhanabagiam on 12th February 1939.

With the exception of an extra-judicial confession which the accused is said to have made to his father-in-law's brother (P.W. 20) the evidence against the accused was entirely circumstantial. The body of Dhanabagiam (wife of the accused) was found on the morning of 13th February in a field within the

(1) (1936) I.L.R. 59 Mad. 622. (2) (1933) 64 M.L.J 466 (P.C.).

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limits of the village of Eriyur in Kallakurichi Taluk. It was about one mile from the railway station of Pukkirivari on the Salem-Vridhachalam line. Information was given at first to the village munsif of Ulagianallur who was dead before the trial took place. He apparently discovered that the corpse was not lying within the limits of the village, and therefore he sent a yadast (Exhibit F) to P.W. 19 the village munsif of Eriyur. P.W. 19 received Exhibit F at about 2-30 p.m. and sent reports Exhibits G and G-1 to the police at Varanjaram and the Sub-Magistrate of Kallakurichi. The Inspector of Police (P.W. 22) heard of this case when he went to the police station at Varanjaram at 8 p.m. The Inspector went to Kallakurichi the same night and next morning proceeded partly by road and partly by rail to Pukkiravari taking with him the Assistant Surgeon from the hospital at Kallakurichi and also a photographer. The Inspector reached Pukkiravari at 9-45 and proceeded on foot to the place where the body lay one mile south of the railway station. He held an inquest during the forenoon and it was concluded by 2 p.m. The body was photographed, and then the Assistant Surgeon made the post mortem examination. This disclosed that the woman had been strangled to death. There is no dispute about the manner of her death, and the case is clearly one of murder.

At the inquest it was not known who the deceased was. Enquiries were set on foot and the accused was arrested at Sattanur at 2-30 a.m. on 18th February. After he had been arrested he made a statement to the police and produced from the house of one Periaswami Mudali, where he was staying, three jewels (M.O's 1, 2 and 4) which according to the prosecution belonged to the deceased Dhanabagiam

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and which she was wearing when she was last seen alive.

A large number of witnesses were examined to prove that the accused was with his wife on the 12th February from about morning meal time until shortly before sunset. P.W. 4 who was a farm servant in the house of the father of the accused at Naduvalur, said that on the morning of 12th February the accused took his wife away from his father's house. Naduvalur is to the south of the Salem-Vridhachalam railway line and according to the prosecution the accused took his wife to Kattukottai the nearest railway station. He was seen at the station at 1 p.m. on 12th February in company with a woman. The station master (P.W. 5) said that the accused bought two tickets for himself and the woman from Kattukottai to Pukkiravari, and got into the 2-30 p.m. train with the woman. That he got into the train was spoken to by three other witnesses, P.Ws. 6, 7 and 8, and they also said that at Pukkiravari the accused and the woman alighted. This was the evidence also of the station master of Pukkiravari (P.W. 9) and the pointsman (P.W.10). P.W. 11 is a man who keeps a little shop for light refreshments just outside the railway station at Pukkiravari. He said that on the afternoon of 12th February the accused and a woman passed near his shop, and that the woman sat down under a tamarind tree quite close to his house while the accused went into the toddy shop also close by. P.W. 12 was a witness who said that he saw the accused in the toddy shop. Finally P.W. 13, a man of Ulagaiyanallur, said that at about two naligais before sunset he saw the accused and a woman sitting close to each other very near to the place where the body of Dhanabagiam was found

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strangled next morning. The evidence of P.Ws. 9, 10, 11 and 13 is important because they were all examined at the inquest on 14th February. They saw the body of Dhanabagiam and they say that that was the body of the woman with whom they had seen the accused on the afternoon of the 12th.

Finally there was the evidence of P.W. 20, a brother of Dhanabagiam's father. He said that on Friday, 17th February, when he met the accused at 11 a.m. the accused made a statement as follows:—

"I got on the train with her at Kattukottai on Sunday. We got down at Pukkiravari. I took her beyond the river and told her to go to her aunt's house at Ammanathur, which is half a mile from Olagainallur. I went back on Wednesday. There was a crowd there and a corpse. I got afraid and ran away. On Wednesday night I came to Mangalur. On Thursday morning with a companion I went to Ariyalur and caught a bus and went to Athur. I took a bullock cart that night at Athur and have now come here to Sathanur."

P.W. 20 then says that he confronted the accused with some information which he had received from his own sister, and accused him of having murdered his wife, and he says the accused then confessed in these words:

"It is true. I did it. If you are going to inform the police, I and my son will go now and die."

P.W. 20 says that he was moved by this appeal and this threat, and that he said that he would not give information to the authorities about the murder. Later on he alleges that he did go to the police lines at Perambalur and told a constable about it, but the constable directed him to make a complaint at the Chinnasalem police station. Curiously enough the Inspector of Police says that he did not attempt to check this statement of P.W. 20. P.W. 20 however addressed a letter to the police at Chinnasalem which he says is Exhibit K. Exhibit K-1 is the

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envelope in which it was sent. He says he posted this letter on the morning of the eighteenth in the railway train at Ariyalur. His statement appears to be to some extent confirmed by the fact that the postal cover bears a stamp indicating that it was held back because late fee had not been paid.

All this evidence has been criticised on behalf of the appellant, but after carefully examining it we find ourselves in agreement with the assessors and the learned Sessions Judge that it must be accepted. The story of P.W. 4 was confirmed by an item of circumstantial evidence. He said that when the accused took his wife away from his mother's house the mother of the accused told him (P.W. 4) to run after them with their child aged 4, and a bundle of sarees which Dhanabagiam has left behind. P.W. 4 says that he did so and caught up with the accused and his wife and gave them the mother's message. Thereupon he says that Dhanabagiam told her husband to tear up and burn these old clothes, and the accused accordingly set fire to the clothes with a match and burnt them. He says that they also told him to take the little boy back and he did so. In confirmation of this story the Sub-Inspector of Athur (P.W. 18) says that P.W. 4 took him to the place where he said the cloths had been burnt, and the Sub-Inspector picked up there some ashes (M.O. 10) which are clearly the ashes of burnt clothing. The evidence of the witnesses who say that they saw the accused on the railway between Kattukottai and Pukkiravari and from the railway station at Pukkiravari to the place where the body was found, it was suggested, was not evidence that the Court could rely upon. The witnesses admitted that they had never seen the accused before, and the suggestion was that it would be very unsafe

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in such circumstances to rely upon their identification of him. Reference was made to the case of *Adolf Beck**. It is however to be borne in mind that all these witnesses picked out the accused at identification parades held by the Sub-Magistrate at Kallakurichi on 19th February and subsequent dates. It has not been suggested that any of them has any motive to give false evidence against the accused.

Mr. Nugent Grant in criticising the evidence of P.W. 4 laid special stress upon that part of his evidence in which he describes the jewels of the deceased woman. The witness said:

"The sari in Court (M.O. 8) is the one which Dhanabagiam was wearing when she left home. She wore gold bangles on her hand (M.O. 4), silver bangles on her feet (M.O. 3), an addigai or saradu (M.O. 2). These are the jewels now in Court. I did not notice M.O. 1 the ruby ear ornaments nor the nose screw (M.O. 5)."

From the difference in tense which the learned Judge has used in referring to wearing of the saree and the wearing of the jewels, learned Counsel wishes us to say that this boy was not testifying that Dhanabagiam on the morning of the 12th February was wearing the gold bangles (M.O. 4) or the saradu (M.O. 2) which her husband produced from Periaswami Mudali's cow shed on 18th February. We do not think there is any justification for this distinction. We think the boy in his reference to the jewels was referring as far as he could remember to the jewels which she was wearing at that time. P.Ws. 9, 10, 11 and 13 were examined, as already mentioned at the inquest; P.Ws. 6, 7 and 8 were examined by the Inspector on 15th February and P.Ws. 7 and 8 identified the accused on 19th February the day after he

* Notable British Trials Series: Trial of Adolf Beck, Edited by Eric R. Watson.

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had been arrested. If this evidence of identification stood alone, it might be difficult to rely upon it but it does not stand alone. Taken in conjunction with the other evidence we think that it is reliable evidence.

Learned Counsel for the accused is not able to contend that if this evidence is accepted as true the conviction of the accused is wrong. There was some evidence with regard to motive but we do not think it necessary to discuss it any further than to say that Dhanabagiam was not looked upon with favour by the accused's mother, and that her presence in the family as his wife was inconvenient. That, we think, is clearly established, to say the least. But evidence regarding the motive is not important. When it is shown that the accused took his wife away from his home on the morning of 12th February, that he took her by train from Kattukottai to Pukkiravari and afterwards was seen with her near the time of sunset on the 12th at the place where her strangled body was found next morning, when it is proved that the accused on being questioned about his dead wife's jewels produced M.Os. 1, 2 and 4, which Dhanabagiam was wearing according to the evidence of P.W. 4 when she left Naduvalur with the accused, the only possible inference that can be drawn is that the accused is responsible for the murder of his wife.

Learned Counsel had addressed to us a legal argument suggesting that the case must be sent back for re-trial. Learned Counsel points out that practically the whole of the evidence is circumstantial and that the learned Sessions Judge did not explicitly put to the accused, when questioning him under section 342, Criminal Procedure Code, all the items of evidence leading up to the inference that he murdered his wife, and did not ask him to explain them. Learned

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Counsel has drawn our attention to the case of *In re Sangama Naicker*(1) and the Privy Council case of *Dwarakanath Varma* v. *The King Emperor*(2). In the case in *In re Sangama Naicker*(1) reference was made to three other cases in which re-trial was ordered because the Sessions Judge had not put to the accused under section 342, Criminal Procedure Code, the items of the circumstantial evidence from which he had drawn the inference that the accused was guilty of murder. We think it is necessary to say that their Lordships of the Privy Council in the case of *Dwarkanath Varma* v. *The King Emperor*(2) were dealing with very exceptional facts. The passage in the judgment of Lord ATKIN in which section 342, Criminal Procedure Code, is referred to is as follows :—

> "The learned Chief Justice told the jury that the absence of blood in the body cavity was a vital point. If so, it is plain that under section 342 of the Code it was the duty of the examining Judge to call the accused's attention to this point and ask for an explanation."

There was no reference in the statement of the accused to the absence of blood in the abdominal cavity and Lord ATKIN was pointing out that section 342 of the Code ought to be observed not only in the letter but also in the spirit. It is clearly very unfair to draw an inference of guilt from a fact which an accused person has not had an opportunity of explaining. There is however nothing in the judgment of their Lordships of the Privy Council to indicate that every failure to comply strictly with the letter of section 342 renders the conviction of an accused person illegal. Section 537, Criminal Procedure Code, has a bearing upon this point. No omission to comply strictly with section 342 can render a conviction

(1) (1936) I.L.R. 59 Mad. 622. (2) (1933) 64 M.L.J. 466 (P.C.).

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liable to be set aside, unless it has in fact occasioned a failure of justice. In the present case learned Counsel for the appellant has not attempted to suggest that the omission of the learned Sessions Judge to put every point to the accused in the form of questions has led, in this case, to a failure of justice. He has not for instance suggested that the accused, if he had been questioned specifically on every point, would have been able to offer a satisfactory explanation, and the reason why learned Counsel has not been able to make any suggestion of this kind is found in the statements made by the accused in answer to questions put to him by the learned Sessions Judge. In the Magistrate's Court he was simply asked the question "You now heard it said that you murdered your wife Dhanabagiam. What do you say ?" and his reply was "I have not committed any crime." When asked by the learned Sessions Judge "Have you anything further to say ?", he replied with a very long and detailed statement in which he denied the facts alleged on behalf of the prosecution that were supposed to show his motive for murdering Dhanabagiam. With regard to the jewels he said that when the police asked him for his wife's jewels, he thought that they were referring to jewels belonging to a second wife from whom he had been divorced. He went on to say:

> "Kolandavelu (P.W. 20) is enjoying my father-in-law's property. I asked him for a share on behalf of my wife. Hence his enmity to me. I did not meet him, nor did he come to Sathanur. I did not tell him anything."

He continued:

> "I did not see Doraswami Padayachi (P.W. 4). On my father's instigation he is giving evidence against me. I was in Sathanur on Sunday. I did not come here. I did not burn the saree".

The learned Sessions Judge then questioned him about Exhibit J, a letter which he had written to

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P.W. 20 and which the learned Judge thought indicated that he was displeased with or had some grievance against his wife. He answered that by saying that he had no dissatisfaction with his wife. The learned Judge then questioned him about the jewels of his first wife (M.Os. 1, 2 and 4) and he again said :

"I thought that they were referring to my second wife's jewels, and informed them it was with Periaswami Mudali. I did not produce it myself. Periaswami Mudali produced it."

And finally, when the learned Judge asked him "Do you want to say anything more ?" the accused said :

"The witnesses had opportunities of observing me at Kallakurichi jail. My younger brother resembles me much. Possibly they saw him and are mistaking me for him."

It is clear therefore that either in answer to the general question put by the learned Judge, or in answer to specific questions, the accused has dealt in his statement with all the points appearing in evidence against him and has offered such explanation as he had to offer. This case therefore has no resemblance to the case of *Dwaraknath Varma* v. *The King-Emperor*(1) or the case reported as *In re Sangama Naicker*(2) (the record in which we have examined and which reveals that the accused gave no explanation of the circumstances hostile to them, nor were given an opportunity to do so), or the other cases mentioned in that judgment. In the case reported as *In re Sangama Naicker*(2) and in all the cases referred to in that judgment, it was particularly noticed that the facts unexplained by the accused were *vital* facts, i.e., facts from which an inference of guilt almost necessarily followed. We think it is clear that when an accused person in answer to a

(1) (1933) 64 M.L.J. 466 (P.C.). (2) (1936) I.L.R. 59 Mad. 622.

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general question or even one or two questions gives a reply or replies which show that he is well aware of all the circumstances appearing in evidence against him and their implications, and attempts to explain them, the Sessions Judge may be going beyond his province if he questions him further in detail. He may be open to the criticism of cross-examining the accused and attempting to elicit contradictory answers. This is more particularly the case when the accused is represented by his own Counsel ; and in this case the accused was represented by two experienced Advocates. It is not possible to lay down a more general rule than that it is the duty of the Court to be satisfied either by his statements or by his answers to questions or by both, that the accused explains or has an opportunity to explain circumstances from which hostile inferences may be drawn against him. We can find no ground whatever for sending back this case for a re-trial. There was no defect of any kind in the proceedings before the learned Sessions Judge.

Agreeing with the assessors and the learned Judge we confirm the conviction of the accused for the murder of his wife. There is no question of the appropriateness of the sentence. We confirm the sentence of death also.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Pandrang Row, Mr. Justice Abdur Rahman, Mr. Justice Krishnaswami Ayyangar and Mr. Justice Patanjali Sastri.

1939, October 11, November 24.

B. NANA RAO (FOURTH DEFENDANT), APPELLANT,

v.

M. U. ARUNACHALAM CHETTIAR AND SIX OTHERS (SECOND PLAINTIFF, DEFENDANTS 1 TO 3 AND NIL), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), *ss.* 64 *and* 73—*Explanation to sec.* 64—*Effect of—Attachment of certain property—Subsequent mortgage of same by judgment-debtor—Subsequent attachment of same property by another under another decree against judgment-debtor—First attachment pending at all material times—Property sold under second attachment—First attaching decree-holder applying for and obtaining rateable distribution of sale proceeds under sec.* 73—"*Enforceable under the attachment*" *in sec.* 64—*Meaning of—Purchaser under sale not entitled to priority over mortgagee.*

On 7th March 1925 A attached certain property of X in execution of a decree obtained against him. On 20th May 1926 X mortgaged the attached property to certain persons. On 16th December 1926 C purchased the property in a court-auction held in execution of a money decree obtained by another against X in pursuance of an attachment effected on it on 29th June 1926. The mortgagees filed a suit on their mortgage impleading C also as a defendant. A's attachment was pending at the date of the suit. A applied for and obtained an order for rateable distribution of the assets realized by the court-sale. In the mortgage suit C contended that his title prevailed over that of the mortgagees on the ground that he had purchased the property at a sale held in respect of a claim "enforceable under the attachment" within the meaning of section 64 of the Code of Civil Procedure.

* Second Appeal No. 742 of 1935.

Held by the Full Bench (ABDUR RAHMAN and KRISHNASWAMI AYYANGAR JJ. dissenting): C's title to the property did not prevail over the mortgage.

Section 64 provides that where a property has been attached any subsequent alienation is void against all claims enforceable under that attachment. The attachment effected after the private alienation (here a mortgage) is not assisted by the attachment made before the alienation.

APPEAL against the decree of the Court of the Subordinate Judge of Salem in Appeal Suit No. 82 of 1934 preferred against the decree of the Court of the District Munsif of Krishnagiri in Original Suit No. 388 of 1931.

This Appeal came on for hearing and KRISHNASWAMI AYYANGAR J. on behalf of the Court (KRISHNASWAMI AYYANGAR and SOMAYYA JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The decision of this second appeal turns on the effect of the explanation added to section 64 of the Code of Civil Procedure, 1908, which according to the appellant, has brought about a change in the rights of claimants to rateable distribution as they were understood to be when the old Code of 1882 was in force. As a comparison of the language of the present section 64 with that of section 276 of the Code of 1882 is necessary for the decision of the question, it will be advantageous to set out the provisions of both the sections for the purpose of studying them together. Section 276 in the form in which it existed in the Code of 1882 had been enacted by the Code of 1877 with a change of language as compared with its predecessor (section 240 of the Code of 1859), made not with the object of changing the law but for better expressing the meaning underlying the section as interpreted by the Privy Council in *Anund Loll Doss* v. *Jullodhur Shaw*(1).

Section 276 of the Code of 1882 is as follows:—

"When an attachment has been made (by actual seizure or by written order duly intimated and made known

(1) (1872) 14 M.I.A. 543, 549.

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in manner aforesaid) any private alienation of the property attached (whether by sale, gift, mortgage or otherwise) and any payment of the debt, or dividend, (or a delivery of the share) to the judgment-debtor (during the continuance of the attachment) shall be void as against all claims enforceable under the attachment."

Section 64 of the present Code is as follows :—

" Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation.—For the purpose of this section claims enforceable under an attachment include claims for the rateable distribution of assets."

The suit out of which the second appeal has arisen was instituted to enforce a mortgage executed on 20th May 1926. The plaintiffs, who or whose interests are now represented by respondents 1 to 4, were the undivided brothers of Thandavaraya Chetti, the mortgagee, who had died before suit. There were four defendants impleaded in the suit, of whom the first three were the mortgagor and his undivided brothers, respondents 5 to 7 in the second appeal. They did not contest the suit and have in fact remained throughout *ex parte*, neither opposing nor supporting the claim of the mortgagee. The opposition really came from the appellant who was the fourth defendant in the suit. He derived his interest in the suit property under a court-sale held in execution of a money decree obtained by a creditor of the mortgagor in Original Suit No. 237 of 1925 on the file of the Court of the District Munsif of Krishnagiri. The court-sale was on 16th December 1926, more than six months after the mortgage. He raised several defences to the suit but they were all overruled by the Courts below on substantially the same grounds, and a decree has been passed in favour of the mortgagees. Of the defences raised, one alone merits consideration as the others have all been satisfactorily disposed of by concurrent findings of the Courts below. That defence was that at the date of the mortgage there was a pending attachment on the property, and that, as he, the appellant, had purchased the property

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at a sale held in the process of enforcing what according to him should be regarded as a claim *enforceable under the attachment* within section 64, his title prevailed over that of the mortgagee. In fact he claims that his purchase was the resultant of a claim enforceable under a pending attachment as defined by the explanation to section 64 of the Code of Civil Procedure. Not that the attachment itself resulted or could result in the sale at which he purchased, so that it could be aptly described as a claim enforceable under that attachment, but that the same efficacy is to be attributed by force of the statute to the later attachment under which he purchased. This is the question that arises for consideration and for appreciating it a few facts are necessary.

The attachment, on which the appellant relies in support of his attack on the mortgage, had been made, as already indicated, under a decree different from that in execution of which he purchased the property. His purchase was, as already mentioned, on 16th December 1926 in Original Suit No. 237 of 1925 in pursuance of an attachment effected in it on 29th June 1926, that is, more than a month after the suit mortgage. If regard be had to this attachment alone, it is clear that it cannot avail him to get rid of the suit mortgage which was earlier than the attachment, as section 64, taken by itself and without the explanation, renders a private transfer void only if it is made subsequent to *the* attachment. What is however urged for the appellant is that there was an earlier attachment, though in another suit, against the same judgment-debtor and that he could take advantage of that attachment for avoiding the suit mortgage. That other suit was Original Suit No. 497 of 1923 on the file of the Court of the Principal District Munsif of Salem, in which a money decree had been obtained by one Appu Chetti in October 1924. In it an attachment was effected on 7th March 1925. This attachment which was more than a month prior to the suit mortgage was pending during all the time the decree in Original Suit No. 237 of 1925 was under execution and was in fact subsisting even at the time when the appellant purchased the property. It appears that, on the very day of the appellant's purchase at the court-sale, Appu Chetti, the decree-holder in the other suit, applied for and obtained an order for rateable distribution of the assets realized by that sale. The decree in Original Suit No. 497 of 1923 was not however fully satisfied and, for

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aught we know, the attachment made in it continued and was still alive even at the date of the present suit, though it does not appear to have been pursued to a sale.

For attracting the operation of the section, the first condition prescribed by it is that the transfer sought to be challenged must have been made after and pending an attachment. But this circumstance is not by itself sufficient. It must also appear that the transfer was contrary to the attachment in the sense that it must have the effect of prejudicially affecting rights brought into existence by the attachment or likely to arise out of it. If both these conditions are satisfied the transfer will be disregarded, not wholly even then, but to the extent necessary to protect those rights. These are the rights which are comprehended by the expression "claims enforceable under the attachment" in section 64. Every transfer contrary to such a claim is contrary to the attachment itself according to the plain intendment of the section. Normally and in the absence of the explanation, the protection afforded by the section on an attachment being made will benefit the decree-holder directly and the auction-purchaser indirectly. They would be the only persons who could under the section acquire rights if the attachment is duly enforced according to the procedure prescribed by the Code. Even then those rights depend on the particular attachment which preceded the private transfer, and which alone can be used as a weapon of attack against it. As the Privy Council has ruled in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1):

"All that can be done is to employ that attachment for the purpose of impugning the private alienation, for, it is on that alone that the decree-holder's title" (in this case the decree-holder was the Court auction-purchaser) "to the property . . . rests."

The question whether a third class of persons, namely, other decree-holders, who had not attached but who had merely applied for the execution of their decrees within the time limited by section 295 of the Code of 1882, were entitled to the protection of section 276, corresponding to the present section 64, was considered in *Kunhi Moossa* v. *Makki*(2),

(1) (1916) I.L.R. 44 Cal. 662 (P.C.). (2) (1899) I.L.R. 23 Mad. 478.

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Durga Churn Rai Chowdhry v. *Monmohini Dasi*(1), *Ganga Din* v. *Khushali*(2) and *Monohar Das* v. *Ram Autar Pande*(3), but the decision (unlike in Bombay) was adverse to their pretensions. The reason for the decision was given in the following words by the Allahabad High Court in the latest of the cases cited:

"The words 'shall be void as against all claims enforceable under the attachment' in section 276 of the Code of Civil Procedure cannot in our judgment include the claims of a person who has not caused the property of the judgment-debtor to be attached, but has simply asked for a rateable distribution of the assets which might be realized by a sale of the property of the judgment-debtor. Those words have been in our judgment rightly interpreted to mean the claim of the person who has obtained an attachment. They were evidently added to the section in order to remove the ambiguity which existed in the corresponding section of Act VIII of 1859. The claim of a person who applied for a rateable distribution of the assets is, in our opinion, not a claim which is enforceable under the attachment placed upon the property at the instance of another judgment-creditor. It is manifest that if the claim of the attaching creditor be discharged, and his decree be recorded as satisfied, the attachment obtained by him must necessarily come to an end. In that case there would be no sale in pursuance of the attachment, and no assets would be realized which might be rateably distributed. Therefore the claim of a person who has applied for a rateable share in assets which might or might not be realized cannot be regarded as a claim enforceable under the attachment."

It will be observed that section 295 contained no reference to an attachment, at any rate in express terms, but proceeded to give effect to claims for rateable distribution, whenever assets were realized by sale or otherwise in execution of a decree. Assets may be realized legally without an attachment, e.g., in respect of the balance of the sale-proceeds under a mortgage decree after satisfying the mortgagee; or even in other cases, by a sale without an attachment, which at the worst is only irregular and not wholly void; *Subramania Aiyar* v. *Krishna Aiyar*(4). It can scarcely be contended that such assets were excluded from the operation of the

(1) (1888) I.L.R. 15 Cal. 771. (2) (1885) I.L.R. 7 All. 702.
(3) (1903) I.L.R. 25 All. 431. (4) (1925) 51 M.L.J. 172.

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section. There seems to be little ground therefore for connecting section 295 with an attachment so as to make its operation dependent on it. An attachment however is the all important consideration for the application of section 276. It is out of it that the rights recognized by the section spring up. On this point the observations of MITTER J. in *Anandalal Das* v. *Radhamohan Shaw*(1) throw useful light. Referring to section 271 of the Code of 1859 by which rateable distribution was limited to the surplus alone remaining after satisfaction of the attaching decree-holders' claim, the learned Judge observed:

"That section, it is to be observed, comes into operation when the property attached has already been sold, and when there is a surplus left in the hands of the Court after the demand of the attaching creditor is satisfied in full. The persons among whom this surplus is directed to be distributed are allowed to participate in it, not because of the previous attachment with which they had nothing to do, but because of a particular contingency which has brought into the hands of the Court a certain sum of money which the Court has been authorized to apply for their benefit. The efficacy of the attachment is exhausted for the benefit of the attaching creditor himself and if no surplus is left after full satisfaction of his decree, the other creditors must be left to execute their decrees as best as they can."

It follows that it is unnecessary for the application of section 295 to show that the assets realized were realized as the result of an attachment. In fact the section did not concern itself with an attachment or its absence but merely started with enquiring whether the assets had been realized by sale or otherwise in execution. The rights conferred by the section were not made dependent on an attachment and were not, we think, in fact dependent on such a circumstance. When the section itself does not suggest the hypothesis of a prior attachment it is difficult to support the theory that the right given by it is, or can be regarded as, a right or claim enforceable under an attachment. Such a right could ordinarily inhere only in the creditor who attached, and who alone could be said to have rights enforceable under the attachment, though after the sale takes place the benefit and the protection of

(1) (1868) 2 Beng. L.R. 49 (F.B.).

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section 276 would accrue to the purchaser also. For, the protection of the purchaser is the protection of the attaching creditor, as it is only through the sale that the creditor gets his decree satisfied. There was therefore little justification for the view that a claim for rateable distribution could be regarded as a claim enforceable under an attachment within the meaning of section 276 of the old Code. It would have been perfectly legitimate to put the same construction on section 64 of the Code of 1908 but for the explanation newly added to the section.

It is contended for the appellant that an important change has been introduced in the Code of 1908 by the addition of the explanation to section 64. Before dealing with this contention it may be observed in passing that in other respects the section is practically a repetition of the old section 276. We doubt whether the substitution of the words "contrary to such attachment" for the words "during the continuance of the attachment" which occurred in the old Code has the effect of making section 64 "less favourable" or more restrictive as WALLIS C.J. was inclined to think in *Annamalai Chettiar* v. *Palamalai Pillai*(1). In the light of the decisions of the Privy Council in *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*(2) and *Anund Loll Doss* v. *Jullodhur Shaw*(3) it could not have been the object of section 276 to render all alienations during the continuance of the attachment void irrespective of their effect on the rights of the attaching creditor. It avoided such of them only, as tended to prejudice rights arising and enforceable under the attachment. It is, we think, more reasonable therefore to hold that the change of language was merely verbal and intended to make the sense clearer, rather than to abridge previously existing rights.

Now, coming to the explanation newly added by the Code of 1908, the question is whether it has gone far enough to bring within the protection given by the section persons who at the date of the private transfer had not attached but had only applied for the execution of their decrees, that is, applied for rateable distribution under section 73. In other words, can such non-attaching decree-holders take advantage of an

(1) (1917) I.L.R. 41 Mad. 265 (F.B.). (2) (1901) I.L.R. 29 Cal. 154 (P.C.).
(3) (1872) 14 M.I.A. 543.

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earlier attachment made at the instance of another decree-holder, and on its strength, seek to avoid the transfer for their benefit also in spite of the fact that they had not attached the property at all or attached it only after the transfer? Or is it further necessary, for these non-attaching decree-holders to entitle themselves to the benefit of section 64, that assets should also have been or be realized under the earlier original attachment? The appellant contends that the further condition implied in the latter query is not required by the section when read with the explanation. This is really the point in controversy. That there are observations in the judgments of both WALLIS C.J. and KUMARASWAMI SASTRI J. in the Full Bench decision in *Annamalai Chettiar* v. *Palamalai Pillai*(1) contrary to the appellant's contention can scarcely admit of doubt. WALLIS C.J. has observed:

"Section 64 of the present Code affords no greater protection to the attaching decree-holder than section 276 of the old Code, and if he cannot protect himself against an alienation after attachment unless the *attached property is brought to sale* in execution of the decree in respect of which the attachment was made, it necessarily follows that other decree-holders who have applied for execution cannot be on any better position."

KUMARASWAMI SASTRI J. is more express. He said:

"There can be little doubt that section 64 as it stands at present can protect decree-holders entitled to rateable distribution against private alienation *only where assets have been realized*, in which case they will be entitled to share the proceeds in preference to the alienee."

The italics are ours. These observations which do militate against the appellant's contention are sought to be got over in two ways. In the first place, it is argued that they must be regarded as unnecessary for the decision of the question referred to the Full Bench, and were in fact outside the reference. Looking at the terms of the reference there is justification for this argument as the question referred merely proceeded on an assumption of facts entirely absent in the present case.

The question was this:

"Whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment which

(1) (1917) I.L.R. 41 Mad. 265 (F.B.).

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has since been raised by satisfaction of the decree or otherwise, are entitled to question a private alienation made during the continuance of *such attachment*?"

It is quite clear that the reference was made on the footing that the prior attachment had ceased to be operative by the decree having been satisfied or otherwise, unlike in the present case where the prior attachment has been found to be subsisting at all material times and not shown to have been ever withdrawn or terminated. But for this difference in the facts, we should be bound to give effect to what we think was an opinion adverse to the appellant expressed by the Full Bench. It is conceded on both sides that there is no reported decision, of this Court at any rate, which has dealt with the point in an authoritative manner so as to furnish a precedent binding on us.

Secondly, it is urged that the qualification suggested by the learned Judges is inconsistent with the language of the explanation and opposed to the policy underlying the section itself. It is to be observed that the crucial date with reference to which the validity of a private transfer has to be tested under section 64 is the date of the transfer itself. If, before that date, rights had actually come into existence, or should, by force of the statute, be deemed to have come into existence, they must be allowed to prevail against the mortgagee whose rights arise under, and only on the date of, the mortgage. *Prima facie*, such an overriding right can spring into existence only in favour of a decree-holder who has attached the property prior to the transfer. Even then, the attachment does not by itself and without more operate to put an end to the transfer, even as against himself. The rights flowing from an attachment are inchoate and imperfect, and requiring to be perfected by further process in execution to be pursued till the attached property is sold. In order to remove the impediment it is essential that the creditor should follow out the remedial procedure prescribed by the Code to its end. This was the mode and, we think, the only mode available to the attaching-decree-holder under the old Code to get rid of a private alienation. None the less, the right, as an efficient enforceable right, came into existence simultaneously with the attachment, and would last as long as the attachment itself lasted. It might be that

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further action was necessary to achieve the overthrow of the private transfer, but the potentiality was there. The weapon had been forged and was ready for use; it had only to be wielded. By whom could it be wielded? By the attaching decree-holder and the auction-purchaser alone under the old Code, and even under the present section 64 without the explanation. But does not the explanation bring in a new class of persons who, at the date of the private transfer, had only put in claims for the rateable distribution of assets and had not attached the property? As we have already observed, this class of persons were held not entitled to the benefit of the protection under the old Code. But it is impossible to deny that it was the plain object of the explanation to admit them to the protection of the section, whether or not the words employed sufficed to achieve that object. So much we think is clear. It is only necessary to enquire what the nature of the claim is to be and subject to what limitations, if any, it is allowed to be recognized.

By *claim* is meant a demand, a right or title to something. A claim for rateable distribution of assets is accordingly a demand cognizable under section 73 of the Code. Section 73 without its provisos which are immaterial for the present purpose runs as follows:—

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons."

It will be observed that in one important respect there is a change of language from the old section 295. For the words "whenever assets are realized by sale or otherwise in execution of a decree" which found place in it, the words "where assets are held by a Court" have been substituted. For the words "prior to the *realization*" have been substituted "before the *receipt* of such assets". These changes make it clear that it is wholly unnecessary under the present Code that the assets should have been brought into Court as the result of an attachment or by realization in execution. The method by which the assets reaches the hands of the Court

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is now made perfectly immaterial; all that is necessary is that the assets should be *held* by the Court irrespective of the means or the process which produced it; vide *Pratapa Bhattadu* v. *A.E.L. Mission*(1) and *Thiraviyam Pillai* v. *Lakshmana Pillai*(2). Realization in execution might perhaps suggest, though not necessarily, a prior attachment. Even this possibility of a connection to an attachment is now ruled out by the substituted words of the present section. Neither the form in which execution has been had, nor the precise extent to which execution had been allowed to run, nor the exact source or genesis of the fund in Court, any longer forms part of the definition of assets; *Noor Mahomed Dawood* v. *Bilasiram Thakursidass*(3). A claim for rateable distribution under the section now stands entirely dissociated from any attachment and its efficacy as a claim is made to depend only upon its being made prior to the receipt of the assets by the Court. We are of opinion that, immediately on the application being made, provided it is made in time, the applicant acquires a right to rateable distribution which is denied to all later applicants. The satisfaction of that right may have to await the receipt of the assets, but that is no reason for saying that there is no right or claim in existence until then. We are not able to persuade ourselves that the Privy Council decision in *Mina Kumari's Case*(4) has laid down the contrary proposition. In that case their Lordships were interpreting section 295 of the old Code for the purpose of section 276. A claim under section 295 had necessarily to function through an attachment in order to operate against a private transfer under section 276. In fact, as we have said, the attachment by itself did not and could not displace the transfer, which could only be displaced by the attachment being worked out, and only by the results of such working out. The observations of the Privy Council must be understood with reference to the question before them, namely, whether section 276 put an end to the disputed transfer. The answer was no, as a claim for rateable distribution had perforce to operate through an attachment which was an indispensable condition under the section. But it does not follow from this observation that no claim arose

(1) (1924) I.L.R. 49 Mad. 38. (2) (1917) I.L.R. 41 Mad. 616.
(3) (1919) I.L.R. 47 Cal. 515. (4) (1916) I.L.R. 44 Cal. 662 (P.C.).

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under the section until assets were received or came to be held by the Court. On the contrary, we are inclined to think that the moment an application is made by persons of the description mentioned in the section and within the time limited by it, a claim straightaway did arise, which can be properly described as a claim for the rateable distribution of assets, within the meaning of the explanation to section 64.

If the explanation is incorporated into the section itself, it would read as follows :—

" Where an attachment has been made, any private transfer (of the property so attached) contrary to such attachment shall be void as against all *claims for rateable distribution* of assets."

It is not, be it noted, as against claims for rateable distribution of assets *under the attachment*, that the transfer is rendered void but as against claims for rateable distribution of assets simpliciter without reference, so far as such claims are concerned, to the attachment. By the explanation claims for the rateable distribution of assets—note that the words " under an attachment " are not added so as to qualify such claims—are equated to claims enforceable under an attachment. True, an attachment must first be made and must also subsist at the time of the private transfer. But, if a claim for rateable distribution has arisen while yet the attachment is pending, it is given the efficacy which is the peculiar attribute of a claim enforceable under the attachment, in the sense explained. It is, of course, necessary that the transfer should also be contrary to the claim for rateable distribution. So it would be, as the explanation makes it clear that it is to have and be given, without reference to an attachment, the same vitality as a claim based on the attachment. A claimant for rateable distribution is thus admitted to the protection which was till the introduction of the explanation being shared by the prior attaching-decree-holder, and a purchaser under that attachment. It is unnecessary under the present Code, in view of the extended meaning given by the explanation to " claims enforceable under an attachment ", to consider whether a claim for rateable distribution can strictly be regarded as a claim truly enforceable *under the attachment*. The statute has said so and there is an end of the matter. It is not for the Court

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to ignore a statutory definition and proceed to try and extract the true meaning of an expression independently of it.

We have said that the Bombay High Court took a view different from that adopted by the other High Courts on the meaning of section 276 of the old Code. In the opinion of TELANG J. expressed in the decision in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(1), as a result of the combined operation of that section and section 296 of the old Code, a claim for rateable distribution could be held to be a claim enforceable under an attachment. That view was, if we may say so with respect, based on a forced construction, and did not, we think, recommend itself to the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(2), where their Lordships merely assumed its correctness " for the sake of argument " but yet found it unserviceable. TELANG J.'s observation, based on *Mahadeo Dubey* v. *Bhola Nath Dichit*(3), that

" one cannot logically avoid the conclusion that the claim of the creditor who has applied for execution as mentioned in section 295 is properly described as one ' enforceable under the attachment ' of the creditor who may be called the principal creditor "

cannot, it seems to us, be supported in the light of later authority. However that may be, it is undeniable that the result achieved had the merit of advancing the beneficent objects underlying the section. As observed by STRACHEY C.J. in *Bithal Das* v. *Nand Kishore*(4) those objects were two-fold :

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

(1) (1891) I.L.R. 16 Bom. 91. (2) (1916) I.L.R. 44 Cal. 662 (P.C.).
(3) (1882) I.L.R. 5 All. 86 (F.B.). (4) (1900) I.L.R. 23 All. 106.

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These being the salutary objects behind the section, it scarcely admits of doubt that the extension given to section 276 tended to advance the policy of the law. TELANG J.'s opinion not having been shared by the other High Courts, it became necessary, and this was the chief reason, to amend the section by adding the explanation to section 64. But it does not by any means follow that the Legislature intended to go no further than the decision. This is a question to be answered only on a true construction of the language of the section to be understood no doubt in the light afforded by a historical retrospect of the antecedent case-law but not to be controlled by it.

We have already adverted to the language of section 64, and to the effect on it of the explanation. It is necessary for a proper appreciation of the point under consideration to emphasise an aspect of the matter which has not received the importance it deserves. For the purpose of attracting the operation of section 276, a claim for rateable distribution had to be a claim enforceable under the attachment. Its connection, as we have observed, to a live subsisting attachment was a necessary condition of the protection. So it was, we think, that TELANG J. had to lay emphasis on the fact that the first attachment in the case before him was in force on the date of the application. In fact he regarded this circumstance as the essential feature which distinguished the case before him from those reported as *Ganga Din v. Khushali*(1) and *Durga Churn Rai Chowdhry* v. *Monmohini Dasi*(2), as the following observation shows:

"But it is to be remarked that in both the cases referred to, the first attachment was either in fact withdrawn or had become inoperative by law, and that circumstance necessarily distinguishes both these cases from the one before me, in which the first attachment stands, and is admitted to be fully operative."

It is difficult, we agree, to interpret section 276 in a different sense, as the private alienation was declared by the section to be void only against "all claims enforceable *under the attachment*". The words italicized enacted a paramount check and only subject to it could the old clause function.

(1) (1885) I.L.R. 7 All. 702. (2) (1888) I.L.R. 15 Cal. 771.

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Where the link between the attachment and the claim did not exist, the protection also did not extend. This in fact was also the basic ground of the decision of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1). In that case, the respondent who was the decree-holder and had purchased under a later attachment was held not entitled to impugn an earlier private alienation, though it was made at a time when there was an attachment pending in a prior decree which had not been pursued to a sale. The effect of their Lordships' judgment as correctly stated in the headnote was this:

"The respondents' title rested entirely on the attachment in the Execution Case No. 16 of 1907 (the later attachment in pursuance of which he had purchased) and that alone was the attachment the continuance of which could avoid the appellants' private alienation; but on the facts it did not do so. The respondent could not invoke the attachment in Execution Case No. 8 of 1902 (the first attachment) to defeat the alienation to the appellant which was made in different execution proceedings. Nor could he with its aid rely on section 295 of the Code of Civil Procedure, 1882, as entitling him to the benefit of section 276."

We strongly feel that there is no warrant for holding that the same condition is to be imported into the interpretation of the new section. Look at the result. In spite of the apparent purpose of the explanation which was to throw open the protection of the section to a claimant for rateable distribution, it has finally ended, on this interpretation, by failing to give it to him or giving it when he cannot need it. For, to say that he qualifies himself for the protection only on assets being realized is to nullify the effect of the explanation. When does he want the protection? Not when the assets have been realized. For then he is in a position to obtain immediate satisfaction and his right cannot thereafter be taken away from him. It is with all respect meaningless to argue that he requires any protection when this stage is reached, as by then the private transfer had been struck at and destroyed by the sale which has fetched the assets. The protection, if it is to be real, is needed at an earlier stage and only to remove an impediment placed in the way of the execution, proceeding along normally and fructifying ultimately into a sale, in the proceeds of which, when once

(1) (1916) I.L.R. 44 Cal. 662 (P.C.).

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realized, his rights become crystallized and thereafter indisputable. It seems to us therefore that there is every reason why the Court should struggle against a construction which rendered the legislative effort entirely otiose. It was pointed out by the Calcutta High Court as early as 1888 in *Durga Churn Rai Chowdhry* v. *Monmohini Dasi*(1) that

"to hold that claims under section 295 are claims enforceable by attachment against which assignments made under section 276 are void, would perhaps be carrying out the intention that may have been in the mind of the Legislature when the old Code (of 1859) which did not provide for a rateable distribution was suddenly modified by the introduction of that perfectly new principle. Unfortunately the sections of the Code relating to execution were not recast so as to be fully adapted to the new state of things, and it appears to us that in this respect section 276 has not been successfully framed with the object of protecting rateable distribution amongst claimants under section 295."

Where the Calcutta High Court had failed, TELANG J. succeeded by a construction which has certainly the merit, if we may say so with respect, of originality and boldness, but all the same emphasized the need for an amelioration in favour of the claimant. In the Full Bench decision in *Annamalai Chettiar* v. *Palamalai Pillai*(2) itself one of the referring Judges, SESHAGIRI AYYAR J., expressed a strong inclination in favour of the wider construction, but was only held back by the pressure of authority which he thought was against it. BAKEWELL J. was apparently of the opinion that the cases decided under the old Code ceased to be authoritative in the changed conditions brought about by the addition of the explanation. We are also inclined to accept the same view. For in approaching the construction of the new section, it is not without value to remember that the new Code, as its preamble shows, is both a consolidating and an amending Act. If the words of a later statute differ materially from those of an earlier one, effect should be given to the change, especially where to do so would be to advance the policy underlying it. We agree that, if the language fails to achieve the object in view, it can only be regretted but not helped. But the Court need not be astute to adopt

(1) (1888) I.L.R. 15 Cal. 771. (2) (1917) I.L.R. 41 Mad. 265 (F.B.).

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a construction which would tend to bring about a frustration of the objective. If the words of a later statute differ from those of an earlier one, the Court, in construing the later, is not bound by decisions under the earlier, even though it relates to the same subject-matter, *Ex parte Willey: In re Wright*(1), though change of language may not by itself be conclusive on the question whether a change of interpretation was intended. We should in this connection remember the principles of construction laid down by the House of Lords in *Bank of England* v. *Vagliano Brothers*(2) and followed by the Privy Council in *Norendra Nath Sircar* v. *Kamalbasini Dasi*(3):

"The proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute intended to embody in a Code a particular branch of the law is to be treated in this fashion . . . its utility will be almost entirely destroyed. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions."

We are conscious that KUMARASWAMI SASTRI J. was for limiting the scope of the section to very narrow limits and expressed the view that

"in the numerous and important class of cases relating to attachment of immoveable property the amendment would be of no use to decree-holders entitled to rateable distribution. Assuming that the Legislature intended the attachment under section 64 to enure for the benefit of all persons entitled to rateable distribution who had applied for execution prior to the private alienation it has not gone far enough when it introduced the explanation to section 64

(1) (1883) 23 Ch. D. 118, 127. (2) [1891] A.C. 107.
(3) (1896) I.L.R. 23 Cal. 563 (P.C.).

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worded as it is, and made no provision for the continuation of the attachment in Order XXI in cases where the attaching-creditor was paid off. The result is not very happy but the remedy is in the hands of the Legislature."

The idea contained in the last sentence in the passage cited has been shared by FAZL ALI J. in *Radha Mohan* v. *Musammat Wahidan*(1). But we venture to think, with the utmost respect, that the result has been achieved in fact. KUMARASWAMI SASTRI J. has relied mainly on the Privy Council decision in *Mina Kumari's* case(2) in support of the observations he has made. We do not think, as we have indicated already, that the decision was intended to cover cases arising under the present Code, at any rate on facts different from those which were present in the Full Bench case. He has also referred to Order XXI, rules 55, 57, 89 and certain forms appended to the Civil Procedure Code. These rules and forms were, we think, intended to provide for ordinary cases, where the complications arising out of claims for rateable distribution do not come into play, and ought not to be used to cut down the effect of the explanation to section 64. He notices the provision contained in Order XXI, rule 90, which does seem to affirm a present right in the claimant for rateable distribution without reference to the necessity for the realization of assets, but it is not clear why the pointing finger of this rule as well as of rule 72 (2) should not be followed to reach the clue to the proper construction. The reasoning to be found in the decisions reported as *Pratapa Bhattadu* v. *A. E. L. Mission*(3), *Bibi Miyakhan* v. *Gulabchand Ramchand*(4) and *Lakshmi* v. *Kuttunni*(5) seems to go some distance in favour of the appellant, whereas, *Gotatai Vighneswarudu* v. *Venkata Suryanarayanamurthi*(6), a decision of WALLIS C.J. and KUMARASWAMI SASTRI J., tends the other way. There are also other decisions of other High Courts to an opposite effect, but in all of them the first attachment had come to an end, as in the decisions of our own Court.

We find it difficult to understand why a subsequent lapsing of the original attachment, whether by satisfaction of the decree or otherwise, should prejudice the right of the claimant

(1) (1934) I.L.R.13 Pat. 446.
(2) (1916) I.L.R. 44 Cal. 662 (P.C.).
(3) (1924) I.L.R. 49 Mad. 38.
(4) (1911) 13 Bom. L.R. 1189.
(5) (1886) I.L.R. 10 Mad. 57.
(6) (1917) 7 L.W. 573.

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for rateable distribution provided he had made the claim in time, that is, while that attachment was in force. If we are justified in thinking that th .t right comes into positive existence taking a definite shape the moment a proper application under section 73 is made, it stands to reason that it should not suffer annihilation by the act of a mere stranger. The right being in existence, it may be necessary to enforce it by proceeding to re-attach and sell the property in the execution already taken out in order that the private alienation may be got out of the way. In such a contingency the fact that the attachment so made is subsequent to the transfer should not matter, as otherwise the scope of the explanation and the object behind it would stand unwarrantably restricted. Nor can we see why the claimant for rateable distribution should be denied the initiative in his own interest to work out his statutory right, instead of fastening his hopes to the off chance of the decree-holder who first attached proceeding with his execution and producing a result in which he could share. We are not unaware that the view expressed by us goes against some of the observations in the Full Bench decision but in all humility we feel that the point merits reconsideration.

We therefore think it eminently desirable that the question discussed above should be considered and decided by a Full Bench. We accordingly frame the question as follows :—

"Is a private transfer made after and during the pendency of an attachment in one suit, void against the title of an auction-purchaser in execution of a decree in another suit under an attachment made after the transfer but while the decree in the former suit remained unsatisfied and the attachment therein was subsisting ?"

Pursuant to the aforesaid order of reference the Second Appeal came on for hearing before the Full Bench constituted as above.

ON THE REFERENCE :—

D. Ramaswami Ayyangar (with him *C. S. Venkatachari*) for appellant.—[After stating the facts and the question referred to the Full Bench, Counsel proceeded :] Section 73 of the Code of 1908 deals with rateable distribution. It corresponds to section 295 of the Code of 1882. Under section 73 it is immaterial how the assets are realised. It may be independent of any attachment. Under that section it

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is enough if the person claiming rateable distribution had filed an execution petition before the receipt of assets by Court. It is not necessary that he should also have attached. Section 276 of the Code of 1882 corresponds to section 64 of the Code of 1908. But the former section had no explanation corresponding to the one in the latter section. If the point under reference had arisen under the Code of 1882, the appellant must fail. It is the addition of the explanation to section 64 of the Code of 1908 that makes all the difference. Section 64 mentions the persons who are entitled to take advantage of the section and the conditions under which they can do so.

The conditions are (i) there must be an attachment of property and (ii) a private alienation of the same after the attachment. If these two conditions are present in any given case, then the private alienation is void as against a person who has applied for rateable distribution. The respondents want to introduce a further condition in section 64, namely, that the attachment before the private alienation must have ripened into a sale of the property. It is enough if the attachment had been pending at the time of the alienation. It is immaterial whether it ripened into a sale or not. There are observations in *Annamalai Chettiar* v. *Palamalai Pillai*(1) against the appellant's contentions. But that case could be explained on the footing that the prior attachment was raised subsequently. Moreover, according to the judgment of KUMARASWAMI SASTRI J. in that case, it is enough if the assets are somehow realized, not necessarily by attachment ending up in sale. But WALLIS C.J. holds the contrary opinion. Further, it merely follows *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(2) as if it is concluded by the same. But the latter case was a decision under the Code of 1882 which had no explanation corresponding to the one attached to section 64 of the Code of 1908 and the former case is a case under the Code of 1908 and the significance of the introduction of the explanation was lost sight of in the former case. The Privy Council overruled the judgment of TELANG J. in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(3) which was a case under the Code of 1882. TELANG J. construed section 276 of the Code

(1) (1917) I.L.R. 41 Mad. 265 (F.B.).
(2) (1916) I.L.R. 44 Cal. 662 (P.C.). (3) (1891) I.L.R. 16 Bom. 91.

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of 1882, which had no explanation corresponding to the one attached to section 64 of the Code of 1908, as being wide enough to cover a case which could strictly come under the explanation. The Privy Council overruled that construction of section 276. But in 1908, the Legislature in introducing the explanation to section 64 and by enacting section 73 which is wider than section 295 of the Code of 1882 has gone beyond what was decided by TELANG J. as a matter of construction of section 276. The case of *Bibi Miyakhan* v. *Gulabchand Ramchand*(1) which supports the appellant's contention was also under the Code of 1882 and before the above-mentioned Privy Council case. In *Nur Mahomed Peerbhoy* v. *Dinshaw Hormasji Motiwalla*(2) the binding character of *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(3) under the Code of 1908 was left open. In *Annamalai Chettiar* v. *Palamalai Pillai*(4) and *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(3) no question of rateable distribution could arise because the first attachment fell to the ground by the satisfaction of the decree in pursuance of which the attachment was made. In *Kunhi Moossa* v. *Makki*(5) it was held that the subsistence of the first attachment would make all the difference. The explanation puts a person entitled to a claim for rateable distribution on the same footing as a person who attached before the private sale in order to invalidate the private sale. If there are more than one execution petitions in respect of the same property and one of them proceeds to sale the sale is one in respect of all the execution petitions. The same result and no more would follow if the attachment before the private alienation proceeds to sale. The Legislature uses the word "include" in the explanation to the section. According to the rule of interpretation laid down in *Rodger* v. *Harrison*(6) the introduction of the word "include" enlarges the meaning of section 64. But for the introduction of the word "include" the section would not cover the cases contemplated by the explanation. After the introduction of the word "include" a Court is not competent to scan the section to find out if the section can include all the cases contemplated by the explanation. *Durga Churn Rai Chowdhry* v.

(1) (1911) 13 Bom. L.R. 1189. (2) (1922) 45 M.L.J. 770, 775 (P.C.).
(3) (1916) I.L.R. 44 Cal. 662 (P.C.).
(4) (1917) I.L.R. 41 Mad. 265 (F.B.). (5) (1899) I.L.R. 23 Mad. 478.
(6) [1893] 1 Q.B. 161, 167.

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Monmohini Dasi(1) followed *Ganga Din* v. *Khushali*(2) and held that section 276 of the Code of 1882 could not be interpreted as taking within its ambit persons entitled to rateable distribution and suggested improvement to the section which was embodied as explanation to section 64 of the Code of 1908.

In *Abdul Salam* v. *Veerabhadra Raju*(3) it was held that an execution application, though defective in form was sufficient to get the benefit of rateable distribution under section 73. In *Somasundaram Chettiar* v *Alamelu Achi*(4) it was held that the Code of 1908 did not contemplate an application for rateable distribution but only the filing of an execution petition in the proper Court before the receipt of the assets.

In *Narasimhachariar* v. *Krishnamachariar*(5) it was held that the realization of assets in one suit is a realization of assets in all the suits in connection with pending execution applications. The case of *Deorajo Kuer* v. *Jadunandan Rai*(6) construed the effect of explanation to section 64 in connection with section 73. It was held that the attachment before the private sale enured for the benefit of all who were entitled to rateable distribution. If *Pratapa Bhattadu* v. *A.E.L. Mission*(7) is correct then the observation in *Annamalai Chettiar* v. *Palamalai Pillai*(8), that protection could be given to claimants for rateable distribution after private sale only if the prior attachment had proceeded to sale and assets realised in that sale, is not correct. The method by which the assets came to Court is an irrelevant consideration. The appellant is the auction-purchaser of the property in a court-sale held in pursuance of an attachment after the private sale. He paid the purchase price into Court. The person who had attached the property before the private sale claimed rateable distribution in the purchase price and got the same. So the auction purchaser (appellant) is entitled to avoid the private sale.

T. L. Venkatarama Ayyar for respondents.—All the Courts have held that the interpretation put in *Annamalai Chettiar* v. *Palamalai Pillai* (8) on section 64 and the explanation attached thereto is correct in the following cases under the Code of 1908; see *Bhupal* v. *Kundan Lal*(9) *Mehar Chand* v. *Joti*

(1) (1888) I.L.R. 15 Cal. 771, 774.
(2) (1885) I.L.R. 7 All. 702.
(3) (1929) I.L.R. 52 Mad. 760 (F.B.).
(4) 1937 M.W.N. 480, 486.
(5) (1914) 1 L.W. 403, 407.
(6) (1930) I.L.R. 53 All. 125, 127,
(7) (1924) I.L.R. 49 Mad. 38.
(8) (1917) I.L.R. 41 Mad. 265 (F.B.).
(9) (1921) I.L.R. 43 All. 399.

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Prasad(1), *Provash Chandra Mullick* v. *Debendra Nath Dutt*(2) *Chindha* v. *Chhaganlal*(3), *Radha Mohan* v. *Mussammat Wahidan*(4) and *Kasturchand and another* v. *Wazir Begum and others*(5). No Court has even thrown any doubt on the correctness of *Annamalai Chettiar* v. *Palamalai Pillai*(6).

D. Ramaswami Ayyangar in reply.—For answering the reference it is unnecessary to go so far as to say that *Annamalai Chettiar* v. *Palamalai Pillai*(6) is wrong on the facts of that case. The reasoning of the decision is wrong. In none of the cases cited on behalf of the respondents was the prior attachment subsisting so as to found a claim for rateable distribution under section 73, since the decrees in pursuance of which the attachments were made had been satisfied. The present case was envisaged at page 9 of the report of *Mehar Chand* v. *Joti Prasad*(1).

Cur. adv. vult.

OPINION.

LEACH C.J.

LEACH C.J.—The question which has been referred for decision is this:

"Is a private transfer made after and during the pendency of an attachment in one suit, void against the title of an auction-purchaser in execution of a decree in another suit under an attachment made after the transfer but while the decree in the former suit remained unsatisfied and the attachment therein was subsisting?"

The circumstances which have given rise to this reference are these. On 25th October 1924 one Appu Chetty obtained a money decree in Original Suit No. 497 of 1923 of the Court of the District Munsif of Salem. The decree was transferred to the Court of the District Munsif of Krishnagiri for execution. On 5th March 1925 the decree-holder applied in Execution Proceedings No. 132 of 1925 for the attachment and sale of the property. There was then due under the decree a sum of Rs. 2,399–4–6. An order of

(1) (1934) 33 A.L.J. 4.
(2) (1935) 39 C.W.N. 1076.
(3) (1928) 30 Bom. L.R. 1488.
(4) (1934) I.L.R. 13 Pat. 446, 458.
(5) I.L.R. [1937] Nag. 291.
(6) (1917) I.L.R. 41 Mad. 265 (F.B.).

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attachment was passed on the same day and the attachment was effected two days later, 7th March 1925. On 20th May 1926 the judgment-debtors mortgaged the attached property to respondents 1 to 4 to secure a loan of Rs. 1,200. Appu Chetty had previously agreed with his judgment-debtors to accept payment of the amount due under his decree by instalments. On 22nd August 1925 Appu Chetty's petition for execution was dismissed in accordance with the agreement arrived at, but the attachment was continued pending the payment of the remaining instalments. On 15th August 1925 one Pedda Sambayya Chetty obtained a money decree against the same judgment-debtors in the Court of the District Munsif of Krishnagiri, and on 15th April 1926 Pedda Sambayya Chetty applied for the attachment of the same property in Execution Proceedings No. 322 of 1926 of that Court. Pedda Sambayya Chetty's application for attachment was granted on 10th June 1926 and the attachment was effected on 29th of that month. On 12th December 1926 Appu Chetty, to whom there was still owing under this decree a sum of Rs. 568–4–0 applied in the execution proceedings of Pedda Sambayya Chetty for rateable distribution and his application was granted on 16th December 1926, the date on which the property was sold under Pedda Sambayya Chetty's attachment. Out of the sale-proceeds Appu Chetty received a sum of Rs. 105–14–9, being the amount payable to him on the rateable basis. The purchaser at the auction held in Pedda Sambayya Chetty's execution proceedings is the appellant in the appeal in which this reference has been made. On 11th November 1931 the mortgagee-respondents filed a suit on their mortgage in the Court of the District Munsif of Krishnagiri.

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The suit was defended by the appellant and the question was whether the mortgagees or he had the better title. The appellant claimed that he had the better title by reason of the provisions of section 64 and section 73 of the Code of Civil Procedure. The District Munsif relying on the decision in *Annamalai Chettiar* v. *Palamalai Pillai*(1) granted the respondents a mortgage decree and his decision was upheld on appeal by the Subordinate Judge of Salem. The correctness of these decisions was challenged in a second appeal, which came before KRISHNASWAMI AYYANGAR and SOMAYYA JJ. who after hearing arguments made this reference.

From the narration of the facts it will be observed that the property was sold in Pedda Sambayya Chetty's execution proceedings, which were instituted after the mortgage had been created. The appellant says that the mortgage was invalid by reason of the provisions of section 64 of the Code. The reasoning is this. The mortgage was created during the attachment obtained by Appu Chetty and section 64 renders the mortgage void notwithstanding that the sale took place in Pedda Sambayya Chetty's execution proceedings. The answer to the question therefore depends on the effect to be given to the wording of section 64, and this involves the consideration, not only of the decision in *Annamalai Chettiar* v. *Palamalai Pillai*(1) but of numerous other authorities.

Before proceeding to discuss the authorities which have bearing on the question before us, I will set out the relevant statutory provisions. Section 64 reads as follows :—

"Where an attachment has been made, any private transfer or delivery of the property attached or of any interest

(1) (1917) I.L.R. 41 Mad. 265 (F.B.).

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therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets."

This section is the corresponding section to 276 of the Code of 1882 which said:

"When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt or dividend, or a delivery of the share, to the judgment-debtor during the continuance of the attachment, shall be void as against all claims enforceable under the attachment."

The wording is somewhat different, but so far as this case is concerned there is no material change unless it is effected by the explanation to the section in the present Code. Both section 276 of the Code of 1882 and section 64 of the present Code rendered a private alienation void as against claims enforceable under *the* attachment.

The section which provides for rateable distribution is section 73. Eliminating the provisos which have no bearing here, section 73 says:

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons."

Therefore, in order to entitle a creditor to rateable distribution all that is necessary is that he shall have made, before the Court executing the decree has

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received assets of the judgment-debtor, an application for the execution of his decree. If he has made an application to a Court of competent jurisdiction, although not to the Court executing the decree, he is entitled to rateable distribution without any other application, although as a matter of prudence he should notify the Court actually executing the decree of his claim. If he does not, distribution may be made by the executing Court without knowledge of the claim and he may find that the Court has parted with all the assets. The corresponding section in the Code of 1882 to this section was section 295. Here again, the latter Code made verbal alterations, but these verbal alterations did not, so far as the present case is concerned, materially alter the Code of 1882.

The adding of the explanation to section 64 of the Code of 1908 appears to have been the result of conflicting High Court decisions. In *Ganga Din* v. *Khushali*(1) the Allahabad High Court held that an application for rateable distribution was not a claim "enforceable under the attachment" within the meaning of section 276 of the Code of 1882, but in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(2) TELANG J. held that a claim for rateable distribution did come within the purview of section 276. TELANG J. said:

"I cannot doubt that the claims of those execution creditors who under section 295 are entitled to claim the benefit of a distribution of the fruits of the attachment ought to be treated as falling within the words 'all claims enforceable under the attachment'."

The wording of the explanation follows the wording of TELANG J.'s judgment and did put an end to the controversy. Whether on a true construction of the

(1) (1885) I.L.R. 7 All. 702. (2) (1891) I.L.R. 16 Bom. 91, 100.

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provisions of the Code of 1882 claims for rateable distribution should have been regarded as "claims enforceable under the attachment" it is not necessary to decide. In drafting the present Code the Legislature considered that claims for rateable distribution should be included in this category and as the result added the explanation to section 64. The Court has to decide whether an attachment in proceedings which do not result in the sale of the attached property enures for the benefit of a person who sells in other execution proceedings as the result of an attachment effected after the property has been alienated privately.

In my opinion the judgment of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1) has great bearing on the question under discussion; in fact, in my opinion, it really decides it. It is true that there the Judicial Committee was considering a case under the Code of 1882, but the appeal was heard in 1916, eight years after the present Code had come into force and their Lordships referred to the judgment of TELANG J. in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(2) which in effect read into section 276 of the Code of 1882 what has now been added by the explanation to section 64 of the present Code. In *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1) the appellant claimed under two deeds of sale executed in her favour on 15th July 1907 by a judgment-debtor. The respondent was the transferee of a money decree obtained against the judgment-debtor on 3rd January 1901. He was also the transferee of a money decree obtained against the judgment-debtor on 24th August 1896.

(1) (1916) I.L.R. 44 Cal. 662 (P.C.). (2) (1891) I.L.R. 16 Bom. 91.

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On 13th June 1902 execution proceedings were instituted in respect of the decree passed in 1896. These proceedings were numbered as Execution Case No. 8 of 1902. The property which was the subject-matter of the suit which gave rise to the appeal to the Privy Council was attached, but no further step in execution was taken here. In 1907 an application for execution of the decree of 3rd January 1901 was filed and this application led to the attachment of the same property on 16th July 1907, the day after the property had been sold privately to the appellant. The latter execution proceedings, which were No. 16 of 1907, were persisted in and the property was sold to the respondent at a court-auction held on 23rd August 1907. The question for decision was whether the title obtained by the appellant under the two sale-deeds of 15th July 1907 prevailed over that obtained by the respondent at the court-auction on 23rd August 1907. The execution proceedings of 1907 having been instituted after the alienation to the appellant, the respondent was not able to say that the alienation was void as against that attachment, but he claimed that inasmuch as there was a subsisting attachment under the decree of 1896 that attachment enured to his benefit and rendered the alienation void. The Privy Council held that the respondent's title rested entirely on the attachment in the Execution Case No. 16 of 1907, but as the alienation to the appellant had taken place before that attachment was effected it was not void under section 276. The respondent could not invoke section 295 as there were no assets in Court when the alienation took place. At page 672 of the report Sir LAWRENCE JENKINS who delivered the judgment of the Board said:

"But then it is urged for the decree-holder that the sales to the plaintiff, even if executed on the date the kobalas

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bear, are, nevertheless, void under section 276 of the Code of Civil Procedure. That section provides that when an attachment has been made as there described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. *Ex hypothesi*, the alienation to the plaintiff was not during the continuance of the attachment in Execution Case No. 16 of 1907, or, in other words, the attachment under which the execution sale to the decree-holder was made. Therefore it cannot be avoided by that attachment."

Later in the judgment Sir LAWRENCE JENKINS said:

"He (the respondent) relies on section 295 of the Code of Civil Procedure as entitling him to the benefit of section 276, and for this purpose he calls in aid his application for attachment in Execution Case No. 8 of 1902. To bring section 295 into play certain conditions are necessary, and one of them is that there should be assets held by the Court. It has not been shown that there was such assets, and the indications in the record point the other way. But apart from this, section 295 cannot help the decree-holder. Though the word 'attachment' occurs three times in section 276, the reference is to one, and only one, attachment: that one in this case is the attachment in Execution Case No. 16 of 1907. All that can be done is to employ that attachment for the purpose of impugning the private alienation, for it is on that alone that the decree-holder's title to the property in suit at present rests. So that even if it be assumed, for the sake of argument, that the view which prevailed in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(1) is correct, and that the conditions of section 295 have been satisfied, it cannot advance the decree-holder's case.

It still is the attachment in Execution Case No. 16 of 1907 that is the only weapon of attack, and it is not made more effective by the earlier attachment in Execution Case No. 8 of 1902. All that earlier attachment can do in the circumstances of this case is to entitle the decree-holder to the benefit of the later attachment. He cannot claim to be in a better position than the decree-holder in Execution Case No. 16 of 1907, nor does it strengthen his position that it is the

(1) (1891) I.L.R. 16 Bom. 91.

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same person who is the decree-holder in both cases. To claim a higher right because the attachment in Execution Case No. 8 of 1902 is of an earlier date rests on an obvious confusion of thought."

The Judicial Committee did not accept the decision of TELANG J. in *Sorabji Edulji Warden* v. *Govind Ramji, F.N. Wadia and another*(1) as being correct, but assumed for the sake of argument that it was correct and went on to say that on this assumption the only weapon of attack was the attachment in Execution Case No. 8 of 1902. In other words, the private alienation could only be avoided in the execution proceedings which led to the sale. The execution proceedings which led to the sale in that case were the execution proceedings in which the attachment had been effected after the alienation had taken place. As the judgment of TELANG J. in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(1) was to the effect that the words "all claims enforceable under the attachment" in section 276 of the old Code included claims for rateable distribution and as the judgment of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(2) proceeded on the assumption that *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(1) had been correctly decided, it seems to me that *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(2) must be regarded as having direct application in the matter now before us.

The decision in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(2) was considered by a Full Bench of this Court (WALLIS C.J. and AYLING and KUMARASWAMI SASTRI JJ.) in *Annamalai Chettiar* v. *Palamalai Pillai*(3) and as I read the judgments the Full Bench regarded *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(2)

(1) (1891) I.L.R. 16 Bom. 91. (2) (1916) I.L.R. 44 Cal. 662 (P.C.).
(3) (1917) I.L.R. 41 Mad. 265 (F.B.).

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as applying to the present Code. In *Annamalai Chettiar* v. *Palamalai Pillai*(1) a decree-holder attached land in execution of his decree. Other persons had obtained decrees against the judgment-debtor and they applied for rateable distribution without attaching the land in execution of their decrees. Subsequently the judgment-debtor alienated the land and paid off the decree-holder who had attached. It was held by the Full Bench that the other decree-holders who had applied for rateable distribution were not entitled to question the alienation under section 64. In the course of his judgment, in which AYLING J. concurred, WALLIS C.J. said:

"Section 64 of the present Code affords no greater protection to the attaching decree-holder than section 276 of the old Code, and if he cannot protect himself against an alienation after attachment unless the attached property is brought to sale in execution of the decree in respect of which the attachment was made, it necessarily follows that other decree-holders who have applied for execution cannot be in any better position."

KUMARASWAMI SASTRI J. who delivered a separate but concurring judgment, after quoting from the judgment in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(2), said:

"There can be little doubt that section 64 as it stands at present can protect decree-holders entitled to rateable distribution against private alienation only where assets have been realized, in which case they will be entitled to share the proceeds in preference to the alienee. This can happen only in a very limited class of cases, e.g., where the garnishee pays the attached amount in Court. In the numerous and important class of cases relating to attachment of immoveable property the amendment would be of no use to decree-holders entitled to rateable distribution. Assuming that the Legislature intended the attachment under section 64 to enure for the

(1) (1917) I.L.R. 41 Mad. 265 (F.B.). (2) (1916) I.L.R. 44 Cal. 662 (P.C.).

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benefit of all persons entitled to rateable distribution who had applied for execution prior to the private alienation, it has not gone far enough when it introduced the explanation to section 64 worded as it is and made no provision for the continuance of the attachment in Order XXI in cases where the attaching-creditor was paid off. The result is not very happy, but the remedy is in the hands of the Legislature."

These observations are clearly based on *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1) and they were made in a case under the present Code.

We have been asked to disregard the decision in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1) because in *Nur Mahomed Peerbhoy* v. *Dinshaw Hormasji Motiwalla*(2) the Judicial Committee did not decide whether the former case had bearing on the latter. The facts in *Nur Mahomed Peerbhoy* v. *Dinshaw Hormasji Motiwalla*(2) were that on 19th August 1911 the property of the judgment-debtor was attached in execution proceedings, and in June of the following year it was sold in those proceedings. On 9th August 1912 the judgment-debtor, the first defendant, paid in the whole of the decretal amount and costs and as the result the sale was not confirmed and the execution proceedings were struck off on 1st October 1912. Before the payment of the decretal amount, another application for execution was filed by another decree-holder and on 10th August 1912 the property was attached in those proceedings. On 12th August 1912 an application for rateable distribution was filed by the decree-holder who had instituted the later execution proceedings, but it was refused on the ground that the money which had been lodged in Court was not money realised in execution. Thereupon the second decree-holder applied for the sale of the attached property. The sale was carried

(1) (1916) I.L.R. 44 Cal. 662 (P.C.). (2) (1922) 45 M.L.J. 770 (P.C.).

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out on 25th April 1913 and the property was purchased by the second defendant in the suit. On 17th July 1912 the judgment-debtor entered into a contract with the plaintiff for the sale of the same property. The suit out of which the appeal arose was a suit by the plaintiff for specific performance of the contract. Their Lordships did not think it necessary to consider whether *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1) had any bearing on the question or whether that case was rendered inapplicable owing to the difference of phraseology of section 64 of the present Code from section 276 of the old Code under which that case was determined. The remarks of their Lordships in *Nur Mahomed Peerbhoy* v. *Dinshaw Hormasji Motiwalla*(2) cannot, however, be read as casting doubt on the effect of *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1). They can only be read as expressing their Lordships' opinion that it was not necessary to consider the question of the application of *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1) to the case then before them. For the purpose of answering the present reference the question of its application to the present Code has to be considered and I have stated my reasons for holding that it does apply.

The question has also been considered by the Calcutta, Bombay, Allahabad, Patna and Nagpur High Courts, and they have all applied *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1) to cases under the present Code and they have all accepted as being correct the decision of the Full Bench of this Court in *Annamalai Chettiar* v. *Palamalai Pillai*(3).

In *Provash Chandra Mullick* v. *Debendra Nath Dutt*(4) a Division Bench of the Calcutta High Court

(1) (1916) I.L.R. 44 Cal. 662 (P.C.). (2) (1922) 45 M.L.J. 770 (P.C.).
(3) (1917) I.L.R. 41 Mad. 265 (F.B.). (4) (1935) 39 C.W.N. 1076.

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(S. K. GHOSE and MCNAIR JJ.) had to consider a case in which the facts were these. One Monomoy Bannerjee in March 1933 obtained an attachment in execution of his money decree. On 28th August 1933 one Provosh Chandra Mullick, another judgment-creditor of the judgment-debtor, applied for rateable distribution. On 7th September 1933, during the pendency of Monomoy Bannerjee's attachment, the judgment-debtor sold the property privately to Debendra Nath Dutta. Out of the sale-proceeds Monomoy Bannerjee was paid part of his decretal amount, whereupon his petition in execution was dismissed and the attachment came to an end. On 16th September 1933 Provosh Chandra Mullick himself applied for attachment and sale of the property. The question which the Court was called upon to consider was whether the private alienation to Debendra Nath Dutta was valid. It was held that it was. GHOSE J. who delivered the judgment of the Court said :

"Now *Mina Kumari's* case(1) assumes that the view taken in *Sorabji Edulji Warden's* case(2) is correct and on that assumption it points out that, in order that the claims of non-attaching decree-holders for rateable distribution might be enforceable, it was necessary to bring section 295 (now section 73) into play, but that certain conditions should be fulfilled and one of them was that there should be assets in the hands of the Court. I fail to see how this decision can be affected by the fact that the explanation to section 64 was not then in existence. BAKEWELL J. who was one of the referring Judges in the Madras case, took the view that the Privy Council case in the decision under the old Code was no authority on the question which was raised under the new Code with the explanation added. But the learned Judges who heard the reference all took the view that the question was governed by the decision in *Mina Kumari's* case(1) on the principle that a claim in order to be enforceable must comply

(1916) I.L.R. 44 Cal. 662 (P.C.). (2) (1891) I.L.R. 16 Bom. 91.

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with the conditions laid down in section 73, and that certainly is the import of the decision in *Mina Kumari's* case(1). In that view we see no reason to differ from the decision of the Full Bench in the Madras case."

The Bombay decision is *Chindha* v. *Chhaganlal*(2). In that case one Bhila obtained on 13th April 1920 an attachment before judgment. Chhaganlal, the respondent in the appeal, obtained an attachment before judgment of the same property on 28th May 1920. On 8th June 1920 the judgment-debtor sold the property to the respondent. Out of the amount of the consideration the respondent paid himself the amount due under his decree and also paid to Bhila the amount payable to him. Consequently, on 15th June 1920 the respondent's suit was dismissed and on 22nd of that month Bhila's suit was dismissed. On 19th June 1920, that is four days after the dissolution of the respondent's attachment by reason of the dismissal of his suit and three days before the dissolution of Bhila's attachment, Chindha Rupla Patil, the appellant, also attached the property and in the execution proceedings instituted by him the property was sold on 1st July 1921 at a court-auction. The respondent filed the suit out of which the appeal arose for a declaration that the property could not be sold in execution of the appellant's decree. It was held that the appellant could not claim the benefit of either of the two earlier attachments. After referring to *Annamalai Chettiar* v. *Palamalai Pillai*(3) and *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1), PATKAR J. said:

"The attachment before judgment in the defendant's suit in execution of which the sale was held was subsequent to the alienation of the plaintiff. There were not, therefore,

(1) (1916) I.L.R. 44 Cal. 662 (P.C.). (2) (1928) 30 Bom. L.R. 1488.
(3) (1917) I.L.R. 41 Mad. 265 (F.B.).

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any claims enforceable under the previous attachments under section 64 of the Code of Civil Procedure. It is also clear that the claim of the present defendant does not fall under the explanation to section 64 for there were no assets held by the Court in order to entitle him to the benefit of section 73 of the Code of Civil Procedure. It follows, therefore, that the claim of the present defendant was not a claim falling under section 73 of the Code of Civil Procedure and, therefore, not a claim enforceable under the attachment within the meaning of section 64 of the Code of Civil Procedure. We think, therefore, that the contention of the appellant that the sale-deed is void under section 64 is not sustainable.

It is urged on behalf of the appellant that, though his case might not fall strictly within section 64, the principle of section 64 might be applied in considering his claim under the attachment of June 19, 1920. The argument cannot be accepted. According to the decisions in *Jetha Bhima & Co.* v. *Lady Janbai*(1) and *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(2) the sale-deed in favour of the present plaintiffs cannot be affected by the attachment of the defendant which was levied eleven days after the sale-deed. The previous attachments must be considered to have been withdrawn on account of satisfaction of the claims in respect of which the attachments were effected. The moment the attachment comes to an end by reason of satisfaction of the decree all claims under the attachment cease to be enforceable; see *Khushalchand* v. *Nandram Sahebram*(3)."

BAKER J. concurred in the judgment of PATKAR J.

The Allahabad High Court considered *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(2) and *Annamalai Chettiar* v. *Palamalai Pillai*(4) in *Mehar Chand* v. *Joti Prasad*(5). There, one Roop Chand obtained a money decree and attached the immovable property of the judgment-debtor in March 1927. On 8th June 1927 Joti Prasad who had also obtained a money decree against the judgment-debtor applied for rateable

(1) (1912) I.L.R. 37 Bom. 138.
(2) (1916) I.L.R. 44 Cal. 662 (P.C.). (3) (1911) I.L.R. 35 Bom. 516.
(4) (1917) I.L.R. 41 Mad. 265 (F.B.). (5) (1934) 33 A.L.J. 4.

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distribution. On 21st January 1928 the property was sold in pursuance of Roop Chand's attachment. On 21st February 1928 the judgment-debtor sold the property privately to one Lala Mehar Chand and out of the sale-proceeds paid off the amount due to Roop Chand under his decree. The sale in execution was consequently set aside. On 28th February 1928 Joti Prasad without filing a separate application for execution, but merely relying on his application for rateable distribution, asked the Court to sell the property, which the Court did and confirmed the sale on 31st July 1928. Lala Mehar Chand then filed a suit for a declaration of his title and succeeded. RACHPAL SINGH J. in the course of his judgment referred to *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1) and *Annamalai Chettiar* v. *Palamalai Pillai*(2) and quoted with approval from the judgment of WALLIS C.J. in the latter case. SULAIMAN C.J. who concurred in the judgment of RACHPAL SINGH J. considered that the explanation to section 64 emphasizes that the private alienation which has to be void must be "contrary to such attachment".

The Patna High Court applied *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1) and approved of *Annamalai Chettiar* v. *Palamalai Pillai*(2) in *Radha Mohan* v. *Musammat Wahidan*(3) and the decision of the Nagpur High Court to the same effect was given in *Kasturchand and another* v. *Wazir Begum and others*(4).

The learned Judges who have made this reference have indicated that in their opinion section 64 is sufficiently widely worded to give Pedda Sambayya Chetty the benefit of Appu Chetty's attachment. They have read section 64 as operating to protect all

(1) (1916) I.L.R. 44 Cal. 662 (P.C.). (2) (1917) I.L.R. 41 Mad. 265 (F.B.).
(3) (1934) I.L.R. 13 Pat. 446. (4) I.L.R. [1937] Nag. 291.

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judgment-creditors who have applied for execution before any assets of the judgment-debtor are brought into Court, irrespective of the fact that the attachment which results in the sale has been effected after the private alienation. If it were the intention of the Legislature to embody in the Code this broad principle, the language used has not effected it and the Court can only have regard to the language used. I am unable, however, to accept the proposition that the Legislature had in mind what the learned Judges consider it had in mind. The principle which they say is expressed in section 64 is a principle which runs contrary to the common law and contrary to the provisions of the Code of Civil Procedure of 1859. Under section 270 of the Code the creditor who attached first was given priority. He was entitled to be paid in full. Section 271 provided merely for the rateable distribution of the balance. It seems to me more probable that the Legislature has said what it intended to say. The learned Judges, while they have considered the decisions in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1) and *Annamalai Chettiar* v. *Palamalai Pillai*(2), have not examined the decisions of the other High Courts which have applied the judgment in the former case to the present Code and which have approved of the judgments in the latter case. The learned Judges were impressed by the decision in *Durga Churn Rai Chowdhry* v. *Monmohini Dasi*(3). In that case the Calcutta High Court accepted the view of the Allahabad High Court in *Ganga Din* v. *Khushali*(4) and observed that to hold that claims under section 295 of the Code of 1882 were claims

(1) (1916) I.L.R. 44 Cal. 662 (P.C.). (2) (1917) I.L.R. 41 Mad. 265 (F.B.).
(3) (1888) I.L.R. 15 Cal. 771. (4) (1885) I.L.R. 7 All. 702.

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enforceable by attachment against which assignments made under section 276 were void, would perhaps be carrying out the intention that might have been in the mind of the Legislature when the old Code, which did not provide for a rateable distribution, was suddenly modified by the introduction of that perfectly new principle, but the sections of the Code relating to execution were not recast so as to be fully adapted to the new state of things, and it appeared to the learned Judges who decided *Durga Churn Rai Chowdhry* v. *Monmohini Dasi*(1) that in this respect section 276 had not been successfully framed with the object of protecting rateable distribution amongst claimants under section 295. With the addition of the explanation to section 64 of the present Code the learned Judges who have referred the present question have indicated that in their opinion the section has been framed in such a way that all claimants for rateable distribution have been protected, notwithstanding that the proceedings leading to the sale of the judgment-debtor's property have been instituted after the private alienation. They say that otherwise the protection which the Legislature intended to afford to claimants for rateable distribution would be meaningless. Their argument, however, overlooks the fact that, were it not for the explanation, the controversy which led to the conflicting decisions would remain unsettled. With great respect I am unable to share the opinion expressed in the order of reference.

The answer that I would give to the reference is this. Section 64 provides that where a property has been attached any subsequent alienation is void against all claims enforceable under that particular

(1) (1888) I.L.R. 15 Cal. 771.

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attachment, but it does not go beyond this. An attachment effected after a private alienation is not assisted by an attachment before the alienation. If the execution proceedings in which the second attachment has been made, have been instituted before assets have been brought into Court, the creditor will be entitled to rateable distribution if the property is sold in the earlier execution proceedings, but if the sale takes place as the result of the attachment effected after the private alienation a person who buys the property at the court-auction will not obtain a good title.

I would make the costs of this reference costs in the appeal.

PANDRANG ROW J.

PANDRANG ROW J.—I agree with my Lord.

PATANJALI SASTRI J.

PATANJALI SASTRI J.—I agree with the answer given by my Lord the CHIEF JUSTICE.

ABDUR RAHMAN J.

ABDUR RAHMAN J.—The question to decide is whether the mortgage executed by the judgment-debtors was, in the circumstances mentioned, valid as against the appellant who had purchased the property in the court-sale in the course of execution (Execution Petition No. 322 of 1926). It has been contended on behalf of the appellant that, inasmuch as the mortgage deed was executed by the judgment-debtors in favour of the respondent during the subsistence of the attachment effected in March 1925 and by making his application for execution (Execution Petition No. 322 of 1926) the second decree-holder's claim had become enforceable under the said attachment, the mortgage must be held to be void as against the appellant. This necessitates an examination of the provisions contained in sections 64 and 73 of the Code of Civil

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Procedure. To take up section 73 first. It provides that where assets are held by a Court and more persons than one have, before the receipt of such assets, applied to the Court for the execution of decree against the same judgment-debtor, the assets shall be rateably distributed amongst all such persons. In other words, it provides for rateable distribution of assets held by a Court amongst those unsatisfied holders of decrees for money who have applied to the Court for execution before the assets have been received by the Court. It may be observed that this section was amended by the Code of 1908 and is not confined in its operation to the assets which are realized by sale or any other process in execution. It is immaterial now how the assets are received by a Court so long as they are held by it, although the Court may have done nothing to realise them. Whatever argument might have been advanced before the amendment of this section in regard to the assets realised by sale or otherwise in execution of a decree being distributable between the creditors rateably, it cannot now be contended that it is only the assets which have been realised in that manner that are capable of being distributed under section 73, Civil Procedure Code. This would suggest that the connection existing between an attachment and sale of the property by Court before 1908 was done away with by the amendment made in the present section. A perusal of the language of this section would also show that it does not require a decree-holder to make an application for a rateable share in the assets. Indeed it has been held that a simple application for a rateable distribution is not enough and would not entitle the petitioner to get the same.

"The duty of distribution is"

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as observed by VARADACHARIAR J. in *Somasundaram Chettiar* v. *Alamelu Achi*(1),

"cast on the Court whenever 'more persons than one' have applied for execution of decrees passed against the same judgment-debtor."

No assets can, it is true, be distributed before they are received by the Court and that is how the section has been drafted; but the claim to receive a rateable share must have been in existence and made before they are so received and it is the claim made before the receipt of assets by putting in an application for execution which entitles a decree-holder, who has a money-decree against the judgment-debtor, to receive his share. If a decree-holder does not apply for execution before the receipt of assets by the Court, he obviously cannot get a rateable share of the assets under this section, although they could be actually distributed only after they had been received by Court.

A judgment-debtor loses the power of alienating his rights in the property on its attachment to the extent of the claims enforceable under the attachment. This is a legal consequence of the attachment and should have been provided, as it is in fact provided by the Code, before an application for execution entitling a person to a rateable share could be thought of. That is why, in the scheme of the Code, section 64 precedes section 73.

So far as this case is concerned, an attachment of the property in dispute was effected on 7th March 1925 in the first instance in Execution Petition No. 132 of 1925 and an application for execution was made by the decree-holder in Original Suit No. 237 of 1925 to the same Court during the subsistence of the above

(1) 1937 M.W.N. 480.

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attachment and before the receipt of any assets by that Court. The question is whether the second application for execution (Execution Petition No. 322 of 1926) must be held to be inconsequential or useless for the purposes of section 64, Civil Procedure Code, simply because the execution Court did not proceed to sell the property in pursuance of the attachment effected in March 1925 but did so under the later attachment made in June 1926. This takes me to section 64, Civil Procedure Code, which reads as follows :—

"Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation.—For the purposes of this section claims enforceable under an attachment include claims for the rateable distribution of assets."

This section renders a private transfer of a property or of any interests therein during the continuance of an attachment ineffectual as against all claims enforceable under the attachment if the transfer was contrary to such attachment.

Without taking the decided cases into consideration, and placing a purely grammatical construction on the words of the section, my answer to the question whether an alienation is hit by this section would depend on the reply to the following questions :

(*a*) Was there an attachment ?

(*b*) Was the alienation contrary to (such) attachment or did it affect any claim enforceable under such attachment ?

If the answers to the above questions happen to be in the affirmative, I would say that the transfer was invalid as against the persons whose claims were

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enforceable under the attachment. It cannot be disputed that a transfer by a judgment-debtor after an attachment at the instance of an attaching-creditor would be contrary to the attachment effected at his instance, and to use the language of the section, "void" as against him. The question is whether it would also be "void" as against the claims of the persons who did not attach but had merely applied for execution after the first attachment although before the receipt of assets and had thus become claimants for a share in the rateable distribution of the assets under section 73, Civil Procedure Code. There is no doubt that if they had asked for attachments in their applications they would have got them and any alienation contrary to such attachments would not have affected these decree-holders. This would have caused multiplicity of proceedings and meant unnecessary duplication of legal machinery in issuing several attachments. Are the claimants for rateable distribution then to be debarred from getting the protection which attachments in their own applications for execution would have afforded them ? And do they not, by making an application for execution, get an additional advantage of going back to the date of the first attachment effected at the application of another decree-holder and saying that any alienation by the judgment-debtor after the first attachment would not be voidable at the instance of the first decree-holder alone but at their instance as well ?

In adding the explanation to section 64, I feel that the Legislature has, instead of confining the benefit of the attachment to the attaching-creditor only, extended it to such other creditors also whose claims were "*enforceable*" under the attachment. The use of the word "enforceable" in section 64 is very significant.

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It means "capable of being enforced" and has to be distinguished from the word "enforced". As soon as an application for execution is made by a person holding a decree for the payment of money against a judgment-debtor to the Court which had already attached the property of the same judgment-debtor, the person making the application for execution would be entitled to rateable distribution if the application was made before the receipt of assets and his claim or decree would be *enforceable* under the attachment, although it could not be *enforced* until the assets were actually received in Court. But we are not considering any question of actual distribution of assets, for which their receipt is naturally a condition, but the effect of such an application under section 64, Civil Procedure Code. A claim for rateable distribution has now been included, by the explanation to section 64, in the claims enforceable under an attachment. It would therefore follow that as soon as an application for execution is made by a person in circumstances which would entitle him to claim rateable distribution, his claim would fall within the category of claims enforceable under the attachment. He would then be entitled to claim the benefit of section 64 and to treat the alienation of the property by his judgment-debtor as "void" not only against the attaching-creditor but also as against himself. In other words, if the alienation by his judgment-debtor was contrary to the attachment effected at the instance of the attaching-creditor, it would be void as against his claim which has by virtue of the explanation become enforceable under the attachment. For ascertaining the effect of section 64 it appears to be unnecessary to consider whether the assets were actually realized by the Court subsequently or not. This may be

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vital when the Court wishes to dispose of the various applications and distribute the assets, but has, to my mind, no bearing on the validity or otherwise of the alienation made pending an attachment. But it has been contended that, unless the attachment effected on the property results in a sale, the application for execution which would entitle a party to rateable distribution could not be brought within section 73, Civil Procedure Code, and would not therefore entitle him to take advantage of the attachment effected at the instance of the attaching-creditor. Section 73 provides how the assets are to be actually distributed and has thus to define persons who are entitled to share in the rateable distribution but it is beyond the province of that section to say what the effect of an attachment would be on an alienation not only in regard to the attaching-creditor but also in regard to the claims of persons who are entitled to a share in the rateable distribution. For this purpose we will have to go to section 64; but there is nothing in that section which makes the sale of property or even the receipt of assets a condition precedent for either the validity of the attachment or for voidability of the alienation effected during its pendency. The explanation to section 64 makes it clear that for the purpose of that section, there would be no difference between an attaching-creditor and an applicant for rateable distribution. The claims of both have been declared now to be enforceable under the attachment. If that be so, where is the justification for adding a condition that the first attachment should necessarily have resulted in a sale, failing which, another decree-holder, who was not the attaching-creditor, could not take advantage of the attachment effected before he made his application for execution and could not

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impugn the transfer of property made by the judgment-debtor during the subsistence of that attachment ?

It was argued on behalf of the respondent that their Lordships of the Privy Council took the view in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1) that such a sale in the first attachment was essential and held that

> " to bring section 295 into play certain conditions are necessary and one of them is that there should be assets held by the Court ".

On this assumption it was contended that since the property was not sold in Execution Petition No. 132 of 1925 and there were no assets held by the Court in that execution, the decree-holder cannot be said to have complied with one of the essential conditions of section 73 of the present Code and cannot take advantage of the provisions contained in that section. I shall consider the question whether the sale of the property under attachment is a condition precedent before a subsequent decree-holder can take advantage of section 64 of the Code when I am examining the Full Bench decision in *Annamalai Chettiar* v. *Palamalai Pillai*(2), but should like to observe at this stage that a claim for rateable distribution was not included in the claims enforceable under an attachment in the Civil Procedure Code of 1882 under which the decision was given by their Lordships, and in the absence of such a provision the applicability of section 295 of the old Code was made to depend on the condition that the assets were held by the Court. Section 295 of the old Code provided, and its successor, section 73 in the present Code, now provides, for the actual distribution of assets amongst

(1) (1916) I.L.R. 44 Cal. 662 (P.C.). (2) (1917) I.L.R. 41 Mad. 265 (F.B.)

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the various decree-holders under certain conditions and one of these conditions was held by their Lordships to be the actual presence of assets in Court. But the effect of the decree-holder being a claimant of a share for rateable distribution was not considered by their Lordships as on the date (i.e., 16th July 1907) on which he had in that case made an application for Execution Case No. 16 of 1907, the attachment effected in Execution Case No. 8 of 1902 had come to an end by virtue of an order passed on 29th March 1905, and the private alienation of the property had been effected by the judgment-debtor more than two years after, i.e., on 15th July 1907. How could the decree-holder then call in aid his application for attachment in Execution Case No. 8 of 1902 when the attachment had ceased to exist in 1905 and the other application for execution of another decree was not made by him prior to the alienation of the property by the judgment-debtor ? The prior attachment was not taken into consideration as it had ceased to exist in 1905 and the subsequent attachment was considered to be of no avail as the alienation by the judgment-debtor was before the second application for execution was made. It cannot therefore be said that their Lordships were called upon to decide or decided that an application for execution would or would not entitle a person to take advantage of a subsisting prior attachment effected on the property, although it may be conceded that in the absence of the explanation the argument that on a subsequent application for execution a decree-holder would have been able to claim that advantage was, in spite of TELANG J.'s decision in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(1), a little

(1) (1891) I.L.R. 16 Bom. 91.

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far-fetched. It will also be observed that, although a reference was made to section 64 of the present Civil Procedure Code by one of the Counsel in his arguments, their Lordships appear to have scrupulously avoided any reference to that section apparently because the law applicable to the facts of that case was what existed before 1908 and they must have evidently considered it unnecessary to consider the effect of the addition of the explanation to section 64, Civil Procedure Code, in that case. It is needless to add that the Privy Council decision is no authority on the facts of the present case where the first attachment was in force both when the alienation was made by the judgment-debtor and when the application for execution was made by the second decree-holder. In these circumstances it is impossible to ignore the addition of the explanation to section 64 of the present Code. In fact, when a similar question came up for consideration before their Lordships in *Nur Mahomed Peerbhoy* v. *Dinshaw Hormasji Motiwalla*(1) they happen to observe:

"The point raised by the learned Judge seems to their Lordships to be one of considerable difficulty, and not as easily to be diposed of as was done by the learned Judges of the Court of appeal. In particular, it would have to be considered whether what was said in the case of *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(2) has any bearing on the question, or whether that case is rendered inapplicable owing to the difference of phraseology in section 64 of the Civil Procedure Code of 1908 from section 276 of the Code of Civil Procedure of 1882, under which that case was determined. It would also have to be considered whether at any given moment the plaintiff was able to get specific performance. Their Lordships, if it had been necessary to determine these questions, would have required further argument. But

(1) (1922) 45 M.L.J. 770 (P.C.). (2) (1916) I.L.R. 44 Cal. 662 (P.C.).

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they do not now think it necessary to decide the question because they think the plaintiff's case fails on another ground".

The next case on which reliance was placed by the learned Counsel for the respondent is a Full Bench decision of this Court in *Annamalai Chettiar* v. *Palamalai Pillai*(1) which was, on a difference between SESHAGIRI AYYAR J. and BAKEWELL J., referred to a Bench of three learned Judges. This case has been followed by various High Courts and it was with the object of reconsidering this decision that the present Bench was constituted. The question for reference in that case was

"whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment *which has since been raised by* the satisfaction of the decree or otherwise are entitled to question a private alienation made during the continuation of such attachment".

The answer to this question was given by the Full Bench in the negative and in view of the fact that the attachment was raised by the satisfaction of the decree, the learned Counsel for the appellant appeared to concede that the decision might have been justified on its own facts but he asked us to reconsider the reasons given by the learned CHIEF JUSTICE and another learned Judge of this Court. Coming now to the Full Bench case we find that, starting with the proposition that the decree-holders other than the attaching decree-holders acquired no right to rateable distribution under section 295 (now section 73) of the Code until assets had been realized or, as it might now be said, received—a statement to which no exception could be taken—the learned CHIEF JUSTICE observed

(1) (1917) I.L.R. 41 Mad. 265 (F.B.).

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that the Judicial Committee seemed to have held in *Mina Kumari's* case(1)

"that the attaching decree-holder himself cannot object to a private alienation by the judgment-debtor subsequent to the attachment *unless the attached property has been brought to sale in execution of the decree in respect of which the property was attached*".

Now, if I may say so with great respect to the learned CHIEF JUSTICE, the relevant observation made by Sir LAWRENCE JENKINS at page 672 towards the end of the following passage was not correctly appreciated:

"But then it is urged for the decree-holder that the sales to the plaintiff, even if executed on the date the kobalas bear, are nevertheless void under section 276 of the Civil Procedure Code. That section provides that when an attachment has been made as there described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. *Ex hypothesi*, the alienation to the plaintiff was not during the continuance of the attachment in Execution Case No. 16 of 1907, *or, in other words, the attachment under which the execution sale to the decree-holder was made.* Therefore it cannot be avoided by that attachment".

If I understand the observation correctly, Sir LAWRENCE JENKINS after describing the provisions of section 276 of the old Code applied the same to the facts before him and said that the alienation to the plaintiff could not *ex hypothesi* be affected as it was not made

"during the continuance of the attachment in Execution Case No. 16 of 1907".

Had he stopped here, his observations could not have been misunderstood, but in order to make himself

(1) (1916) I.L.R. 44 Cal. 662 (P.C.).

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clearer in regard to the attachment to which he was referring he added:

"*Or in other words* the attachment under which the execution sale to the decree-holder was made".

I cannot understand Sir LAWRENCE JENKINS to be laying down what the learned CHIEF JUSTICE felt he was. The expression "or in other words" is important and was undoubtedly employed by his Lordship to avoid any possibility of mistake in regard to the attachment to which a reference was made just before. It must not be overlooked that in that case the alienation had been effected on 15th July 1907 while the application for Execution No. 16 of 1907 was presented a day later, i.e., on 16th July 1907 and the attachment under which the sale to the decree-holder was made must have been effected subsequently. Again the learned CHIEF JUSTICE's observation in the next sentence,

"the decree-holder was held not to be entitled to defend his title as against the alienee from the judgment-debtor under section 276 by relying on the fact that before the date of the alienation he had attached the suit property in execution of another decree *without bringing the property to sale in execution of that decree*",

does not seem to be correct. The italicised words do not appear in the Privy Council decision and the decree-holder was held not to be entitled to defend his title as against the alienee by relying on the previous attachment simply because it had ceased to exist in March 1905 and not because the property was not brought to sale in execution of that decree.

The observation in the next paragraph,

"section 64 of the present Code affords no greater protection to the attaching decree-holder than section 276 of the old Code and if he cannot protect himself against an alienation after attachment *unless the attached property is brought*

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to sale in execution of the decree in respect of which the attachment was made, it necessarily follows that other decree-holders who have applied for execution cannot be in a better position ",

is based upon the same misconception in regard to the actual sale of the property which is nowhere to be found in the Privy Council decision. It is not contended that section 64 places the decree-holders who have applied for execution subsequently in any better position than that of the attaching-creditor. The section places both the attaching-creditor and other decree-holders who have applied for execution in the same position so far as the alienation of the attached property is concerned and if the alienation is made during the continuance of the attachment it would be voidable not only against the attaching-creditor but also against the other decree-holders. It appears to me, although it is not quite necessary to decide it in this case, that the attaching-creditor cannot after the addition of this explanation steal a march over the other decree-holders and the judgment-debtor cannot, by paying the attaching-creditor alone, free the property from the claims of those who have already applied for execution during the subsistence of the first attachment. Anyhow, even if one may not go to that length, it is at least clear that by adding the explanation to section 64 the Legislature has succeeded in sufficiently expressing itself and declaring the alienations to be ineffectual not only against the attaching-creditors but even against those who were entitled to rateable distribution under section 73, Civil Procedure Code. It is true that the words " contrary to attachment " used in section 64 in the present Code are narrower, hence more exact, than the words " during the continuance of attachment " occurring in section 276 of the old Code and were

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taken from the judgment of their Lordships of the Privy Council in *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*(1), but this does not mean that section 64 is less favourable now than its corresponding provision in the previous Code in other respects. The explanation to this section has, indeed, by bringing the decree-holders other than the attaching creditors in the category of persons whose claims are enforceable under the attachment, made it more difficult for the judgment-debtor to alienate the attached property without paying his debts for which decrees have been obtained and applications for execution presented. It may be that as a result of payment by the judgment-debtor to the attaching creditor or on the latter's certifying the satisfaction of his decree in accordance with the provisions of Order XXI, rule 55, or on account of a default of the decree-holder as mentioned in Order XXI, rule 59, Civil Procedure Code, the attachment may cease or be deemed to have been withdrawn, but this does not mean that it is not capable of being revived at the instance of the other decree-holder and, even if it is held to be incapable of being brought to life—a point which does not arise for determination in this case as the attachment was never withdrawn here and still stands—there appears to be no reason to hold that the alienation would not be void as against those who by making applications for execution had become entitled to rateable distribution. This is the plain language of the section when it is read with the explanation and there appears to be no reason why a grammatical construction should not be placed on the words of that section particularly when by placing that interpretation the

(1) (1901) I.L.R. 29 Cal. 154 (P.C.).

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apparent intention of the Legislature, in adopting the suggestion made in *Durga Churn Rai Chowdhry* v. *Monmohini Dasi*(1) and giving effect to it by adding the explanation to section 64, is fulfilled.

Let me consider the case by giving an illustration from a slightly different point of view. A obtains a decree against B in the Court of a District Munsif on 1st March 1930 and the decree-holder in execution of that decree attaches B's property in April 1930. But before the property is brought to sale, C gets a decree on 1st July 1930 against B in the Court of a Subordinate Judge and attaches it a fortnight after. There is no doubt that under the provisions of section 63, Civil Procedure Code, it will be the Court of the Subordinate Judge out of the two Courts which would be entitled to realize B's property or determine any claim thereto. Let us also suppose that B had alienated the attached property in May 1930 to a third party. It cannot be disputed that the alienation would not be binding on A. C then applies to the Subordinate Judge for the sale of the property in July 1930. It is clear from the provisions of section 63, Civil Procedure Code, that it is the Subordinate Judge who would be entitled to bring the property to sale and realize the sale-proceeds. The District Munsif would have to stay his hands and cannot after knowing of the attachment by a higher Court proceed to bring the property to sale. Is the alienation voidable against A only in the circumstances or against C as well ? Obviously against both and that only because A who was the first attaching creditor has now been placed in the position of a claimant for rateable distribution and the sale must be held in accordance with the

(1) (1888) I.L.R. 15 Cal. 771.

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provisions of section 63, Civil Procedure Code, by the Subordinate Judge in the decree obtained by C although for the benefit of both A and C. It was held by a Division Bench of this Court in *Narasimhachariar* v. *Krishnamachariar*(1), to which WALLIS J. (as he then was) was a party, that, when a property was attached by different Courts and money was realized in accordance with section 63, Civil Procedure Code, by the Court of the highest grade, the attaching creditors would be entitled to share rateably irrespective of the fact that their decrees have not been transferred to that Court. In delivering the judgment of the Court he puts the following question to himself :

"What however when the attachments are in different Courts and the property is received or realized by the Court of the highest grade under section 63 ?"

He then gave the following answer :

"In such a case there is no receipt at all by the other Courts unless the receipt by the Court of the highest grade can be deemed to be a receipt by the other Courts as well. In my opinion this is the correct view.",

and added later :

"The difficulty is obviated if the payment into Court of the highest grade is treated as payment into Court in all the suits and this in my opinion is the true construction of section 63 . . . ."

If the payment as held in the above case is to be regarded as payment in the illustration given by me in the decrees passed in favour of A and C, both of them will share rateably and will stand exactly in the same position. It was in the latter execution (Execution Petition No. 322 of 1926) that the property was sold. The first decree-holder in Original Suit No. 497 of 1923 actually applied for rateable distribution in Execution Petition No. 322 of 1926 and got

(1) (1914) I.L.W. 403, 407.

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a share of the sale proceeds. It was exactly what the decree-holder of the District Munsif's Court would have done in the illustration given above. The position would have been the same even if the property was sold, in the illustration, by the District Munsif. The Subordinate Judge could have chosen to accept the sale and asked the District Munsif to transfer the sale-proceeds to his Court. The alienation not being binding on A, the whole property would have been sold by the District Munsif. Once the sale-proceeds were received by the Subordinate Judge, they would have been distributed by him amongst the various holders of decrees in accordance with the provisions contained in section 73, Civil Procedure Code. But the point is that A, the holder of the decree in the District Munsif's Court, would have come to the Subordinate Judge's Court as a claimant for rateable distribution and the alienation which was effected by his judgment-debtor after his attachment would have been avoidable not only against him but also against C.

A number of cases were cited during the course of arguments by the learned Counsel for the respondents in support of his contention that the appellant could not successfully assail the alienation by the judgment-debtor during the continuance of the first attachment; vide *Bhupal* v. *Kundan Lal*(1), *Mehar Chand* v. *Joti Prasad*(2), *Provash Chandra Mullick* v. *Debendra Nath Dutt*(3), *Chindha* v. *Chhaganlal*(4), *Radha Mohan* v. *Musammat Wahidan*(5) and *Kasturchand and another* v. *Wazir Begum and others*(6); and they have to be examined to ascertain the extent to which

(1) (1921) I.L.R. 43 All. 399.
(2) (1934) 33 A.L.J. 4.
(3) (1935) 39 C.W.N. 1076.
(4) (1928) 30 Bom. L.R. 1488.
(5) (1934) I.L.R. 13 Pat 446.
(6) I.L.R. [1937] Nag. 291.

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they help him. Having gone through them carefully, however, I am of opinion that they cannot be regarded as authorities in the present case where attachment has continued to subsist on all material dates and has not been removed really up to this day. In all the cases on which reliance was placed by the learned Counsel for the respondent the alienations were not found to be contrary to the attachments which had ceased to exist either by orders of Court or by operation of law under Order XXI, rule 55, Civil Procedure Code, on the dates on which the alienations were made or on the dates on which applications were presented by other decree-holders who but for such cessation would have been entitled to rateable distribution. Let me now examine these cases.

In *Bhupal* v. *Kundan Lal*(1) the decree in favour of the attaching creditor was satisfied on 2nd April 1913 and under the provisions of Order XXI, rule 55, the attachment must be deemed to have come to an end on that date. The private alienation was made on 26th May 1913 while the second attachment in which the property was sold was made on 20th June 1913. In a case like this it could not be urged that the alienation was made during the subsistence of the first attachment and there was no scope for the application of the explanation to section 64.

In *Mehar Chand* v. *Joti Prasad*(2) the attaching decree-holder was paid privately on 21st February 1928 by the sale of the property. Although the subsequent decree-holder had applied for rateable distribution in June 1927, yet on the decree being satisfied the attachment came to an end and the subsequent

(1) (1921) I.L.R. 43 All. 399.
(2) (1934) 33 A.L.J. 4.

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decree-holder who purchased the property in July 1928 without any further attachment was held not to be entitled to defeat the title of the purchaser who had bought the property in February 1928. This case might have been of use to the respondent if the attachment had in the present one ceased to exist but cannot help him when the attachment was in existence at the time the property was purchased by him. This case is an authority against the extreme contention that a claimant for rateable distribution, who would have been entitled to get a share if the assets had come into Court, is still entitled to contest the alienation either on the ground that the attachment has not in spite of the attaching creditor's satisfaction come to an end or that his claim had become enforceable under the attachment at the time it was existing and cannot be defeated by paying the attaching creditor out of Court. It is unnecessary to say anything about this position in this case but the view taken in the Allahabad case may be capable of being defended on the ground that the existence of an attachment is *sine quo non* for the claimant for rateable distribution to attack the alienation successfully. The learned CHIEF JUSTICE, it may be noted, agrees that, if a private alienation is contrary to an attachment, claimants for rateable distribution of the assets would be equally protected. He then proceeds to say at page 11 :

> "It would follow therefore that where the attachment has not fallen to the ground but subsists and property has been sold in pursuance of it, the assets which are realized are liable to be distributed among the decree-holder as well as the claimants for rateable distribution, in spite of the fact that a private alienation has previously taken place."

This is all right so far as it goes but he does not take into consideration the case where the property

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has not been sold in spite of the subsistence of the attachment. The next sentence in his judgment deals with a case where the attachment has fallen to the ground. The result is that a case such as the present one was not considered by him. But the only sentence in his judgment to which one may with great deference take exception appears in the next paragraph. He says :—

> "It would be impossible therefore to hold that there are claimants for rateable distribution of assets before any assets have been received."

The only reason which he gives for this conclusion is that section 73 does not make it necessary for a decree-holder to make any formal application for a rateable share in the assets and an application for execution is all that is required. He therefore states that there may be cases where no formal application for rateable distribution may have been made. I concede that there would be. But then follows the conclusion which has been noted above. With great deference to the learned CHIEF JUSTICE I am not prepared to agree that this conclusion follows from the premises enunciated by him. The relief of rateable distribution, need not have been asked for but has to be granted if an application for execution has been put in by a decree-holder before the assets are received by the Court. The result of his being a claimant for rateable distribution would follow from the application for execution which he has made and not from the fact that the relief has been eventually granted to him or that the Court has been, on the receipt of assets, placed in a position to grant the relief to him. The distinction between a claimant and a recipient should not be lost sight of.

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In *Provash Chandra Mullick* v. *Debendra Nath Dutt*(1) the application for execution by the subsequent decree-holder was made on 28th August 1933 but the previous attachment came to an end on 7th September 1933 as the decree-holder at whose instance the attachment was effected was paid privately. It is therefore similar to the case in *Mehar Chand* v. *Joti Prasad*(2) and does not advance the position any further.

In *Chindha* v. *Chhaganlal*(3) two attachments before judgment were obtained by two persons. The judgment-debtor sold the property on 8th June 1920 to pay off those two persons. A third creditor brought a suit and obtained attachment before judgment on 19th June 1920 and after obtaining his decree got the property sold through Court and purchased it himself. It was held that he could not avail himself of the title of the purchaser who had purchased the property for payment to the first two attaching creditors and in any case before the third person had applied for attachment. It was also observed in the case that

> "under Order XXXVIII, rule 10, Civil Procedure Code, the attachment before judgment could not affect the rights existing prior to the attachment, of persons not parties to the suit."

The plaintiffs were not parties to the third suit and the private sale in their favour could not be said to have been contrary to the attachment before judgment in the defendant's suit.

In *Radha Mohan* v. *Musammat Wahidan*(4) a property was attached by a decree-holder on 17th December 1930. The property was sold privately by the judgment-debtor on 29th January 1931 while

(1) (1935) 39 C.W.N. 1076.
(2) (1934) 33 A.L.J. 4.
(3) (1928) 30 Bom. L.R. 1488.
(4) (1934) I.L.R. 13 Pat. 446.

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the attachment was subsisting. The same decree-holder got another decree against the same judgment-debtor subsequently and applied for rateable distribution on 11th May 1931. But before the sale the purchaser applied to the Court offering to pay the decretal amount and costs in the first execution case and to have the property released from attachment. The decree-holder agreed to this course and the first execution case was struck off on full satisfaction and the attachment was released. The decree-holder contended (i) that the amount deposited must be considered to be "assets held by the Court" and liable to rateable distribution and that therefore neither the first nor the second decree could be said to have been satisfied and (ii) that the private sale of the property was void as against the claim under both the decrees. This case was decided on the question of consent given by the decree-holder to the deposit of the decretal amount and on his failure to raise any objection in the execution proceeding. But on principle it does not go further than the Allahabad or the Calcutta cases cited above. In view of the fact that the attachment had come to an end, the same decree-holder who was asking for rateable distribution could not assail the alienation. What would have been the result if the attachment had not ceased, this case does not decide.

The last case was the one reported as *Kasturchand and another* v. *Wazir Begum and others*(1). The facts in this case were that a property was attached on 14th June 1926. The judgment-debtor made a gift of the same on 19th May 1927 although it was not registered till 13th July 1927. In the meantime however another

(1) I.L.R. [1937] Nag. 291.

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decree-holder attached the same property on 11th July 1927. It was held in that case that the gift of the property was completed in May 1927. It is not stated in this case when the first attachment was removed although it is stated at the top of page 297 that it continued after July 1927.

Relying on the decision in *Annamalai Chettiar* v. *Palamalai Pillai*(1) the learned CHIEF JUSTICE observed that

> "according to that decision a person in a position similar to the decree-holders here is not entitled to rely on a third party attachment even where the proceeding has reached the stage of an application for rateable distribution."

He adds :

> "Here there is no application for rateable distribution, so that there are two links at least missing in the chain ; (i) The attaching creditor under the attachment made in 1926 never got the assets into the executing Court, and (ii) the present attaching creditor under the attachment in 1927 never applied for rateable distribution. That earlier attachment was subsequently raised and passes out of the story "

From what has been stated above, it would appear that the earlier attachment was not raised until after July 1927, but it was raised subsequently. If it was raised, the decision could be justified on the ground that the subsequent decree-holder could not object to the alienation made prior to his attachment when the first attachment was raised and had passed out of the story. The reasons given by the learned CHIEF JUSTICE however are not convincing. The subsequent decree-holder under whose decree the property was attached in 1927 need not have applied for rateable distribution at all. This matter has been dealt with in an earlier portion of this judgment. As for the other reason given by the learned CHIEF JUSTICE that

(1) (1917) I.L.R. 41 Mad. 265 (F.B.).

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the attaching creditor under the attachment made in 1926 never got the assets into the executing Court, I have already expressed my opinion that it is not necessary for the purposes of section 64 that the property should have been sold or that the assets must have come into the executing Court, although this may be necessary for the purposes of section 73.

In almost every case cited above a reference has been made to *Annamalai Chettiar* v. *Palamali Pillai*(1). But the Full Bench ruling has not been closely examined and, with due respect to the learned Judges who decided that case or who followed it, I am of opinion that even if the actual decision in that case might have been correct, the reasoning given in that judgment is not supported either on principle or by the language employed in sections 64 and 73, Civil Procedure Code, or even by the decision of their Lordships of the Judicial Committee in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(2).

My answer to the reference must for the above reasons be in the affirmative.

I agree that the costs of this reference be made costs in the appeal.

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KRISHNASWAMI AYYANGAR J.—It is not without regret that I feel myself obliged to express my dissent from the view accepted by a majority of my learned brothers on this reference. That view which is essentially different from mine has indeed made it necessary that I should go over the ground once again, and test the soundness of every link in the chain, every step in the reasoning by which I was persuaded to accept the opinion expressed in the order of reference. Having done that, and having given my careful and

(1) (1917) I.L.R. 41 Mad. 265 (F.B.). (2) (1916) I.L.R. 44 Cal. 662 (P.C.).

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anxious attention to all that has been urged at the bar since, I regret to say that I still remain of the same opinion. In the order of reference I have endeavoured to explain at some length the considerations which influenced me in forming my opinion. A briefer and a more pointed statement is all that is now necessary and may perhaps be more to the purpose to explain the reason why I have felt obliged to differ from my learned brethren.

That the Legislature had an object in adding the explanation in section 64 is undeniable. Whether that object was to introduce a change or remove a doubt, it is bootless to enquire. Whichever it was, it is manifest that it concerned claims to rateable distribution, a subject on which the Code of 1908 has made at least one important change. Under the old Code, such claims were linked up with execution, and were recognised only when made in respect of assets *realized in execution*. That link has been removed under the new Code, and the right is no longer dependent on the mode by which the assets reach the hands of the Court. In whichever way the assets are received now, whether by execution or otherwise, it makes no difference. Look at the consequence which necessarily follows from this change. Rateable distribution is entirely dissociated from attachment in execution. True, the claim to rateable distribution may arise, as it often does even now, in respect of assets realized in execution. But the necessity which had existed for the assets being realized by the process of execution has definitely ceased under the new Code. The claim may now arise in respect of assets brought into Court in either of two ways: (i) by attachment in execution, or (ii) by other means without any connexion with execution. The right to rateable distribution in section 64 must

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comprehend both varieties, and there can be no warrant for limiting it to only one of the two.

I have said that the purpose behind the explanation to section 64 was either to effect a change or remove a doubt in respect of claims to rateable distribution. The plain object of the section was to prevent the successful perpetration of fraud by the debtor against the just claims of a different creditor even after adjudication by Court. The law favours equal distribution of a debtor's assets among his creditors provided they exhibit some degree of diligence and sets its face against an unnecessary multiplicity of proceedings so far as it can be avoided. When the creditor properly moves the Court, it helps him by attaching the debtor's property, that is, it takes the property into its own custody. Thereafter the attaching creditors' rights are safe and cannot be defeated by any subsequent dealing by the debtor with the property attached. In this respect, the present section 64 does not differ from the old section 276, the object of both being to throw a protection round the creditor who had attached. Under the old section however the protection was a more limited one and was confined to claims truly enforceable under the attachment which must also be placed on the property at his instance, and not at the instance of any other creditor. In the referring order I have attempted an explanation of the expression, "claims enforceable under an attachment." It is now enough to say that only such claims fulfil the description as are necessarily traceable to and integrally connected with the attachment relied on for avoiding the alienation. A prior attachment and enforceability under it were thus the two essentials on which the old Code insisted before it extended its protection. If these

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conditions were satisfied, section 276 of the old Code stepped in and annexed to such claims a power and potency of sufficient strength to avoid a subsequent private alienation. So far the position remains unchanged even under the new Code.

To explain the matter still further, a bare claim for rateable distribution arising out of an application for execution which had not got to the stage of an attachment was under the old Code ineffectual against a private alienation. Until an attachment was made by the claimant, he could not prevent the debtor from dealing with his property to his (the claimant's) prejudice. That there was a subsisting attachment at the date of the alienation, at the instance of another creditor, was a circumstance from which the claimant could derive no benefit, as his claim was not one which could properly be regarded as enforceable under that attachment. Not possessing this quality, his claim could not affect the alienation, in spite of its taking its origin in an execution application of a prior date.

An application for execution was and is all that is necessary to entitle a decree-holder to rateable distribution [*Somasundaram Chettiar* v. *Alamelu Achi*(1) and *Abdul Salam* v. *Veerabhadra Raju*(2)], provided the application is made in time. But under the old Code the capacity to avoid a later alienation was the peculiar attribute of a prior attachment only, and not that of a bare application for execution, which, though prior in date, did not carry with it anything more than what may be called a limited and contingent right. If the prior attachment progressed to a sale, the alienation was destroyed. But the destruction

(1) 1937 M.W.N. 480, 486. (2) (1929) I.L.R. 52 Mad. 760 (F.B.).

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was wrought not by the naked claim for rateable distribution founded on a mere execution application but by the prior attachment taking effect according to the positive provisions of section 276. It is the sale alone following the attachment that produced this result. In the resulting proceeds, the claimant who had put in his application in time had no doubt the right to share given to him by section 295. But, until the sale actually took place, he had to wait in patience and had but a mere contingency in his favour. For it was the right solely of the prior attaching decree-holder to proceed further with the execution or abandon the attachment. If he was minded to do the latter, nobody could prevent it, though that step would put an end to the expectations of the bare claimant for rateable distribution. The latter could not help such a culmination coming to pass, as he had no sort of control over the attaching decree-holder who had the right at his will to determine what he would do, regardless of the consequence of his action or inaction on the expectations of other decree-holders. This, I consider, was the state of the law under the old Code and was recognized by the Privy Council as such in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1). Their Lordships emphasized the position, first, by saying that the prior attachment was alone the weapon of attack, and secondly, by indicating the necessity for the contingency being converted into an actuality by the assets being actually realized by the sale.

The position then under the old Code of a decree-holder who had not attached, but who had merely qualified himself for rateable distribution by an

(1) (1916) I.L.R. 44 Cal. 662 (P.C.).

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execution application, was thus attended with risk. He had a chance, but not a certainty, of getting even a partial satisfaction and his doubtful position seems to have evoked the ineffective sympathy of the Calcutta High Court in *Durga Churn Rai Chowdhry* v. *Monmohini Dasi*(1), whereas, TELANG J. in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another*(2) managed, if I may say so without meaning the slightest offence, by a fallacious reasoning to give him a protection where the other Courts with stricter adherence to the language of the old Code found themselves powerless to give. He argued, wrongly as I think, that there was such a necessary connexion between the attachment of one decree-holder and the bare claim for rateable distribution of another, that the claim of that other could be regarded as a claim enforceable under the attachment. The connexion could not however be maintained unless the attachment fructified in a sale and led to the actual receipt of assets by the Court. It is this handicap that has been sought to be removed by the explanation added to section 64 under the Code of 1908.

The explanation has, it seems to me, extended the protection of the section to bare claims for rateable distribution also, by the inclusive definition newly introduced by it. I read the words "for the purpose of the section" as meaning for the purposes of avoiding a private alienation which is the obvious object of the section. Indeed, I cannot think of any other. Claims for rateable distribution, whether or not they are in fact or in law claims really enforceable under an attachment, are by force of the new definition notionally to be regarded as

(1) (1888) I.L.R. 15 Cal. 771. (2) (1891) I.L.R. 16 Bom. 91.

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such for the purpose of avoiding a private transfer. This remarkable improvement in the status of these claims has been effected by including such claims by statutory definition within the expression "claims enforceable under an attachment." The claims for rateable distribution *simpliciter* without the support of an anterior attachment are now as powerful and potent as claims enforceable under an attachment. The qualification considered essential by all the other Courts except Bombay, namely a prior attachment, was dropped, as I think, deliberately, in view of what had been said in *Durga Churn Rai Chowdhry* v. *Monmohini Dasi*(1). That a change was intended is perfectly plain to my mind, from a further circumstance. The word "include" used in the explanation, has the legal significance attached to it by Lord ESHER M.R. in *Rodger* v. *Harrison*(2);

"The word interpreted."

(in the present case the phrase is "claims enforceable under an attachment")

"has its ordinary meaning. That meaning it still has in the Act. But then there are other meanings that the Legislature wishes it to have in the Act. So the definition is used to enlarge the meaning of the term beyond its ordinary meaning and make it include matters which the ordinary meaning would not include. But this enlargement of meaning is confined to the matters expressly mentioned in such definition."

In the light of this explanation of the word "include" there is sufficient warrant for holding that the scope of section 64 has been enlarged. In what other direction, I respectfully ask, is effect to be given to this, to me, plain enlargement unless it be in regard to the rights of claimants for rateable distribution? And how else is that to be, except by removing the

(1) (1888) I.L.R. 15 Cal. 771. (2) [1893] 1 Q.B. 161, 167.

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handicap, the necessity for a prior attachment? To my mind, it is clear that the substratum of a prior attachment is no longer to be considered necessary to turn a bare claim for rateable distribution into a weapon of attack. The pendency of an earlier attachment is still a requisite but it is enough if it had been placed by some other creditor and was still subsisting when the claim was made. That necessary integral connexion which under the old Code was such a supreme and essential pre-requisite is no longer required under the new Code. As I read the explanation, its effect seems to be that claims truly enforceable under the attachment, equally with claims for rateable distribution devoid of that characteristic, are placed on an equal footing and both have under the new Code the power of overriding a subsequent private alienation, provided of course the claimant for rateable distribution has made his application in time and while the attachment is yet pending.

I have given my best consideration to the decision of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(1) but regret to find myself unable to agree that it is or was intended to be an authoritative ruling on the construction of section 64 with the explanation newly added to it, more especially in view of what their Lordships have thought fit to observe in *Nur Mahomed Peerbhoy* v. *Dinshaw Hormasji Motiwalla*(2). I am also quite alive, I may add, to the volume and weight of judicial opinion which has accumulated in this country ever since the Full Bench decision of this Court in *Annamalai Chettiar* v. *Palamalai Pillai*(3). But sitting now as a member of a Fuller Bench, I have felt myself at liberty to

(1) (1916) I.L.R. 44 Cal. 662 (P.C.). (2) (1922) 45 M.L.J. 770 (P.C.). (3) (1917) I.L.R. 41 Mad. 265 (F.B.).

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examine the foundations on which that opinion rests. It is enough to say that I have most carefully considered that case and every other case cited at the bar or referred to in the judgment just now delivered, but I still remain unconvinced.

My answer to the question referred is accordingly in the affirmative. I agree that the costs of this reference should be costs in the appeal.

[The second appeal then came on for final hearing after the expression of the opinion of the Full Bench, when the Court (KRISHNASWAMI AYYANGAR and SOMAYYA JJ.), delivered the following Judgment:—]

In view of the answer of the Full Bench this second appeal must be dismissed with costs.

G.R.

PRIVY COUNCIL.

J.C.* 1940, March 15.

THE SECRETARY OF STATE FOR INDIA, REPRESENTED BY THE COLLECTOR OF SOUTH ARCOT, APPELLANT,

v.

MASK & CO., RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Jurisdiction of civil Courts—Decision by Officer of Customs—Appeal to Government—Right of resort to civil Courts—Sea Customs (Act (VIII of 1878) *ss.* 188 *and* 191*—Land Customs Act (XIX of* 1924), *sec.* 9*—Government of India Act,* 1915 (5 *and* 6 *Geo. V. c.* 61), *sec.* 32.

A decision by an Assistant Collector on the duty leviable on imported goods is a decision within the meaning of section 188 of the Sea Customs Act, and, when the right of revision therefrom conferred by section 191 has been exercised

* *Present*: LORD THANKERTON, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

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and an order under that section is made, the order is final and the jurisdiction of the civil Courts is excluded.

Opinion of INNES J., in *Hari Bhanji* v. *The Secretary of State for India*(1), disapproved.

Wolverhampton New Waterworks Company v. *Hawkesford*(2), *Neville* v. *London "Express" Newspaper, Limited*(3), *Sheik Mahomed* v. *The Secretary of State for India**, *Bhiwandiwala & Co.* v. *Secretary of State*(4), *Thin Yick* v. *Secretary of State for India in Council*(5), *Vacuum Oil Co.* v. *Secretary of State for India*(6), *Ford Motor Company of India, Ltd* v. *The Secretary of State for India*(7), *Secretary of State for India* v. *Moment*(8) and the Government of India Act, 1915, sec. 32, referred to.

APPEAL (No. 23 of 1939) from a judgment and order of the High Court (February 2, 1938) which set aside a decree of the Subordinate Judge of Cuddalore (March 30, 1937).

The Assistant Collector of Customs assessed betel-nuts imported by the respondents as boiled betel-nuts. The respondents, maintaining that the betel-nuts should have been classed as raw sliced betel-nuts and assessed to a lower duty, deposited the amount of the higher duty and appealed to the Collector of Customs, and the Collector having decided against them, applied to the Government of India for a revision of the Collector's decision. The Government of India affirmed the Collector's decision. The respondents then instituted the present suit in the Court of the Subordinate Judge of Cuddalore for a refund of the difference between the higher duty levied and the lower duty which they claimed was the one properly

(1) (1879) I.L.R. 4 Mad. 344, 353.
(2) (1859) 6 C.B. (N.S.) 336, 356; 141 E.R. 486.
(3) [1919] A.C. 368.
* Civil Suit No. 747 of 1920, High Court, Madras (unreported).
(4) (1936) 45 L.W. 394. (5) I.L.R. [1939] 1 Cal. 257.
(6) (1932) L.R. 59 I.A. 258; I.L.R. 56 Bom. 313.
(7) (1937) L.R. 65 I.A. 32; I.L.R. [1938] Bom. 249.
(8) (1912) L.R. 40 I.A. 48; I.L.R. 40 Cal. 391.

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leviable. The Subordinate Judge held he had no jurisdiction and dismissed the suit. The High Court reversed his finding and remitted the suit for trial on the merits.

H. Willink K.C. and *W. W. K. Page* for appellant.—The facts are not in dispute and the questions which arise are: (i) Whether the jurisdiction of the civil Courts is completely excluded by the Sea Customs Act in the matters provided for in the Act, and (ii) whether the procedure under the Act is alternative, excluding resort to the civil Court when one has elected to adopt it. Some of the provisions of the Sea Customs Act (VIII of 1878) have been made applicable to acts and proceedings under the Land Customs Act (XIX of 1924). Of those made applicable, the material sections here are: sections 30, 31, 32, 182, 188, 191 and 195.

The question is one of interpretation of the statute. I submit that the statute gives the trader a specific remedy where he is dissatisfied with the Customs Officer's classification of his goods and he has no other: *Doe* v. *Bridges*(1), approved in *Pasmore* v. *Oswaldtwistle Urban Council*(2), *Wolverhampton New Waterworks Company* v. *Hawkesford*(3) cited in *Neville* v. *London "Express" Newspaper, Limited*(4) and *Wake* v. *Mayor, &c. of Sheffield*(5), which turns on the Public Health Act, 38 and 39 Vict. c. 35, sections 150, 268 and 295.

Turning to the Indian decisions, I submit that *Collector of Sea Customs* v. *P. Chithambaram*(6) is not helpful. In *Hari Bhanji* v. *The Secretary of State for India*(7) the observations on the present question are obiter [Reference was made to the Consolidated Customs Act VI of 1863, sections 218–220]. In the Act of 1863 there is a right of appeal, but it is restricted. In *Raja Nilmoni Singh Deo Bahadur* v. *Ram Bandhu Rai*(8) the alternative argument, election, was also considered. In *Bhaishankar* v. *The Municipal Corporation of Bombay*(9) certain propositions are laid down and followed. *Ganesh*

(1) (1831) 1 B. & Ad. 847; 109 E.R. 1001.
(2) [1898] A.C. 387; 395, 397.
(3) (1859) 6 C.B. (N.S.) 336, 356; 141 E.R. 486.
(4) [1919] A.C. 368, 391, 405. (5) (1883) 12 Q.B.D. 142.
(6) (1876) I.L.R. 1 Mad. 89, 104. (7) (1879) I.L.R. 4 Mad. 344.
(8) (1881) L.R. 8 I.A. 90; I.L.R. 7 Cal. 388.
(9) (1907) I.L.R. 31 Bom. 604, 609, 610.

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Mahadev v. *The Secretary of State for India*(1) was cited in the Courts below. *Vishnu Vinayak* v. *Secretary of State for India*(2) proceeds on the same basis as the present case. *Kamaraja Pandiya Naicker* v. *The Secretary of State for India in Council*(3) is not very helpful. So far as it goes it seems to be against me. The decision referred to in Notes of Recent Cases in 71 Madras Law Journal, page 40, is by the same Judge and he follows his previous decision. The decision on section 188 of the Sea Customs Act in *Bhiwandiwala & Co.* v. *Secretary of State*(4) which was relied on by the Subordinate Judge was treated by the High Court as *obiter*.

[The Government of India Act, 1915, 5 and 6 Geo. V. c. 61, section 106 and *Thin Yick* v. *The Secretary of State for India in Council*(5) were referred to and it was submitted that the scope of the Sea Customs Act of 1878 might be ascertained by a comparison with the Act of 1863.]

Page followed.

Wallach for respondent.—If section 188 applies only to orders under section 182, the civil Court has jurisdiction in this suit. "Final" in the Act means final only so far as proceedings under the Act are concerned. The Indian Legislature has in many cases said that no suit shall be brought in a civil Court. If the Legislature intended by section 188 or otherwise to exclude recourse to a civil Court it would have said so in plain language. Any provision excluding the right of the subject to resort to the civil Courts would be contrary to section 32 of the Government of India Act, 1915, 5 and 6 Geo. V. c. 61 and *ultra vires* of the Indian Legislature. That was the Act in force at the time of the institution of this suit and it re-enacted in that section the provisions of section 65 of the Government of India Act, 1858. [*Secretary of State for India* v. *Moment*(6) was referred to.] Sections 30 to 32 and 39 of the Sea Customs Act do not apply to this case. [Section 29 was also referred to.]

There is no provision in the Act under which the Customs Officer, when he has to determine the category in which goods should be placed, can call for evidence to see whether the

(1) (1918) I.L.R. 43 Bom. 221, 225. (2) (1921) I.L.R. 46 Bom. 738.
(3) (1934) 69 M.L.J. 695.
(4) (1936) 45 L.W. 394. (5) I.L.R. [1939] 1 Cal. 257.
(6) (1912) L.R. 40 I.A. 48; I.L.R. 40 Cal. 391.

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goods are of a description which brings them under a particular category or not. *Hari Bhanji* v. *The Secretary of State for India*(1) supports me to a considerable extent. In *Vacuum Oil Co.* v. *Secretary of State for India*(2) there was no appeal under the Act and the suit was brought in the Original Side of the High Court.

[*Ford Motor Company of India, Ltd.* v. *The Secretary of State for India*(3) was also referred to.]

[On the meaning of the word "final", reference was made to the United Provinces Court of Wards Act (IV of 1912), *Secretary of State for India in Council* v. *Fahamidannissa Begum*(4), *Valli Ammal* v. *The Corporation of Madras*(5) and *Ramaswami Goundan* v. *Muthu Velappa Gounder*(6).]

Willink K.C. replied.—The point of jurisdiction was taken in the *Vacuum Oil Company's* case(2) though it was not argued. In the *Ford Motor Company's* case(3) the point was taken in the written statement but it was abandoned.

[Sections 220 and 223 of the Sea Customs Act of 1863 were compared with sections 188 and 190 of the Act of 1878.] In sections 188, 189 and 191 of the present Act, the words "decision or order" are new words introduced. The provisions are now within the scope of appeals instead of being under the head of miscellaneous sections.

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The JUDGMENT of the Judicial Committee was delivered by Lord THANKERTON.—The sole question for determination in this appeal is as to the jurisdiction of the civil Courts to entertain the suit. The appeal is taken from a judgment and order of the High Court of Judicature at Madras, dated 2nd February 1938, which set aside a decree of the Subordinate Judge at Cuddalore, dated the 30th March 1937 (which had dismissed the respondents' suit on the ground of want of jurisdiction), and directed the Subordinate Judge

(1) (1879) I.L.R. 4 Mad. 344.
(2) (1932) L.R. 59 I.A. 258; I.L.R. 56 Bom. 313.
(3) (1937) L.R. 65 I.A. 32; I.L.R. [1938] Bom. 249.
(4) (1889) L.R. 17 I.A. 40; I.L.R. 17 Cal. 590.
(5) (1912) I.L.R. 38 Mad. 41. (6) (1922) I.L.R. 46 Mad. 536.

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to restore the suit to the file and to dispose of it on the merits.

The respondents are a firm of merchants having their head office at Panruti in the Province of Madras and, in the course of their business, they import betel-nuts from Java into British India. The facts in the present suit, which was filed by the respondents on 10th April 1934, are not materially in dispute. The suit relates to two consignments of betel-nuts, imported by the respondents in December 1932 from Java to Pondicherry by sea, and thereafter by rail to Panruti. These consignments, which originally consisted of 3,927 bags in all, were re-packed at the port of Pondicherry, owing to damage to the gunnies, into 4,063 bags, before importation into British India. The consignments were imported into the Province of Madras by rail and carts from Pondicherry to Panruti by various instalments, the first of which consisted of 1,000 bags imported through the Customs station at Pondicherry on 31st December 1932. The remaining bags were imported in several instalments in the months of February, March and November 1933, through the Customs stations at Pondicherry and Madalapet.

It appears that, prior to this occasion, the respondents had been in the habit of importing their betel-nuts at the port of Cuddalore in the Province of Madras, but, in the beginning of the year 1932, the Customs Collector at that port had assessed a similar consignment of 3,605 bags as boiled betel-nuts subject to duty on a tariff value, contrary to the respondents' contention that they should be assessed as raw betel-nuts, subject to duty *ad valorem*. In the hope that they might achieve an assessment in accordance with their contention, the respondents altered their place of

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importation in the case of the consignments here in question, but their disappointment in that respect has given rise to the present suit, in which they seek to challenge the adverse decision in a civil suit.

On the arrival of the consignments at Pondicherry, the respondents wrote on 27th December 1932 to the Collector of Customs, Madras, asking to be allowed to import the goods as raw sliced betel-nuts and not as boiled. As they anticipated an increase in the *ad valorem* duty to come into effect at the beginning of 1933, they requested a telegraphic reply, which they received on 29th December 1932, saying,

> "If you desire import before January first you must import goods and deposit duty calculated on higher tariff value. Inspector will at time of taking deposit and passing goods take sealed samples for test and will also deliver to you other sealed samples to enable you appeal if necessary."

The respondents thereupon imported 1,000 bags on 31st December 1932, and paid the higher duty under protest to the Assistant Inspector of Customs at Pondicherry Railway Chauki, samples being duly taken. After examination of the samples, the Assistant Collector of Customs, Madras, wrote to the respondents on 28th February 1933, as follows :—

> "I have to state that, on examination of the samples from the consignment in question, it has been found that the betel-nuts imported are 'boiled.' The 1,000 bags cleared on 31st December 1932 are therefore assessable at 37½ per cent on a tariff valuation of Rs. 23 per cwt. and the remaining bags, if cleared, will be liable to duty at 45 per cent on a tariff value of Rs. 16 per cwt."

An appeal by the respondents against this decision was dismissed by the Collector of Customs on 20th June 1932. The matter was taken to the Government of India in revision, but by their order, dated 13th

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August 1933, the Government of India confirmed the Collector's decision. The present suit was filed on 10th April 1934.

In the suit the respondents seek to recover the excess amount collected from them by levying duty upon a tariff value of Rs. 23 per cwt. upon 1,000 bags and of Rs. 16 per cwt. upon the remainder, viz., 3,063 bags instead of levying duty upon the invoice value of Rs. 10–9–1 per cwt. In paragraph 14 of the plaint they state that the cause of action arose on 18th August 1933, when their petition for revision to the Government of India was thrown out. Various issues were framed by the Subordinate Judge, but it was decided to determine in the first instance issue No. 3—"Has this Court no jurisdiction to entertain this suit and is the suit barred by the provisions of the Sea Customs Act?" By a judgment delivered on 30th March 1937, the Subordinate Judge held that the Court had no jurisdiction to entertain the suit and dismissed the suit. An appeal was allowed by the High Court on 2nd February 1938, and the Subordinate Judge was directed to proceed to dispose of the suit on the merits. This appeal is from that decision.

While the imposition of the duties here in question is regulated by the Land Customs Act (XIX of 1924), the matter in issue arises under certain provisions of the Sea Customs Act (VIII of 1878) which are incorporated, subject to the necessary verbal modifications, by section 9 of the Land Customs Act, and the schedule to the Act. The sections of the Sea Customs Act which are material are contained in Chapter XVII of the Act, which is headed "Procedure relating to Offences, Appeals, etc.", and which includes

sections 169 to 193. The material sections are as follows:—

"182. In every case, except those mentioned in section 167, Nos. 26, 72 and 74 to 76 both inclusive, in which, under this Act, anything is liable to confiscation or to increased rates of duty; or any person is liable to a penalty,

such confiscation, increased rate of duty or penalty may be adjudged—

(a) without limit, by a Deputy Commissioner or Deputy Collector of Customs, or a Customs Collector;

* * * *

186. The award of any confiscation, penalty or increased rate of duty under this Act by an officer of Customs shall not prevent the infliction of any punishment to which the person affected thereby is liable under any other law.

188. Any person deeming himself aggrieved by any decision or order passed by an officer of Customs under this Act may, within three months from the date of such decision or order, appeal therefrom to the Chief Customs Authority, or, in such cases as the Local Government directs, to any officer of Customs not inferior in rank to a Customs Collector and empowered in that behalf by name or in virtue of his office by the Local Government.

Such authority or officer may thereupon make such further enquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against:

Provided that no such order in appeal shall have the effect of subjecting any person to any greater confiscation, penalty or rate of duty than has been adjudged against him in the original decision or order.

Every order passed in appeal under this section shall, subject to the power of revision conferred by section 191, be final.

189. Where the decision or order appealed against relates to any duty or penalty leviable in respect of any goods, the owner of such goods, if desirous of appealing against such decision or order, shall, pending the appeal, deposit in the hands of the Customs Collector at the port where the dispute arises the amount demanded by the officer passing such decision or order.

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When delivery of such goods to the owner thereof is withheld merely by reason of such amount not being paid, the Customs Collector shall, upon such deposit being made, cause such goods to be delivered to such owner.

If upon any such appeal it is decided that the whole or any portion of such amount was not leviable in respect of such goods, the Customs Collector shall return such amount or portion (as the case may be) to the owner of such goods on demand by such owner.

190. If, upon consideration of the circumstances under which any penalty, increased rate of duty or confiscation has been adjudged under this Act by an officer of Customs, the Chief Authority is of opinion that such penalty, increased rate or confiscation ought to be remitted in whole or in part, or commuted, such Authority may remit the same or any portion thereof, or may, with the consent of the owner of any goods ordered to be confiscated, commute the order of confiscation to a penalty not exceeding the value of such goods.

191. The Local Government may, on the application of any person aggrieved by any decision or order passed under this Act by any officer of Customs or Chief Customs Authority, and from which no appeal lies, reverse or modify such decision.

193. When a penalty or increased rate of duty is adjudged against any person under this Act, such officer, if such penalty or increased rate be not paid, may levy the same by sale of any goods of the said person which may be in his charge, or in the charge of any other officer of Customs . . ."

Under section 9 of the Land Customs Act, references to a Chief Customs Officer in the Sea Customs Act are to be deemed to refer to a Collector of Land Customs, references to a Customs Collector to a Lands Customs Officer, and references to Officers of Customs to Collectors of Land Customs or Land Customs Officers. Further, by section 4 of the Central Board of Revenue Act (Act IV of 1924), the Governor-General in Council was substituted for the Local Government in section 191 of the Sea Customs Act.

At the hearing before the Board, the appellant maintained that the decision of the Assistant Collector

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of Customs, dated 28th February 1933, was a "decision or order passed by an officer of Customs" within the meaning of section 188 of the Sea Customs Act, and that the decision of the Collector of Customs on appeal therefrom, dated 20th June 1933, which had been confirmed on revision under section 191, was final, and excluded the jurisdiction of the civil Courts. He maintained that the only right of challenge of a decision or order by an officer of Customs was by an appeal under section 188 and that the jurisdiction of the civil Courts was excluded. Alternatively, he maintained that the right of appeal conferred by section 188 constituted a procedure which was alternative to the procedure in the civil Courts, and that as the respondents, in their option, had chosen to proceed under section 188, they were bound by that election, and were thus excluded from resort to the civil Courts.

There can be little doubt that adjudications as to confiscations, increased rates of duty or penalties made under the power conferred by section 182 are decisions or orders within the meaning of section 188, and the appellant submitted in the first place that the decision of the Assistant Collector in the present case was an adjudication as to increased rate of duty under section 182. In their Lordships' opinion this contention is untenable, as the decision was as to the normal rate of duty, whereas an increased rate of duty connotes something in the nature of a penalty, an illustration of which is to be found in section 167, No. 35, where goods in excess of the manifest or not corresponding with the specification are liable to confiscation or to be charged with such increased rates of duty as the Chief Officer of Customs directs.

The appellant next maintained that the decision or order referred to in section 188 was not confined

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to adjudications under section 182, but included decisions by an officer of Customs as to the rate of duty applicable to particular goods, which necessarily involved the determination of the particular category in the tariff classification into which the goods fell, and that, accordingly, the decision of the Assistant Collector in this case was a decision or order within the meaning of section 188. The respondents, on the other hand, maintained that the decisions or orders referred to in section 188 related only to adjudications under section 182. This argument of the respondents was not mentioned by the Subordinate Judge, and his judgment does not suggest any doubt of the applicability of section 188. But it was raised in the High Court, who decided it in favour of the appellant.

Their Lordships are of opinion that the High Court were right in deciding that section 188 is applicable. The words "decision or order" are wide words, and they appear to be of a more general nature than the adjudications referred to in section 182, which are also referred to as awards in section 186. The difference of language in sections which are in such close juxtaposition primarily suggests an intention to cover a wider area in section 188. It is suggested that the heading of the chapter—"Procedure relating to Offences, Appeals, etc."—rather indicates that the appeals are correlated with the offences. Their Lordships are unable to draw any such inference. The chapter is one relating to procedure and not a chapter relating to offences; indeed, it might be suggested that if the provisions as to appeals were merely part of the procedure relating to offences, there would be no occasion for a separate mention of appeals in the heading. But, in their Lordships' opinion, the heading

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of the chapter is of no material assistance in the construction of section 188.

In the next place, the proviso in section 188, which is limited to adjudications under section 182, does not, in the opinion of their Lordships, necessarily involve the narrower construction of the opening words of the section. If the latter had expressly referred to any decision or order under section 182 or any other section in the Act, the proviso would have been drawn in exactly the same terms. But section 189 uses terms naturally applicable to any duty leviable under any part of the Act.

Their Lordships agree with the High Court that there is no reason for limiting the words "any decision or order passed . . . under this Act" in section 188 to decisions or orders passed under section 182. Their Lordships are unable to agree with the somewhat tentative opinion expressed by Sir CHARLES INNES in *Hari Bhanji* v. *The Secretary of State for India*(1), which is referred to by the High Court. That opinion was not relevant to the case before the learned Judge, which related to an illegal levy of duty under the Act of 1863.

The Sea Customs Act, 1878, was passed to consolidate and amend the law relating to the levy of Sea Customs duties which was then regulated by the Consolidated Customs Act (Act VI of 1863), which was repealed by the Act of 1878. If there were any doubt as to the proper construction of section 188 of the 1878 Act, it would undoubtedly be legitimate to consider the previous law which it was consolidating and amending, and their Lordships desire to add that their view already expressed as to the construction of section 188 is confirmed by a consideration of the

(1) (1879) I.L.R. 4 Mad. 344, 353.

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provisions of the Act of 1863. The material provisions of the latter Act are as follows :—

"VI. If any dispute shall arise between any Officer of Customs and any Master or Commander of a vessel, or importer, exporter, owner, or consignee of goods, or agent, or other person, in respect to any matter (not specially provided for by any law for the time being in force) relating to the importation, exportation, or warehousing of any goods, or to the levy of any duty or penalty thereon, or to any seizure or forfeiture thereof, the Chief Customs Authority of the Presidency or place in which such dispute shall have arisen shall settle the same, subject to an appeal to the Local Government, acting under the general instructions of the Governor-General of India in Council.

CLXXXIV. If any dispute shall arise as to the proper rate of Duty payable in respect of any goods imported into, or exported from, any Port in British India, the importer, exporter, owner, or consignee of such goods, or his agent, shall deposit in the hands of the Officer in charge of the Custom House at the Port of importation or exportation respectively, the amount of Duty demanded by such Officer, pending the decision of the Chief Customs Authority. Upon payment of such deposit and compliance with the provisions of this Act relating to the entry of such goods, the Officer in charge of the Custom House shall cause the goods to be delivered to such importer, exporter, owner, or consignee, or his agent.

CCXVIII. In every case in which, under this Act, any vessel, cart, or other means of conveyance, or any horse or other animal is liable to confiscation; or any goods are liable to confiscation or to increased rates of Duty; or any person in charge of or owning a vessel, or landing or shipping goods, or passing them through the Custom House, is liable to a penalty, an Officer in charge of a Custom House may, unless it be otherwise provided in this or any other Act relating to the Customs, adjudge such confiscation, penalty, or increased rates of Duty.

CCXX. In any case adjudicated by an Officer of Customs, any party aggrieved by the award may appeal to the Chief Customs Authority of the Presidency or place, or to any superior Officer of Customs empowered in that behalf by the Local Government. It shall thereupon be lawful for such

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authority or superior officer to make such further enquiry, and to pass such order as he shall think proper, confirming, altering or annulling the original award. Provided that no such order in appeal shall have the effect of subjecting any person to any greater confiscation, penalty, or rates of Duty than shall have been adjudged against him in the original award.

CCXXI. The award of any confiscation, penalty or increased rates of Duty under this Act by an Officer of Customs shall not interfere with any punishment to which the person affected thereby shall be liable under any other law.

CCXXIII. If, upon consideration of the circumstances under which any penalty or confiscation has been adjudged under this Act, by an Officer of Customs or by a Magistrate, the Chief Customs Authority of the Presidency or place shall be of opinion that such penalty or confiscation ought to be remitted in whole or in part, or commuted, such Chief Customs Authority may remit the same or any portion thereof, or may commute any order of confiscation to a penalty not exceeding the value of the goods ordered to be confiscated."

Section 6 appears under the heading of "General Rules"; section 184 under "Miscellaneous provisions"; and the other four sections under "Offences and Penalties." In their Lordships' opinion, it is clear that the provisions of section 6 and of section 220 are both now incorporated in section 188 of the later Act, the subject-matter of the appeal being altered from an "award" to a "decision or order", and the heading of the chapter being altered to "Procedure relating to Offences, Appeals, etc." Section 184 of the 1863 Act is reproduced in section 189, while section 221 is reproduced as section 186 of the 1878 Act, before section 188, and section 223 reappears as section 190 of the later Act.

The decision of the Assistant Collector therefore falls within the terms of section 188 of the Sea Customs Act of 1878, and the respondents in fact acted on that view, and exercised the right of appeal conferred by

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that section and by section 191. It is now necessary to determine whether the order of the Collector of Customs, dated 20th June 1933, which dismissed the appeal under section 188, and which was confirmed by the Governor-General in Council on an application under section 191, excludes the jurisdiction of the civil Courts to entertain a challenge of the merits of that decision. It is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well-settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. Many of the cases referred to in the judgments below are of this nature, and are not relevant to the present case, in which there are no allegations of that nature.

Section 188 provides that

"every order passed in appeal under this section shall, subject to the power of revision conferred by section 191, be final."

By sections 188 and 191 a precise and self-contained code of appeal is provided in regard to obligations which are created by the statute itself, and it enables the appeal to be carried to the supreme head of the executive Government. It is difficult to conceive what further challenge of the order was intended to be excluded other than a challenge in the civil Courts.

Further, it is to be noted that the same finality clause applies equally to appeals against adjudications under section 182 and to appeals against decisions or

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orders as to the rate of duty leviable under the tariff; their Lordships are unable to construe this clause differently according as it applies to these two classes of appeals, as apparently the High Court were prepared to do. In their judgment the High Court refer with approval to the unreported decision of COUTTS TROTTER J. in *Sheik Mahomed* v. *The Secretary of State for India** in which he held that the suit, which challenged the adjudication of a fine under section 182, was barred by section 188, and the learned Judges add:

"We think that the decision in that case is, if we may say so, not open to exception and it does not help the Government in this case, because the act of the Customs Authorities in that case was an adjudication."

Later, the learned Judges rejected the argument that section 188 only applied to decisions or orders passed by Customs Authorities when acting under section 182, and held that the opening words of section 188 were not so limited. Nevertheless, they held as regards the present case that the finality clause was not so worded as to exclude the jurisdiction of the civil Courts. Their Lordships are unable to agree with this distinction.

Their Lordships are of opinion that in this case the jurisdiction of the civil Courts is excluded by the order of the Collector of Customs on the appeal under section 188, and it is unnecessary to consider whether, prior to taking such appeal under section 188 the respondents would have been entitled to resort to the civil Courts, or whether they would have been confined to the right of appeal under section 188.

The determination of this question must rest on the terms of the particular statute which is under consideration, and decisions on other statutory provisions

* Civil Suit No. 747 of 1920, High Court, Madras (unreported).

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are not of material assistance, except in so far as general principles of construction are laid down. The main principles to be observed in the present case are to be found in the well-known judgment of WILLES J. in *Wolverhampton New Waterworks Company* v. *Hawkesford*(1) which was approved of in the House of Lords in *Neville* v. *London "Express" Newspaper, Limited*(2). The question is whether the present case falls under the third class stated by WILLES J., viz.,

> "Where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it . . . With respect to that class it has always been held, that the party must adopt the form of remedy given by the statute."

It has been held that the jurisdiction of the civil Courts is excluded in three cases in which an appeal under section 188 had been taken—*Sheik Mahomed* v. *The Secretary of State for India** already referred to, *Bhiwandiwala & Co.* v. *Secretary of State*(3) which is referred to by the High Court, and *Thin Yick* v. *Secretary of State for India in Council*(4). Each of these cases related to an appeal against an adjudication under section 182. In the case referred to in 71 Madras Law Journal, Notes of Recent Cases, page 40, VARADACHARIAR J. held that jurisdiction was not excluded in circumstances similar to the present case, except that there had been no appeal under section 188, and, for the reasons already explained, their Lordships do not find it necessary to consider the question. Similarly, in the cases of *Vacuum Oil Co.* v. *Secretary of State for India*(5) and *Ford Motor Company of India, Ltd.* v. *The Secretary of*

(1) (1859) 6 C.B. (N.S.) 336, 356; 141 E.R. 486.
(2) [1919] A.C. 368.
* Civil Suit No. 747 of 1920 (unreported).
(3) (1936) 45 L.W. 394. (4) I.L.R. [1939] 1 Cal. 257.
(5) (1932) L.R. 59 I.A. 258; I.L.R. 56 Bom. 313.

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State for India(1) no appeal had been taken under section 188; the question of jurisdiction was not in issue, though in the former case an issue had been framed, but it was abandoned by the Advocate General. It was submitted on behalf of the respondents that an exclusion of the subject's right of resort to the civil Courts would be *ultra vires* of the Indian Legislature in view of the provisions of section 32 of the Government of India Act, 1915, which re-enacted section 65 of the Government of India Act of 1858, and reference was made to *Moment's* case(2) which was a case of tortious trespass on land. But, in their Lordships' opinion, neither section 32 nor the principle involved in the decision in *Moment's* case(2) affect the validity of an Act of the Indian Legislature which creates an obligation and provides an exclusive code for its determination; such an obligation is not covered by sub-section 2 of section 32.

On the whole matter, their Lordships are of opinion that the decision of the Subordinate Judge was correct, and they will humbly advise His Majesty that the appeal should be allowed, that the order of the High Court should be set aside and that the decree of the Subordinate Judge should be restored. The appellant will have the costs of the appeal, and also his costs in the High Court.

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

Solicitors for respondents: *Lambert and White.*

C.S.S.

(1) (1937) L.R. 65 I.A. 32; I.L.R. [1938] Bom. 249.
(2) (1912) L.R. 40 I.A. 48; I.L.R. 40 Cal. 391.

INCOME-TAX REFERENCE.

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

1940, February 6.

THE COMMISSIONER OF INCOME-TAX, MADRAS, PETITIONER,

v.

J. M. MUHAMMAD ISMAIL ROWTHER (ASSESSEE), RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 4 (ii)—Profits from business outside British India—Remittance of, to Mysore—Purchase of Mysore Government bonds at Mysore—Bonds brought to British India and deposited in a bank as security for overdraft—Bonds, if capital.

An assessee derived income from immovable properties in British India and in Saigon and from a partnership business in Saigon. During the year of account, namely, the year ending 31st March 1937, he sent 39,834 dollars to the Bank of Mysore, Mysore City, and out of that amount purchased there Mysore Government bonds of the face value of Rs. 60,000. In January 1937 the assessee sent these bonds to the Madras branch of the Imperial Bank of India and subsequently arranged with the Kumbakonam branch of that Bank for an overdraft on the security of these bonds for the purpose of purchasing immovable property worth Rs. 33,000. For the year 1937–1938 he was assessed to income-tax on a total income of Rs. 62,599 which included the sum of Rs. 60,000, being the face value of the aforesaid bonds. The assessee objected that this sum did not represent profits and a question arose, "whether there was any material before the Assistant Commissioner to justify his conclusion that the Mysore Government bonds purchased by the assessee in Mysore did not represent his capital".

Held: The answer was in the negative and the bonds were capital assets of the assessee. The bonds were not

* Original Petition No. 255 of 1938.

bought in Mysore for the purpose of being brought into British India and sold in British India. The assessee bought them as a permanent investment. The investment of the moneys remitted to Mysore amounted in the circumstances of the case to a conversion of profits into capital. The fact that the assessee deposited the bonds by way of security for an overdraft would not change their character.

Gresham Life Assurance Society v. *Bishop*(1) and *Scottish Widows' Fund Life Assurance Society* v. *Farmer*(2), applied and followed.

PETITION stating a case to the High Court under section 66 of the Indian Income-tax Act, 1922.

K. Bashyam (with him *T. R. Srinivasan*) for respondent.—The Income-tax authorities have included in the total income of the assessee a sum of Rs. 60,000 being the face value of certain Mysore Government bonds. The bonds were purchased by the assessee at Mysore out of the amount of 39,000 and odd dollars remitted to Mysore from the assessee's business at Saigon. By bringing these bonds to British India and depositing them in the Imperial Bank of India, Madras, as security for an overdraft, the assessee has not brought any profits of his foreign business to British India. The value of the bonds has not yet been realized. What will be actually realized is uncertain. Brokerage has also to be paid. Further, even when the proceeds are realized they must be used as *income*. See *Commissioner of Income-tax, Bombay* v. *Ahmedabad Advance Mills, Ltd.*(3). The observations of the Chief Justice of Bombay are adopted by the Privy Council; *Commissioner of Income-tax, Bombay* v. *Ahmedabad Advance Mills, Ltd.*(4).

By purchasing foreign bonds and sending them the assessee is not remitting money or its equivalent as known in the commercial world. That does not amount to remittance of profits; see *Scottish Widows' Fund Life Assurance Society* v. *Farmer*(2) and *Gresham Life Assurance Society* v. *Bishop*(1). The purchase of Mysore bonds converts the profits into capital

(1) [1902] A.C. 287.
(2) (1909) 5 T.C. 502.
(3) I.L.R. [1938] Bom. 171.
(4) I.L.R. [1940] Bom. 332 (P.C.).

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and by being brought to British India and by having an overdraft secured thereon their character as capital is not changed. It is just like buying immovable property in Mysore and bringing its title-deeds to British India and raising money on its security. It is not suggested that the bonds were purchased as a device for bringing foreign income. If the first question is answered in the negative the second question does not arise.

K. V. Sesha Ayyangar for petitioner.—Without being a device, receipt of bonds may amount to receipt of income. Receipt of shares of a company in lieu of its dividend and receipt of debentures in lieu of interest on loans have been considered to be receipt of income. If the bonds are sold and the proceeds are realized in British India they are taxable; see *The Scottish Provident Institution* v. *Farmer*(1). In *Commissioner of Income-tax, Bombay* v. *Ahmedabad Advance Mills, Ltd.*(2), emphasis is laid on the fact that the foreign income is *spent* on the purchase of property in a foreign place and on the user of that property. The *Scottish Widows' Fund* case(3) is distinguishable on the facts.

[LEACH C.J.—The observations of the Lord President provide an answer to the question raised here.]

JUDGMENT.

LEACH C.J.

LEACH C.J.—The assessee is a resident of Kuthanallur in the Tanjore District in the Madras Presidency. He derives income from immovable properties which he possesses in British India and in Saigon in Indo-China, and from a business which he carries on in partnership in Saigon. For the year 1937–38 he was assessed to income-tax in this country on a total income of Rs. 62,599. This amount included a sum of Rs. 62,006 which the Income-tax Officer held represented a remittance to British India of profits made in Saigon during the year of account.

(1) (1912) 6 T.C. 34. (2) I.L.R. [1940] Bom. 332 (P.C.).
(3) (1909) 5 T.C. 502, 510.

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The assessee objected to the assessment. He contended that he had been over-assessed to the extent of Rs. 60,000. For the two years which ended with 31st March 1936 the assessee's profits in Saigon amounted to $ 59,290. Of this he remitted 39,834 dollars during the year of account to the Bank of Mysore, Mysore City, and there purchased Mysore Government bonds of the face value of Rs. 60,000. The actual price paid for these bonds was Rs. 69,416. The whole of this amount was paid out of the moneys remitted from Saigon. For two months the bonds remained in the custody of the Bank of Mysore, but in January 1937 the assessee caused them to be sent to the Madras branch of the Imperial Bank of India for safe custody. Subsequently, he arranged with the Kumbakonam branch of the Imperial Bank of India for an overdraft for the purpose of purchasing immovable property worth Rs. 33,000. The security consisted of the Mysore Government bonds which the assessee had purchased out of the remittance from Saigon. The assessee says that the Income-tax authorities have no right to treat the bonds as representing a remittance of profits, and at his request the Commissioner of Income-tax has referred to this Court for decision the following questions of law:

"(i) Whether there was any material before the Assistant Commissioner to justify his conclusion that the Mysore Government bonds purchased by the petitioner in Mysore did not represent his capital?

(ii) If the answer to the above question is in the affirmative, whether under a proper construction of section 4 (2) of the Act a sum of Rs. 60,000 representing the face value of the bonds was liable to be assessed or only the amount of Rs. 33,000 which the petitioner had obtained on an overdraft against the security of the bonds."

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If the first question is answered in favour of the assessee the second question does not arise. The reference was made by the Commissioner on 4th September 1938, but at the suggestion of the learned Counsel engaged in the case the hearing was postponed until the Privy Council had decided an appeal which was then pending from the Judgment of the Bombay High Court in the case of *Commissioner of Income-tax, Bombay* v. *Ahmedabad Advance Mills, Ltd.*(1). The Judicial Committee has now delivered judgment in that case. The judgment does not decide the question which arises for decision in the present case, but there are observations in it which are helpful to the Court. In the case referred to, the assessee was a limited company and had lying in London a sum of Rs. 18,000 which it had received as income on certain sterling bonds of the Government of India, the interest on which was paid in London. The assessee company invested this income in the purchase of stores and machinery which it shipped to Bombay and utilized in its business in British India. The question was whether the stores and machinery could be regarded as income brought into British India within the meaning of section 4 (2) of the Indian Income-tax Act, 1922, and therefore taxable. The Bombay High Court held that the bringing of stores and machinery into British India did not represent a remittance of profits made abroad. The purchase had resulted in the capitalization of the profits received in England. It was pointed out by BEAUMOUNT C.J. that foreign income might be received in sterling or francs or dollars, and might be brought into India in the form of rupees, or be remitted to India by means

(1) I.L.R. [1938] Bom. 171.

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of a banker's draft, and in this connection referred to the judgment of Lord BRAMPTON in *Gresham Life Assurance Society* v. *Bishop*(1) where it was said that income might be received "*in specie* or in any form known to the commercial world for the transmission of money from one country or place to another", the implication being that it could not be received in any other form. The learned Chief Justice went on to say that in order to attract income-tax in India what is brought into this country must be income, profits and gains, and if the assessee has converted income received abroad into capital, and then brings that capital to India, he is not bringing into India income, profits or gains. It was not suggested in that case that the stores and machinery were brought into India for the purpose of being sold and the proceeds applied as income, but it was apprehended that if an assessee converted foreign income into some form of capital, for instance, bonds, and having realized the assets in this country had applied the proceeds as income, the Court would hold that what had been brought into this country was in fact income and not capital.

The decision of the Bombay High Court was approved by the Judicial Committee and, in delivering the judgment of the Board, Lord ROMER quoted the remarks of Lord LINDLEY in *Gresham Life Assurance Society* v. *Bishop*(1) where he said:

> "A sum of money may be received in more ways than one, for example, by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by business men."

The Privy Council however refrained from deciding the question whether the purchase of bonds out

(1) [1902] A.C. 287.

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of profits made abroad would represent a remittance of profits if the bonds were brought into British India and realized as that question did not arise in the case. It was left to be decided if and when the occasion arose. It arises in this case, but on facts very different from those contemplated in the judgment of BEAUMONT C.J.

In the present case the bonds were not bought in Mysore for the purpose of being brought into British India and sold here. On the facts stated in the reference it must be taken that the assessee bought them as a permanent investment. He has still got the bonds, and the fact that he has deposited them by way of security for an overdraft does not change their character. It is conceded on behalf of the Income-tax authorities, and rightly conceded, that where a person invests profits in bonds and no question of remittance of profits arises, the bonds will constitute capital assets. In my opinion, the investment of the moneys remitted to Mysore by the assessee must in the light of the surrounding circumstances be held to be a conversion of profits into capital, and nothing more.

The decision in the case of *Scottish Widows' Fund Life Assurance Society* v. *Farmer*(1) is also helpful here. Lord JOHNSTON, the Lord President, there observed:

"Either the money itself must be brought over *in specie*, or the money must be sent in the form which, according to the ordinary usages of commerce, is one of the known forms of remittance."

Later on, the Lord President went on to say:

"Although the bearer bonds are marketable securities, that is, of course, surely neither here nor there, because in

(1) (1909) 5 T.C. 502.

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one sense everything is a marketable security at a price. The fact that a bearer bond is a marketable security and easily marketable and therefore a negotiable instrument, does not seem to me to touch for one moment the question whether it is an ordinary form of remittance. Nobody ever heard of remitting money by means of a bearer bond, for this very good reason; you could not possibly remit money by it and know exactly what you are doing, because the price of bearer bonds fluctuates in the market every day, and a bond might start from New York at one price and arrive in London at a perfectly different one. It therefore is not at all in the same category with that way which modern arrangements have perfected, by which you may send money from one country to another in the form of hard cash consigned in a package or box or by means of a bank draft, which is, of course, simply a transaction of debtor and creditor between different persons on different sides of the Atlantic."

There is also the further factor that before securities can be bought or sold a commission is payable to a broker. In that case part of the revenue of a mutual life assurance society, carrying on business in the United Kingdom only, consisted of interest on foreign bearer bonds and other foreign securities. The securities were kept at the society's head office and the interest was included in its revenue account. When the interest fell due on the foreign bonds the coupons were sent from the society's head office to the agents abroad for the purpose of the collection of interest and out of the interest further foreign securities were bought. The further purchases were also sent to the United Kingdom. The question was whether the receipt of the foreign bonds at the head office represented a receipt of income within the United Kingdom. It was held that it did not.

The Court is not now here concerned with the case where a person, in order to avoid the payment of income-tax, converts his foreign profits into foreign

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the assessee on an income of Rs. 9,302 but by taking into account the Rs. 26,624 they have held that the assessee must pay tax on the Rs. 9,302 at the rate which would be payable on an income of Rs. 37,445. The assessee challenged the correctness of this decision and asked the Commissioner of Income-tax to refer to this Court under the provisions of section 66 (2) of the Act certain questions. The Income-tax Commissioner considered that only two questions of law arose and these he has referred. They are as follows:

(*a*) Whether the Bank is an association of individuals within the meaning of section 3 of the Act and whether it can be assessed to income-tax as an association of individuals.

(*b*) Whether the Bank is not a mutual benefit society and as such can be said to have derived a profit of Rs. 26,624 as a co-operative society to be included in its total income.

The assessee is satisfied with the reference of these two questions and therefore the Court is not called upon to go beyond them.

The first question arises out of a contention advanced on behalf of the assessee that the assessee was not liable to income-tax at all as the assessee does not come within the charging section 3. Section 3 says:—

"Where any Act of the Indian 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, this 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."

The argument is that the word "individual" must be taken to be used merely as denoting a person and therefore the words "and other association of individuals" cannot apply to a corporate body which for the most part is composed of co-operative

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societies. In support of this contention great reliance is placed on the judgment in *Commissioner of Income-tax, Bombay* v. *Ahmedabad Millowners' Association*(1). In that case it was held that the expression "association of individuals" in section 3 means an association of human beings. The question which the Court had to decide was whether the Ahmedabad Millowners' Association which was composed of 61 members, 60 of whom were limited liability companies and one a person, was assessable to income-tax. The case was decided by BEAUMONT C.J. and WADIA J. In the course of his judgment the learned Chief Justice stated that he was disposed to agree with the Commissioner of Income-tax that if one merely took the dictionary meaning of the word "individual" it would include a limited liability company, but he considered that to do so would not be in accordance with its popular use by people speaking the English language. He concluded his judgment with this statement:

"The question is whether 'other association of individuals' includes an association of companies. It seems to me quite clear on the context that it cannot do so. 'Individual' where first used must mean human being, because it is used as something distinct from a joint-family, firm and company. The whole expression seems to me to mean 'every human being, Hindu undivided family, company, firm and other association of human beings.' One cannot give to the word 'individuals' in the expression 'association of individuals' a different meaning to that which the word 'individual' bears in the same phrase."

This opinion is in direct conflict with the opinion expressed by the learned Chief Justice in an earlier case; *Currimbhoy Ebrahim Baronetcy Trust* v. *The Commissioner of Income-tax, Bombay*(2). One of the

(1) I.L.R. [1939] Bom. 451. (2) (1931) 5 I.T.C. 484.

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questions in that case was whether a corporation styled "The Trustees of the Sir Currimbhoy Ebrahim Baronetcy Trust" which had been created under an Act passed by the Governor-General in Council was to be deemed to be an "individual" within the meaning of section 3 of the Income-Tax Act. The Income-tax authorities had assessed the corporation as an "association of individuals." BEAUMONT C.J. held that the corporation was an "individual" within the meaning of the section and not an "association of indivduals." The question of the legality of the assessment was taken to the Privy Council and although the question of the status of the corporation was not directly raised before the Board it falls to be observed that the decision of the Bombay High Court was affirmed.

I consider that the opinion expressed in *Currimbhoy Ebrahim Baronetcy Trust* v. *The Commissioner of Income-tax, Bombay*(1) is preferable to that expressed in *Commissioner of Income-tax, Bombay* v. *Ahmedabad Millowners' Association*(2). While it is true that ordinarily in conversations the use of the word "individual" would be taken to denote a person, the word has in fact a far wider meaning. The first definition of the word given in the Oxford Dictionary is: "one in substance or essence; forming an indivisible entity; indivisible." It is also defined as "existing as a separate indivisible entity, numerically one, single." If a corporate body created by a statute is an individual within the meaning of the section, and I hold that it is, a co-operative society registered under the Co-operative Societies Act must fall within the same category. It is a corporate

(1) (1931) 5 I.T.C. 484.

(2) I.L.R. [1939] Bom. 451.

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body and has perpetual succession. I consider that it is not reasonable to suppose that the Legislature intended that there should be a difference in the meaning of the word "individual" and the plural "individuals." If the word "individual" includes a corporation, the words "association of individuals" must embrace an association of corporate bodies, and therefore the assessee is an "association of individuals".

Support for the opinion that the assessee comes within section 3 is to be found in the decision of the Allahabad High Court in *Messrs. Ram Ratan Das Madan Gopal* v. *The Commissioner of Income-tax, Central and United Provinces*(1) and of the Lahore High Court in *Mian Channu Factories Union* v. *The Commissioner of Income-tax, Punjab*(2). In the former case a Bench of the Allahabad High Court held that the word "individual" in the proviso to section 55 of the Income-tax Act includes an undivided Hindu family. In the Lahore case, which was also decided by a Bench, a "ginning factories union," which was composed of two firms and a Hindu undivided family, was assessed to income-tax on the basis that it was an association of individuals. To give the word "individual" the meaning of "person" only, would, it seems to me, be to disregard the scheme of the Act and to rob the word of an accepted meaning. It follows that in my opinion the first question referred should be answered in the affirmative.

The second question requires little discussion. The Income-tax authorities have held that the assessee is carrying on an ordinary banking business. It carried on a banking business with non-members and

(1) (1934) 8 I.T.C. 69.

(2) (1936) 9 I.T.C. 246.

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therefore cannot maintain the claim to be a mutual benefit society. It can only escape taxation under the provisions of the notification which the Central Government has published under section 60 of the Act, which means that it must pay tax at the rate applicable to the amount of its total profits, namely, Rs. 37,445. The principle stated in *Trichinopoly Tennore Fund* v. *Commissioner of Income-tax*(1) and repeated in *Trichinopoly Tennore Hindu Permanent Fund, Ltd.* v. *Commissioner of Income-tax*(2) applied.

I would answer the second question in that sense.

As my learned brothers agree with me, the assessee must pay the costs which we fix at Rs. 250.

KING J.—I agree.

KRISHNASWAMI AYYANGAR J.—I agree.

N.S.

APPELLATE CIVIL.

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

1940, January 24.

V. C. MANICKA MUDALIAR (DEFENDANT), APPELLANT

v.

ANDALAMMAL (PLAINTIFF), RESPONDENT.*

High Court—Original Side Rules—Practice—Reference of material questions of law and fact to Official Referee—Not only irregular but invalid—Official Referee, a commissioner only.

The procedure of referring material questions of law or fact relating to substantive rights of parties in a case, to the Official Referee for decision and report is not only irregular

(1927) 2 I.T.C. 386 (2) I.L.R. [1938] Mad. 183.

*Original Side Appeal No. 64 of 1938.

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but opposed to the provisions of the Code of Civil Procedure and has no sanction from the rules of practice of the Original Side of the Madras High Court. Order XXVI of the Code of Civil Procedure states when commissions may be issued and Order XXIII of the Rules of the Original Side do not purport to enlarge the powers of the Official Referee or authorise the issue of commissions beyond those mentioned in the Code of Civil Procedure. The Official Referee is not a Judge of the Court but only a commissioner and adjudication by him of questions relating to substantive rights which under the Code and the Rules form part of the functions of a Judge would be *ultra vires*. It is not correct to hold that the Rules of Practice in English Courts apply *en bloc* to the Original Side, except so far as the Rules of the High Court modify them.

Observations of KUMARASWAMI SASTRI J. in C.S. No. 661 of 1920, High Court, Madras, approved and affirmed.

Where, therefore, a reference of the material issues in a suit was made by Court, on consent of parties, to the Official Referee for taking evidence and report thereon,

held: The report of the Official Referee should be ignored. But the evidence recorded by the Official Referee might by agreement of parties be treated as evidence recorded by Court.

Sri Thakur Ramkrishna Muraji v. *Ratan Chand*(1), applied and followed.

APPEAL against the judgment of VENKATARAMANA RAO J. dated 25th July 1938, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 562 of 1930.

T. R. Venkatarama Sastri for *W. S. Krishnaswami Nayudu* for appellant.—After the plaintiff was examined-in-chief, the material issues in the case were referred, with the consent of parties, to the Official Referee for taking further evidence and for report.

[LEACH C.J.—How could that be done? The Official Referee is not competent to try the suit. Recently the Privy Council held in regard to the Official Assignee that he does not act as a tribunal and that he has no powers to decide questions

(1) (1931) I.L.R. 53 All. 190 (P.C.).

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of title; *Sooniram Ramniranjandass* v. *Alagu Nachiyar Koil*(1). What are the rules relating to the matter ?]

Order XXVI of the Civil Procedure Code provides for matters regarding which commissioners may be appointed by Court. Order XXIII and Order XXIV of the Original Side Rules refer to proceedings before the Official Referee.

[KRISHNASWAMI AYYANGAR J. referred to Order XXX, rule 8 and Order XXXI, rule 6 of the Original Side Rules, relating to partnership and partition suits respectively.]

The Official Referee is only a permanent commissioner and has only such powers as are conferred by the Civil Procedure Code on a commissioner. *Abdul Wahab Sahib* v. *M. Rokia Bibi*(2) and *Kanni Chetty* v. *Raju Chetty*(3), referred to. There was an application to recall the order of reference to the Official Referee but it was rejected.

Having regard to the long lapse of time, I am not asking for retaking evidence. The parties are agreed to take a decision upon the evidence already recorded.

[LEACH C.J.—We are not, however, looking into the report of the Official Referee. We hope such references to the Official Referee will not be made hereafter.]

The evidence recorded by the Official Referee may be treated as evidence in the case. The parties had consented to this course before VENKATARAMANA RAO J. Such a course has been approved by the Privy Council in *Sri Thakur Ramkrishna Muraji* v. *Ratan Chand*(4).

[Counsel then argued on the facts.]

K. Krishnaswami Ayyangar for *A. Seshachari* for respondent was not called on to reply.

JUDGMENT.

LEACH C.J.

LEACH C.J.—This appeal arises out of a suit filed by the respondent on the Original Side of this Court for a declaration that a piece of land conveyed to the appellant under a deed dated 30th October 1925 is her property and that she is also entitled to the house built thereon. The respondent's case is that

(1) [1939] Ran. 59 (P.C.). (2) A.I.R. 1924 Mad. 406.
(3) A.I.R. 1926 Mad. 879. (4) (1931) I.L.R. 53 All. 190 (P.C.).

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she acquired the site and built the house out of the proceeds of a milk business belonging to her. The appellant claimed that the milk business belonged to him and that the property was his. The suit was tried by VENKATARAMANA RAO J. who held that the property belonged to both of them in equal shares. Consequently, the learned Judge granted a decree for partition and the delivery to the respondent of her half share with mesne profits. The respondent has not appealed, and the main question which the Court is called upon to consider is whether the appellant is entitled to the share allotted to the respondent, in other words, whether he is absolute owner of the site and the house. The procedure which was adopted in this case was not in accordance with that contemplated by the Code of Civil Procedure, and it is necessary also to consider the effect of this. It will be convenient to deal first with the question relating to the procedure adopted.

The plaint was filed on 18th November 1930. The hearing was interrupted after a portion of the plaintiff's evidence had been recorded by LAKSHMANA RAO J. and on 1st October 1935 the following order was passed by the learned Judge with the consent of the parties:

"That this suit be and is hereby referred to the Official Referee of this Court for the determination of the following issues, viz.:—

(i) Did the plaintiff carry on milk business or any other business of her own and was the defendant entrusted with the management of all or any of the said business as her agent ? If so, is the defendant liable to render an account ?

(ii) Was the said house No. 14, Pallappan Street, Triplicane, Madras, purchased and constructed out of funds belonging to the plaintiff in the name of the defendant benami for the plaintiff ? If so, is the defendant liable to account to the plaintiff for the mesne profits ?

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(iii) Is the defendant in possession of all the movable properties mentioned in the schedule " B " to the plaint and do any of them belong to the plaintiff ?

2. That the said Official Referee do give his findings on the said issues and submit his report and proceedings thereon to this Court expeditiously.

3. That the evidence recorded herein so far, shall be treated as evidence before the said Official Referee and the said Official Referee do continue the enquiry from the stage at which it was stopped.

4. And that the further consideration of this suit do stand adjourned until after the receipt of the report of the said Official Referee by this Court."

In accordance with this order the Official Referee recorded the further evidence tendered by the parties and the depositions and exhibits comprise a volume of nearly 200 printed pages. The Official Referee presented his report to the Court on 2nd September 1937 and it was considered by VENKATARAMANA RAO J. on 12th May 1938. I should mention that shortly after the consent order of 1st October 1935 had been passed the respondent applied to LAKSHMANA RAO J. to recall the order on the ground that the Official Referee had no jurisdiction to conduct the inquiry into the questions set out therein and that it had been passed without the position being fully realized. The learned Judge, however, refused to recall the order and stated his reasons in these words :

" The suit was referred to the Official Referee by consent and it is this Court that goes finally into all the questions and decides the right of the parties. There is therefore no need to or ground for review and the application is dismissed with costs."

The question relating to the procedure adopted was raised before VENKATARAMANA RAO J. who considered that it was unlawful and expressed the opinion that LAKSHMANA RAO J. should have recalled the order of reference. Inasmuch as the suit was of

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longstanding and the parties had agreed that the evidence recorded by the Official Referee should be treated as evidence in the trial, the learned Judge decided not to put the case back for trial *de novo* and gave his judgment on the evidence recorded by the Official Referee, but he did not ignore the Official Referee's report altogether.

There can be no doubt that the procedure adopted in this case was not only irregular, but was opposed to the provisions of the Code of Civil Procedure and had no sanction from the rules of practice of the Original Side of this Court. I entirely agree with the observation of VENKATARAMANA RAO J. that LAKSHMANA RAO J. should have recalled the order of reference when the application was made to him by the respondent. As a matter of fact he ought to have refused to pass the consent order. The questions raised in the issues were entirely within the province of the Judge, and, as VENKATARAMANA RAO J. has said, the Court had no jurisdiction to refer them to any one for decision unless the parties had agreed to submit their disputes to arbitration. This very question was raised before KUMARASWAMI SASTRI J. in Civil Suit No. 661 of 1920, and, with VENKATARAMANA RAO J., I am in agreement with the following observations which KUMARASWAMI SASTRI J. made in that case :

" He (the Official Referee) is not a Judge of the Court but only a commissioner and I think that the adjudication by him of these questions, which under the Code and the Rules, form part of the functions of a Judge would be *ultra vires*. The Judge referring to the Official Referee questions which have to be tried by himself could not confer jurisdiction on the Official Referee any more than he can confer jurisdiction on a stranger by asking him to decide points in dispute in the case. Questions as to the substantive rights are solely within the province of a Judge and matters of detail, i.e., the working out of those rights either by taking out accounts or effecting a

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partition or selling properties are, under the Rules, functions which the Judge may delegate to the Official Referee . . . It will be a novel and, in my opinion, a dangerous proposition to hold that the Rules of Practice in English Courts apply *en bloc* to the Original Side except so far as our own rules modify them."

In a suit of the description of the one now under consideration the Court has no power to adopt the rules of practice in England. Order XXVI of the Code of Civil Procedure states when commissions may be issued. They may be issued for the examination of witnesses, for the purpose of local investigations, for the purpose of examination of accounts and for the effecting of partition, but for no other purposes. Order XXIII of the Rules of the Original Side states the procedure which should be followed when there is a reference, but they do not purport to enlarge the powers of the Official Referee or authorise the issue of commissions beyond those mentioned in the Code of Civil Procedure.

Counsel are agreed, as they were agreed before VENKATARAMANA RAO J., that the Court shall treat the evidence recorded by the Official Referee as being evidence recorded by the Court and they are content that the rights of the parties shall be decided on what appears in the printed record, but they suggest that the report of the Official Referee should be eliminated. It seems to me that it is open to the Court in the circumstances of this case to adopt this course. I consider that the Court should ignore the report of the Official Referee, and I may say that neither I nor my learned brother has read it. Approval for the suggested course may be obtained from the decision of the Privy Council in *Sri Thakur Ramkrishna Muraji* v. *Ratan Chand*(1). In that case an ancestral business of a Mitakshara joint family had been carried on in

(1) (1931) I.L.R. 53 All. 190 (P.C.).

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partnership with another person. The stranger partner retired and thereupon the partnership was dissolved and wound up. The business was then carried on in the same commodities and in the same premises though under a new firm name and with new books. It was alleged that speculative transactions were subsequently entered into and it was contended that the business could not be regarded as a family affair. When the case was before the High Court on appeal, a commissioner was appointed to examine the books and report whether the new business was of a gambling nature. The Privy Council disapproved of this course as this question was one for determination by the Judge alone. As their Lordships were not aware whether the order referring to the commissioner was made under protest by the appellant-defendant or with his consent, they were not prepared to hold that the report of the commissioner should be disregarded, and in fact took it into consideration along with the other evidence in the case. In the case before us the consent of the respondent to the matter proceeding before the Official Referee was withdrawn and it is for that reason that I consider that the report of the Official Referee should not be considered. As the parties have expressly agreed before us that the evidence recorded by the Official Referee shall be treated as evidence in the case there can be no objection to the Court taking that evidence into consideration, but at the same time I trust that in future similar references will not be made to the Official Referee. [His Lordship then dealt with the facts and concluded that the appeal should be dismissed with costs.]

KRISHNASWAMI AYYANGAR J.

KRISHNASWAMI AYYANGAR J.—I am in entire agreement with the Judgment just pronounced by my Lord. I shall, however, add a few words on the question as to what matters are properly referable for inquiry

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to the Official Referee. Before the creation of the office of Official Referee some twenty-five or thirty years back, the practice on the Original Side was to entrust inquiries into accounts and such other matters as are referable to a commissioner under Order XXVI of the Code of Civil Procedure, to a commissioner appointed *ad hoc* by the Court. There were delays in the submission of reports and defects noticed in them which necessitated fresh references. For these and other reasons, it was felt it would be a great advantage to have a permanent officer with the necessary training and experience to enable him to do in a more satisfactory way what was till then being done by a commissioner. To start with, it was certainly not the idea to delegate to the Official Referee any of the functions of the Court. Neither is there anything in the rules of the Original Side to warrant the view that there has since been an enlargement in the scope of the functions of the Official Referee. He is to be no more than a permanent commissioner for the purpose of taking the accounts and making the inquiries contemplated by the Code of Civil Procedure. Order XXIII of the Rules of the Original Side contain the provisions relating to the appointment of a commissioner, and a definition of the matters which could be left to him for inquiry and report. There is nothing in Order XXIV of the Original Side Rules to suggest that it was the intention to give him an extended jurisdiction. Rule (1) of this Order says that

> "subject to the rules hereinafter contained, Order XXIII of the rules relating to accounts and enquiries referred to a commissioner shall, as far as practicable, apply to all proceedings before the Official Referee."

This is a fair indication that the Official Referee is only expected to perform the functions of a commissioner under the Code and that it was never intended

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that he should have power to deal with or decide material questions of fact or law on which the decision of the suit itself depends. So far as my knowledge goes questions of this character were rarely, if ever referred to the Official Referee for decision or report. Such a course might have been taken in a few exceptional instances but I think that it happened almost always because both sides consented to it and invited the presiding Judge to adopt this procedure. In such cases the inquiry generally went on without demur and the report when made was taken into consideration by the Court. I am not aware that there has been any instance of a reference being made on substantial questions in contest between the parties without their express consent, or the Referee's report considered valid in spite of objection taken to his jurisdiction to try. I may also observe that whenever during an inquiry before the Official Referee material questions of fact or law arose, it has been the practice ordinarily for the Referee to refer those questions to the Court or ask the parties to take the orders of the Court thereon. Questions of title to property and such other material questions were as a rule dealt with by the Court.

I agree that in view of the fact that in the present case the consent had been withdrawn even before the commencement of the inquiry before the Official Referee there is good reason for ignoring the findings of the Referee altogether, though there can be no objection to the evidence recorded by the Official Referee being treated as evidence in the case with the consent of the parties. It is on this footing that we have considered the appeal, learned Counsel on both sides having expressly assented to this course.

N.S.

APPELLATE CIVIL.

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

1939, November 21.

IN RE CHIDAMBARAM CHETTIAR (PLAINTIFF), APPELLANT.*

Court Fees Act (VII of 1870), sch. II, art. 17-A and sec. 12 (ii) —Suit for declaration without consequential relief in District Munsif's Court transferred to Subordinate Judge's Court to be tried with a connected suit—Value of transferred suit less than Rs. 10,000—Dismissal of both suits by common judgment—Memorandum of appeal from judgment in transferred suit to District Court—Court-fee to be calculated under art. 17-A of sch. II of Act—Mistake in calculation of court-fee by lower appellate Court—Power of High Court when appeal comes before it to correct court-fee under sec. 12 (ii) of Act.

A suit for a declaration that a certain alienation was a fraud on creditors was filed in a District Munsif's Court. It was transferred to a Subordinate Judge's Court to be tried along with another similar suit filed by the same plaintiff in that Court. The suits were dismissed by a common judgment. The plaintiff filed an appeal to the District Court against the decision in the transferred suit and paid a court-fee of Rs. 15 on the memorandum of appeal which was accepted by the District Judge as being the correct court-fee.

Held that the District Court erred in accepting the memorandum as properly stamped. The decree in the transferred suit that was challenged in the appeal was a decree of the Court of the Subordinate Judge and not of the Court of the District Munsif. Since the value of the suit for purposes of jurisdiction was less than Rs. 10,000 the proper court-fee under article 17-A of Schedule II of the Court Fees Act was Rs. 100.

Held further that section 12 (ii) of the Court Fees Act gives an appellate Court power, when an appeal comes before it, to correct a mistake made in the lower Court.

* Appeal No. 251 of 1939.

CHIDAMBARAM CHETTIAR, *In re.*

APPEAL against the decree of the Court of the Subordinate Judge of Coimbatore, dated 22nd November 1937, in Original Suit No. 176 of 1937.

K. V. Ramachandra Ayyar for appellant.

T. Krishna Rao for *Government Pleader* (*B. Sitarama Rao*) for Government.

LEACH C.J.

The ORDER of the Court was delivered by LEACH C.J.—This appeal has been placed before us to-day on a question raised with regard to the court-fee payable. The memorandum of appeal bears a court-fee stamp of Rs. 15 and the Deputy Registrar has called upon the appellant to pay an additional fee of Rs. 85 on the ground that the memorandum should be stamped with a fee of Rs. 100 under the provisions of article 17-A of the Second Schedule of the Court Fees Act. As the appellant questioned the validity of the Deputy Registrar's decision a notice was issued to the Government Pleader. The facts are these. The appellant filed a suit in the Court of the District Munsif of Dharapuram for a declaration that a certain alienation was a fraud on creditors. He filed a similar suit in respect of another alienation in the Court of the Subordinate Judge of Coimbatore. The suit filed in the Court of the District Munsif was subsequently transferred to the Court of the Subordinate Judge and tried along with the suit which the appellant had filed in that Court. By a common judgment the two suits were dismissed. The appellant then filed an appeal to this Court against the decision in the suit which he had filed in the Court of the Subordinate Judge and filed an appeal to the Court of the District Judge of Coimbatore in respect of the decree of the Subordinate Judge in the suit which was originally filed in the

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Court of the District Munsif. This is the appeal which has given rise to the question of stamping.

The memorandum of appeal was stamped with a fee of Rs. 15 when it was presented to the Court of the District Judge and the District Judge accepted it as being correct. Article 17-A provides that the court-fee on a memorandum of appeal in a suit for a declaration without consequential relief in a District Munsif's Court shall be Rs. 15. The District Court, however, erred in accepting the memorandum as having been properly stamped. The decree which was challenged was a decree of the Court of the Subordinate Judge and not of the Court of the District Munsif and article 17-A clearly states that in the case of a memorandum of appeal against a decree of a District Court or a Sub-Court the fee shall be Rs. 100 if the value for purposes of jurisdiction is less than Rs. 10,000, as in this case. The argument of the appellant that the fact that the suit was originally filed in the Court of the District Munsif makes it a decree of that Court cannot be accepted. The decree was passed by the Court of the Subordinate Judge and is rightly declared to be a decree of that Court.

The learned Advocate for the appellant has suggested that this Court has no jurisdiction to require payment of the difference between Rs. 15 and Rs. 100 by reason of section 12 of the Court Fees Act. He says that there was no question raised when the appeal was filed in the Court of the District Judge and, not having been raised there, it cannot be raised here. This argument ignores the facts and the wording of the section. The District Court in accepting the memorandum of appeal at Rs. 15 did decide that that was the proper fee. Section 12 (ii) gives an appellate Court power when an appeal comes before it to correct a

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mistake made below, and this mistake was corrected by the direction of the Deputy Registrar. There is no substance in the appellant's objections and they must be overruled. As he has insisted on these questions being argued and as the Government Pleader has been served the appellant must pay costs which we fix at Rs. 50. The appeal will not be accepted until both the court-fee and costs which we have now awarded have been paid.

G.R.

APPELLATE CIVIL.

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

S. V. SUBBA RAO (THIRD RESPONDENT), APPELLANT,

1939, November 23.

v.

THE CALICUT CO-OPERATIVE URBAN BANK, LTD., CALICUT (PETITIONER), RESPONDENT.*

Indian Limitation Act (IX of 1908), art. 182—Applicability to execution of awards under the Co-operative Societies Act (II of 1912).

Article 182 of the Indian Limitation Act applies to the execution of an award passed under section 51 of the Co-operative Societies Act, 1912.

Co-operative Credit Society, Arungunam v. *Chinnaswami*(1) overruled.

APPEAL under Clause 15 of the Letters Patent against the judgment of VENKATARAMANA RAO J., dated 12th April 1938 and passed in Appeal against Appellate Order No. 2 of 1938 preferred to the High Court

* Letters Patent Appeal No. 74 of 1938.

(1) I.L.R. [1937] Mad. 495.

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against the order of the District Court of South Malabar, dated 13th December 1937 and made in Appeal Suit No. 175 of 1937, preferred against the order of Court of the District Munsif of Calicut in Execution Petition No. 5320 of 1936.

N. R. Sesha Ayyar for appellant.

K. Kuttikrishna Menon for respondent.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises the question whether article 181 or article 182 of the Limitation Act applies to the execution of an award passed under section 51 of the Co-operative Societies Act, 1912. If the article which applies is article 181 the award which was filed in the Court of the District Munsif of Calicut for execution will be time-barred. If article 182 applies it still may be executed. The District Munsif and the District Judge of South Malabar on appeal held that article 182 applies and their decision was confirmed in a second appeal which was decided by VENKATARAMANA RAO J. The learned Judge has dealt with the argument in full and we are in complete agreement with his observations.

Rule XV (7) (*c*) of the rules framed under the Act states that on application to the civil Court having jurisdiction over the subject-matter of the decision or award, the Court shall enforce the decision or award as if it were a final decree of the Court, and were it not for the judgment of CORNISH J. in *Co-operative Credit Society, Arungunam* v. *Chinnaswami*(1) we should not have thought that there would have been any doubt about the applicability of article 182. It is conceded by the learned Advocate for the appellant, as it must be, that an award under the Co-operative

(1) I.L.R. [1937] Mad. 495.

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Societies Act attracts all the provisions of the Code of Civil Procedure in the matter of execution. If it attracts all the provisions of the Code with regard to execution it must, in our opinion, of necessity attract the provisions of the Limitation Act which apply to the execution of decrees. The award when it is filed has to be executed as a decree of the Court and in effect it becomes a decree of the Court. As the provisions of the Code of Civil Procedure admittedly apply, the provisions of section 48 of the Code must apply. Section 48 provides that a decree shall run for a period of twelve years provided, of course, that steps in execution are taken at intervals of not more than three years as required by article 182 of the Limitation Act. If section 48 applies it follows that the appropriate article is 182 and not article 181. If article 182 did not apply but article 181 did, there would be a conflict as article 181 fixes a period of three years and section 48 a period of twelve years.

CORNISH J. considered that the question was really decided in *Sambasiva Mudaliar* v. *Panchanada Pillai*(1) but we do not accept that opinion. *Sambasiva Mudaliar* v. *Panchanada Pillai*(1) related to the provisions of section 40 of the Revenue Recovery Act, the wording of which is very different from the wording of Rule XV (7) (*c*) of the Co-operative Societies Act. We can see no reason for applying the decision in *Sambasiva Mudaliar* v. *Panchanada Pillai*(1) to a case like the present one, and we consider that *Co-operative Credit Society, Arungunam* v. *Chinnaswami*(2) was wrongly decided.

As indicated by VENKATARAMANA RAO J. in his judgment, the decision of the Calcutta High Court in

(1) (1907) I.L.R. 31 Mad. 24. (2) I.L.R. [1937] Mad. 495.

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LEACH C.J.

Chaitram Sagormull v. *Hardwari Mull & Co.* (*Re : Beledere Jute Mills, Limited*)(1) which was followed by this court in *H.R.E. Board, Madras* v. *The Shirur Mutt*(2), has direct bearing on the question under discussion. The Calcutta case had reference to the execution of an award under section 15 of the Indian Arbitration Act, which says that where an award has been filed in Court it shall (unless the Court remits it to the reconsideration of the arbitrators or umpire or sets it aside) be enforceable as if it were a decree of the Court. It was held that article 182 and not article 181 applied. RANKIN C.J. remarked :

"If one looks at the question of limitation from the point of view of the different alternatives, there can be one inference only and that is that the words employed by the Legislature in the first sub-section of section 15 of the Indian Arbitration Act were intended to go to the question of limitation as well as to the question of procedure."

There is no difference here between section 15 of the Indian Arbitration Act and rule XV-7 (*c*) of the Co-operative Societies Act and as *Chaitran Sagormull* v. *Hardwari Mull & Co.* (*Re : Beledere Jute Mills, Limited*)(1) has been accepted by a Bench of this Court as embodying the correct statement of the law it decides the matter. The appeal will be dismissed with costs.

N.S.

(1) (1927) I.L.R. 55 Cal. 499. (2) (1934) I.L.R. 58 Mad. 760.

APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice Krishnaswami Ayyangar.

1939, October 27.

GOONA DURGAPRASADA RAO *alias* PEDDA BABU AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

GOONA SUDARSANASWAMI AND TWENTY-EIGHT OTHERS (DEFENDANTS 1 TO 5, 7 AND 9 TO 31), RESPONDENTS.*

Hindu law—Conversion or reconversion to Hinduism without performance of expiatory ceremonies—If and when valid—Conversion or reconversion, question of fact—Formal renunciation of religion, if necessary—Correct test to find out conversion or reconversion.

A Hindu (fisherman) of the Baliji community became a convert to Christianity and married a Christian woman. While this marriage was subsisting he reverted to Hinduism and married his brother's widow according to the form prevalent in the Baliji community. By the members of his family and the caste they were recognized as married spouses living in lawful wedlock. In habits and worship he became a Hindu observing the Hindu usages and forms of worship at home and on special occasions. It was found that no formal expiatory ceremonies were performed by him before reverting to Hinduism. There was no evidence that expiatory ceremonies were necessary in that community before a convert could be received back into its fold. The lower Court held that, on account of the absence of any ceremony of reconversion or any expiatory ceremony, he must be deemed to have remained a Christian and that his second marriage was therefore invalid.

Held that the second marriage was valid. A Hindu convert to Christianity can, in certain cases, come back to Hinduism under Hindu law without the performance of any formal expiatory ceremony. Whether there has been conversion or reconversion to Hinduism is a question of fact in each particular case.

* Appeal No. 190 of 1936.

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Per MOCKETT J.—There is no warrant for holding that either of the two ingredients, namely, formal renunciation of religion or performance of expiatory ceremonies, is essential in all cases of conversion or reconversion to Hinduism.

Per KRISHNASWAMI AYYANGAR J.—The correct test is to lay emphasis on the prevailing sentiment and usages of the community and it is its approval or disapproval which should be the governing factor.

APPEAL against the decree of the District Court of Ganjam, dated 24th October 1935 and passed in Original Suit No. 26 of 1931.

B. Jagannadha Das and *C. V. Dikshitulu* for appellants.

S. Suryaprakasam for sixth respondent.

C. Sambasiva Rao for respondents 10, 12 and 29.

Other respondents were not represented.

Cur. adv. vult.

JUDGMENT.

MOCKETT J.

MOCKETT J.—I concur generally with the judgment which my learned brother is about to deliver, and I am not proposing to restate the facts which are clearly set out in the judgments of the learned trial Judge and of my learned brother. I desire however to deal with the important question raised by issue 11 in this case which is:

"Whether the late G. M. Appalaswami Naidu was a Roman Catholic, not governed by Hindu law, at the time of his death."

The evidence in support of the contention that he was then a Roman Catholic is curious. One would expect that the local priest and members of his church congregation would have been forthcoming to speak to his following the Roman Catholic religion. Father Gangloof who seems to have been intimately associated

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with the deceased was alive at the time of the trial but was not called. It is incredible that no members of his congregation are available. There was a Roman Catholic priest, Rev. Ferier, who gave evidence, but he of course was a priest in the locality after Appalaswami's death. He was called to prove the signature of Father Gangloof to Exhibit VII which is addressed: "My dear Mary Sousai". It was suggested that the identity of Appalaswami with Mary Sousai had not been proved. But it is quite evident to me that in the lower Court the fact that Mary Sousai was the name under which Appalaswami was known was not in dispute. Exhibit VII, if admissible, shows that Father Gangloof was corresponding with Appalaswami about the church, but in the absence of the writer being called, I do not see how this letter is admissible. Exhibit VII (*a*), dated 31st January 1921, is however signed by Appalaswami, and this shows his association with the church. Exhibits VI and VI (*a*) are also documents signed by Appalaswami. Exhibit VI, dated 19th February 1922, and VI (*a*), dated 19th May 1915, lead to the same inference, namely, that he was interested in the Roman Catholic Church because he was contributing funds for the *mali* and the purchase of oil for the sanctuary lamp. Exhibit VIII, dated 9th August 1898, shows that Zitama, Appalaswami's first wife, was baptized a Christian in 1898, and Exhibit VIII (*a*) is an extract from the Marriage Register, dated the same day, 9th August 1898. D.W. 2, Appalaswami's clerk, proves no more than that between 1905 and 1912 Appalaswami used to go to church now and then. He can give no further information about Appalaswami's affairs except that he attended his funeral and that Appalaswami was cremated and not buried. That, of course, was in

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1921. D.W. 3, the head clerk in the Tea Estate Labour Association with which Appalaswami was associated, is of little, if any, assistance to the defence. He says that he does not know if Appalaswami became a Christian at any time, and he did not see him going to church. He adds that he had a golden chain round his neck with a pendant which he used to call a cross. The witness never saw the pendant himself. He does say however that from his dress he thought he was a Hindu. Against this evidence, which, as I indicated, is more noteworthy by reason of its omissions than its affirmative proof, there are a number of witnesses to prove that in 1913 Appalaswami married Appalanarasamma according to Hindu rites. These witnesses also prove that Appalaswami was attending temples and in every way, to quote P.W. 9, "he was a Hindu like any of us" (meaning thereby the witnesses). Appalaswami was taken to the cremation ground in a sitting posture and there cremated. The assertion of P.W. 1, Appalanarasamma, that Appalaswami was never a Christian cannot be true and is negatived by the evidence in the case. He was baptized when he was a child of twelve or thirteen and he was no doubt married first in Christian form when he was seventeen, and it would appear from Exhibits VI and VI (*a*) that he was contributing to church funds up to May 1913. But the whole evidence points to the conclusion that so far as he was concerned—and I use that expression advisedly—he abandoned the Christian religion at the time of his marriage to Appalanarasamma in 1913 and lived and worshipped as a Hindu up to the time of his death and was cremated. None of the defendants have gone into the witness box to deny any of the facts proved by the plaintiffs, and it must be emphasized that it has never been suggested from the Bar,

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although we asked the question, that this was a suit in which the plaintiffs and defendants were colluding together to defeat alienees. We obtained that definite assurance because it naturally would be an important element in weighing the evidence in the case. The learned trial Judge too arrived at the conclusion in paragraph 19 of his judgment:

> "That Goona Appalaswami was what is known in some of the southern districts as a caste Christian, that is a Christian by religion but following Hindu customs, manners and habits."

On the evidence in this case, I am not prepared to agree with that finding. The evidence, virtually uncontradicted, shows that Appalaswami from 1913 went far beyond clinging to Hindu customs and associations. He worshipped as a Hindu. There is no suggestion in the evidence that he ever entered a church after 1913. There is however uncontradicted evidence that he attended temples. It would seem however that the *ratio decidendi* of the lower Court in this case amounts to this. On the decisions, says the learned Judge,

> "there must be a renunciation or renouncement of the new religion and a readmission into the old. Without something definitely done in both these directions, it cannot be said that a Christian can become a Hindu or *vice versa*".

This is, of course, a case not of conversion to Hinduism but of a Hindu reverting to his original faith. The learned trial Judge apparently takes the view that there must be proof of some formal abandonment of one religion and the adoption of another. We have been referred to the decisions bearing on this topic. *Administrator-General of Madras* v. *Anandachari*(1) is a judgment of PARKER J. In dealing with the possible

(1) (1886) I.L.R. 9 Mad. 466.

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readmission of one Kristnammal to Brahminism, the learned Judge makes the following remarks:

"His conversion to Christianity according to the Hindu law, rendered him an outcaste and degraded. But according to that law, the degradation might have been atoned for, and the convert readmitted to his status as a Brahman, had he at any time during his life renounced Christianity and performed the rites of expiation enjoined by his caste."

It seems to me that that statement remains as it is, if the words "if any" are added at the end of the sentence. In 1934 VARADACHARIAR J. decided a case, *Gurusami Nadar* v. *Irulappa Konar*(1), and he states:

"The language used in *Administrator-General of Madras* v. *Anandachari*(2) merely refers to the expiatory ceremonies enjoined by the practice of the community in question; and with reference to the class of people we are now concerned with, no suggestion has anywhere been made in the course of the evidence that any particular expiatory ceremonies are observed amongst them. No particular ceremonies are prescribed for them by the Smriti writers, nor have they got to perform any homas. One has therefore only to look at the sense of the community and from that point of view it is of particular significance that the community was prepared to receive Vedanayaga and the fifth defendant as man and wife and their issue as legitimate."

VARADACHARIAR J. also deals with the decisions on this matter so far as the law of bigamy is concerned. I do not consider the criminal aspect of this matter assists except to the extent that, as is obvious, conversions or reconversions are recognized by the Courts. I respectfully agree with VARADACHARIAR J. that, because in *Morarji* v. *Administrator-General, Madras*(3) VENKATASUBBA RAO J. referred to several facts as proved and relied upon them as establishing a conversion, it is erroneous to hold that it has been laid down by

(1) (1934) 67 M.L.J. 389. (2) (1886) I.L.R. 9 Mad. 466.
(3) (1928) I.L.R. 52 Mad. 160.

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the learned Judge that all those facts must be proved to exist before the Court could give a finding in favour of a conversion. Indeed in *Ramayya* v. *Josephine Elizabeth*(1) VENKATASUBBA RAO J. himself has made this quite clear. No general law has been cited to us with regard to any particular ceremonial being necessary before a conversion or reconversion is validated. That in many castes they insist upon such ceremonies is probable, but that is a question rather of custom than of law. It seems to me that no special test could be laid down as applicable to all cases. On the other hand, I consider that whether there has been a conversion or reconversion must be a question of fact in each particular case and it may well be that in any particular case the consideration whether any essential ceremonial has been performed may be of importance. We have had no evidence before us of the necessity of any ceremonial in Vada Baliji fisherman community of Gopalpur and this decision deals with readmission to that community. On the other hand, it is clear that Appalaswami Naidu was admitted to caste and worship by his caste men. I entirely agree that no gesture or declaration can change a man's religion, but equally I cannot see why, when on the facts it appears that a man did change his religion and was accepted by his co-religionists as having changed his religion, and lived, died and was cremated in that religion, the absence of some formality should negative what is an actual fact. It seems to me somewhat analogous to the legal position with regard to change of domicile which must always be a question of fact in every particular case. I naturally differ from the experienced Judge who has tried this case,

(1) (1936) 44 L.W. 854.

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with great hesitation on a topic of this sort, but it seems to me that his decision rests on the absence of a formal renunciation of religion and the absence of proof of performance of expiatory ceremonies, and there is no warrant for holding that either of these two ingredients is essential in all cases. My conclusion in short is that on the evidence it is shown that in fact Appalaswami returned to Hinduism at the time of his marriage in 1913 and remained and died a Hindu and was accepted as such by his co-religionists without demur and that the probabilities are that this caste does not insist on any ritual in such matters. On the other matters which have been argued before us, I generally agree with my learned brother.

This appeal is allowed and the decree of the lower Court is set aside as against respondents 1 to 5. As against the other respondents, the decree is confirmed. The suit is remanded to the lower Court for disposal according to law. The appellants will have their costs in the trial Court against respondents 1 to 4 and also against respondents 11 to 15, 17, 18, 21 to 26 and 28 but in this Court the appellants will bear their own costs so far as these respondents 1 to 4 are concerned. The appellants will pay the court-fee due to Government both here and in the lower Court in the first instance, but the amount will come out of the estate and will be provided for in the final decree in proportion to the parties' respective shares.

The appellants must pay the costs of respondents 6, 10 and 29.

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KRISHNASWAMI AYYANGAR J.—A question of some importance and difficulty arises for decision in this appeal. It is whether a Hindu convert to Christianity can, without the performance of a formal expiatory

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ceremony, come back to Hinduism under the Hindu law. It is extremely doubtful whether the ancient Hindu law and the texts and Smrithis permitted the return into the fold, of an apostate who had wilfully and deliberately chosen to abandon the religion of his birth to become a convert to an alien faith, which holds the Hindu religion in contempt. Apostasy was a sin which was probably regarded as not capable of condonation or expiation by mere *prayaschittic* ceremonies. The Hindu society of old, had it been governed purely by the Smrithis and Dharma Sastras, might in all probability have refused to readmit the convert to social or religious communion. Before us, however, no Hindu law texts were cited as governing the matter or tending to throw any light on the question. In fact, the examination of the few cases bearing on the subject has left the impression that the consideration of the topic has to be approached not from the point of view of strict religion on the views of ancient law-givers but on a fair appreciation of the current sentiments and usages of the particular community into which the convert seeks readmission.

It is not necessary except very briefly to refer to the facts established. The two appellants claim a share in the properties left by one Goona Appalaswami who died in 1921 at the age of forty. He was born in a community of Hindu fishermen, of the caste called Vada Balijis of Gopalpur. At a very young age—when he was barely twelve—he seems to have been converted to the Roman Catholic faith. This event took place in 1893 and is evidenced by a baptismal certificate (Exhibit VI). In 1898 his first marriage took place with the fifth defendant in the suit out of which this appeal has arisen. The marriage was according to the Christian form, the bride embracing Christianity

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on the same day as the marriage, probably a little earlier. There were four sons of this marriage and they were defendants 1 to 4 in the Court below and have been joined as respondents 1 to 4 here, though they have been unrepresented before us. There is no question raised about the validity of this marriage either here or in the trial Court. It is scarcely likely that Appalaswami took to Christianity out of religious conviction. His age at the time and his life and conduct afterwards suggest the contrary, though down to 1913 there is reason for thinking he kept contact with the padres and the church. It is however undeniable that his outward bearing and habits almost from the beginning were more those of a Hindu than a Christian and, as he advanced in life, he drifted more and more to his old faith which was the faith of most of his relations and friends. It is difficult to fix any point of time at which he could be said to have definitely abjured Christianity and re-entered the religion of his fore-fathers. It is certain, however, that no formal ceremonies of any kind were undergone by him such as are sometimes resorted to in the present day when a non-Hindu desires to become a convert to the Hindu religion.

In 1913 Appalaswami married his deceased younger brother Ayyappa's widow, Appalanarasamma, as his second wife while the first wife was still living with him and the marriage with her yet in force. The appellants are the sons of Appalaswami by this second wife, Appalanarasamma. The deceased brother, Ayyappa, had himself been converted to Christianity in 1899, and it was as a Christian that he had married, according to Christian rites, Appalanarasamma who had also been by that time converted to the same faith. It is plain that, if Appalaswami had continued to be a Christian,

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the objection to what would have amounted to a bigamous alliance would have been insuperable. If, however, he had turned Hindu, the way would have been smoothed for a valid second marriage, with the aid of the custom of his caste which would have come to his rescue in overcoming the objection to marrying a brother's widow, abhorrent to ordinary Hindu law and sentiment. The appellants' case which is supported by the uncontradicted evidence of their mother, Appalanarasamma, is that she was married not in the Christian form but according to the form prevalent in the Baliji community and this, in our opinion, is satisfactorily established. There is evidence sufficient to justify us in holding that the relationship between Appalaswami and Appalanarasamma was similar to that subsisting between married spouses living in lawful wedlock and it was so regarded by the members of his family, no less by his caste. If it was the intention of Appalaswami to take Appalanarasamma as his wedded wife, as we think it was, it is clear that by the date of the marriage, if not before, he must have definitely made up his mind to abjure Christianity for good and become a Hindu in every respect. Otherwise, it would have been impossible for him to confer on Appalanarasamma the status of a married wife. In fact the entire evidence fits in with this view of the facts. There is no proof of any contact with the church or the padres after the marriage. On the contrary, as the learned Judge has pointed out, Appalaswami was in habits and worship a Hindu, observing the Hindu usages and forms of worship at home and on special occasions. He used to wear a big namam on his forehead, attended the local temples and the jatras, observed Hindu vratams and festivals, worshipped idols and the sacred *tulasi*, and listened with interest

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to the puranas and took vows for Hindu Gods. The birth certificates of the appellants describe them as Hindus. The sons of the first wife married in Hindu families and according to Hindu rites and customs. The whole Baliji community seems to have accepted the entire family as still in the caste and finally when the brothers, Ayyappa and Appalaswami, died, they were both without doubt cremated and *brindavans* erected over their ashes. It is in fact difficult to conceive of a more complete reversion to Hinduism or a clearer abandonment of Christianity. The plaintiffs and their mother, not to mention the other members of the family, were throughout, over a fairly long period, received and treated by the entire Hindu community as Hindus without the slightest trace of any objection or dissent. These facts make it apparent that the case before us is not in any way similar to the kind of life lived by certain Catholic Christians in Tinnevelly or South Kanara. With them, the old customs and associations may persist to some extent in the matter of dress, manners and even as regards social barriers of caste unknown to Christian society; but in essential matters they hold fast to Christianity in faith and will not be allowed to swerve from it. They attend service in the church, and do not, and will not be allowed to attend Hindu temples or worship Hindu deities. There can be no question of course of inter-marriages with Hindus. What is remarkable in this case is that there is not the slightest evidence after 1912 or 1913 of Appalaswami or any of the members of his family having ever evinced any interest in Christianity or done anything to indicate that they paid even formal allegiance to its tenets or observances. The learned Judge is inclined to accept the case of the appellants in this regard but is of opinion that he could

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not uphold the validity of the marriage of their mother with Appalaswami, as Appalaswami could not become a Hindu without formally renouncing Christianity and securing re-admission into Hindu society by the performance of expiatory ceremonies. The only point for consideration is whether the learned Judge is right in this view. We are not inclined to attach weight in themselves to reasons of policy or convenience, which appear to have influenced the mind of the learned Judge. That society might get into a state of flux and confusion if a formal abandonment followed by the performance of expiatory ceremonies is not insisted on, is scarcely a sound reason for the Court lending its support to maintain a social order if the society concerned has itself lost faith in it. In matters affecting the well-being or composition of a caste, the caste itself is the supreme judge. If a caste is found to have given up certain old notions and practices and adopted new ones, not in any way repugnant to morality, such usages should be respected. The function of the Court is merely to ascertain the law, or the effect of usages having the force of law, and to apply it without being involved in the tangles of policies and expediencies. Any other course would lead to disastrous results, and introduce uncertainty and confusion into the administration of justice. The Hindu law of to-day is after all but a bundle of customs and usages approximating more or less to certain ancient standards fixed by wise men of an ancient age. At no time did those standards and the rules in which they found expression attain universal acceptance in the country, even among communities professing the Hindu faith. Among the lower castes in particular there have been usages of an alien origin which have persisted through the ages, and for that

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reason consistently upheld by the Courts. We cannot shut our eyes to changes almost revolutionary in character and extent which have been for a considerable time past taking place in the structure of the Hindu social order, and in the ideas and sentiments which govern it. The old sanctions seem to have all but disappeared, sweeping away before them the old faith and the old institutions which did constitute in the past an integral condition of the indigenous social fabric. The attitude of neutrality on the part of Government in matters appertaining to religion and religious belief, which is now of course a thing of the past, while it did not start, did not restrain the forces of disintegration which began early to assert themselves. Members even of the higher castes accustomed to strict discipline chafed under the old restrictions, which to them had ceased to have a meaning, and threw them off with impunity. Liberties were taken by individuals, and almost silently acquiesced in by society, tending naturally to destroy faith in the time-old articles. In view of the forces at work it is no surprise that, as early as 1903, the Privy Council refused to permit a departure from the orthodox standards in matters of diet or ceremonial observances to affect the status and civil rights of the erring individual; see *Bhagwan Koer* v. *Bose*(1). Expiations for many transgressions which in the past would have been insisted upon were and are now scarcely considered necessary or perhaps considered unnecessary. A true and genuine change of heart, rather than the adoption of mere formalism, is the consideration that would in modern conditions appeal most to the modern mind. These observations are made not for the purpose of

(1) (1903) I.L.R. 31 Cal. 11, 33 (P.C.).

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comment or criticism on current social trends, but only for furnishing the necessary background against which the learned Judge's opinion has to be viewed. Considerations such as these seem to my mind to have been in fact at the back of the mind of the learned Judges who were responsible for the weighty pronouncements in the cases to be presently noticed.

The subject received the most careful and elaborate consideration at the hands of SANKARAN NAIR J. in *Muthusami Mudaliar* v. *Masilamani*(1). He expressed the opinion which has never since been departed from in this Court that a marriage contracted according to Hindu rites by a Hindu with a Christian woman who before marriage had been converted to Hinduism is valid if such marriages are common among and recognized as valid by the custom of the caste to which the man belongs, though not in strict conformity with orthodox Hindu religion. He declared in effect that where a caste accepts a marriage as valid and treats the parties thereto as members of the caste, the Court will not condemn it as invalid unless it is repugnant to the ordinary notions of morality. The correct test to be applied is contained in the following observation, namely:

> "If according to the usage of the community a marriage is valid or the community recognize a marriage as valid, then, in the absence of any statutory prohibition, I fail to see why it should not be recognized as valid, even without the requisites of a valid custom in derogation of what may be styled the ordinary Hindu law unless it offends against rules which would render any other marriage invalid."

The importance of this clear statement of the law in relation to the present case is not to be ignored. Indeed it furnishes the clue. Emphasis is therefore

(1) (1909) I.L.R. 33 Mad. 342.

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to be laid on the prevailing sentiment and usages of the community and it is its approval or disapproval which should be the governing factor. There is, it may at once be mentioned, not a vestige of disapproval of the marriage by the community in the present case, but on the contrary it seems to have set its stamp of complete approval on it. What is of supreme importance is that not even a suggestion is to be found in the evidence about the necessity for expiatory ceremonies in the Baliji caste, before a convert is received back into its fold. It is hardly right for the Court to erect a barrier which the autonomy of the caste does not see fit to do, simply because in some other caste or some other community it might be considered proper that an expiatory ceremony should be performed. That a Hindu having renounced Hinduism once can revert to it scarcely admits of doubt ; see *Proceedings, 8th November* 1866(1), *Kusum Kumari Roy* v. *Satya Ranjan Das*(2) and *Morarji* v. *Administrator-General, Madras*(3). It cannot be denied that many tribes of old, of non-Aryan origin and descent, merged into the Hindu population accepting the Hindu religion. It is certain that large hordes of Scythians, Yavanas, Kirathas, Kambhojas and Persians entered India in ancient times, but their identity has now been completely lost. They have been in fact assimilated into one or other of the component parts of Hindu society, even as the descendants of the old Buddhists, who at one time formed the dominant element in the land, have been absorbed by it. The process of absorption is still active with Arya Samajists taking the lead with their suddhi movement, the only new factor being the entry of political considerations into

(1) (1866) 3 M.H.C.R. Appx. vii. (2) (1903) I.L.R. 30 Cal. 999.
(3) (1928) I.L.R. 52 Mad. 160.

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the field. Modern instances of even European or American Christians being converted into Hinduism show the degree of tolerance and accommodation that Hindu society has shown itself to be capable of. *Morarji* v. *Administrator-General, Madras*(1) furnishes a recent illustration, where the admission into the Hindu fold of a lady, Austrian by birth and British by domicile, was upheld and the succession to her estate was allowed to be regulated on the footing that she had become a Hindu. VENKATASUBBA RAO J. held that it is a question of fact in each case whether a given person is a Hindu or not. In coming to a conclusion on that question he took note among other things of the formal ceremony of conversion which the lady had undergone. But he never meant to lay it down as a proposition of law that a ceremony of conversion or any form of expiatory ceremony was an essential preliminary to a valid conversion. The error of this view has been pointed out by VARADACHARIAR J. in *Gurusami Nadar* v. *Irulappa Konar*(2) and by VENKATASUBBA RAO J. himself in *Ramayya* v. *Josephine Elizabeth*(3). In the former case the learned Judge, after pointing out that no particular expiatory ceremonies were prescribed in the community in question in that case, emphasised the necessity for looking to the sense of the community and considering whether it was prepared to receive back the convert into its fold. According to him a formal ceremony would not be insisted on except possibly in the twice born castes. In the latter case VENKATASUBBA RAO J. had his own prior decision quoted to him in support of the contention that expiatory ceremony was necessary, but he definitely ruled that a

(1) (1928) I.L.R. 52 Mad. 160. (2) (1934) 67 M.L.J. 389.
(3) (1936) 44 L.W. 854.

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formal conversion is not a pre-requisite to a person becoming a Hindu. The learned Judge in the Court below did not have the advantage of this explanation, and was inclined in its absence to treat the views of VARADACHARIAR J. as *obiter*. It is now patent that he fell into an error in so doing. We must accordingly hold that there is no authority in support of the learned District Judge's view that, on account of the absence of a ceremony of reconversion or any other expiatory ceremony, the Court is bound to treat Appalaswami as having continued to remain a Christian, and his marriage with Appalanarasamma as invalid.

The result is that the appeal has to be allowed and the decree of the lower Court set aside as regards respondents 1 to 5. Respondents 6, 10, 12 and 29 are the alienees of portions of the properties left by the deceased Appalaswami. The alienations in their favour have been rightly upheld by the Court below and not seriously challenged before us. The suit is remanded for a preliminary decree to be passed by the lower Court and further steps to be taken according to law for giving effect to the rights of the appellants as the legitimate sons of Appalaswami to shares in the estate left by him.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth and Mr. Justice Venkataramana Rao.

1939, September 6.

KHAJI MUHAMMAD HUSSAIN SAHIB (DEFENDANT), APPELLANT,

v.

THE MASJIDAY MAHMOOD JAMAIT MANAGING COMMITTEE OF PUDUPET, by its Secretary SHAHUL HAMID MARAKKAYYAR (PLAINTIFF), RESPONDENT.*

Societies Registration Act (XXI of 1860), sec. 20—Charitable society—Test of—Paramount object—Charitable—Some objects not strictly charitable but religious—Such society, if a charitable society—Incorporation of such society under the Act, if proper—Office of Muthavalli, if could be acquired by prescription by such society.

Where a society is formed for certain purposes whose paramount object is charitable, the fact that some of the objects may not be strictly charitable but religious would not render the society any the less a charitable society, if the purpose is one intended to benefit the public or a considerable portion of the public. Such a society could be lawfully incorporated under the Societies Registration Act.

Such a society incorporated under the Act could validly acquire by prescription the office of Muthavalli of a mosque.

Whether a society formed for an exclusively religious purpose could be construed as a society for a charitable purpose within the meaning of the Act, left open.

Case-law reviewed and discussed.

APPEAL against the decree of the Court of the City Civil Judge, Madras, in Original Suit No. 926 of 1932.

K. Rajah Ayyar and *K. Subramaniam* for appellant.

V. T. Rangaswami Ayyangar for *P. Viswanatha Ayyar* and *S. K. Ahmed Meeran* for respondent.

Cur. adv. vult.

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* City Civil Court Appeal No. 36 of 1935.

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The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—This is an appeal from the judgment and decree of the learned City Civil Judge restraining the defendant by a perpetual injunction from interfering with the plaintiff's right of management, control and possession of the mosque, Masjiday Muhammad Jamait, situate in Pudupet, Madras. The facts relating to the suit out of which this appeal arises may be briefly stated. The said mosque was founded about eighty-five years ago. It is the plaintiff's case that it was built out of public subscriptions collected from the residents of Pudupet and was primarily intended for the benefit of the residents of the said locality. The defendant's case is that it was built by one Gulam Muhammad, but there is no reliable evidence in support thereof except some evidence of tradition. But it is immaterial who founded it because the evidence establishes that it was the Muhammadan residents of the locality who were taking interest in the said mosque and contributing to its upkeep. There is no deed of foundation prescribing any rules for the management of the affairs of the mosque or for the appointment of a Muthavalli or any servant of the mosque. From a document of 1863 (Exhibit VII) it is evident that there was a Muthavalli to the mosque and he was one Kasim Ali who was the maternal grandfather of the defendant. Kasim Ali appears to have died in 1888. The defendant states that a year before his death the said Kasim Ali executed a will (Exhibit I) in favour of the defendant in and by which he appointed the defendant as the Muthavalli and on the death of Kasim Ali in pursuance of the will the defendant succeeded to the office of Muthavalli and was functioning as such. It appears from the evidence that Kasim Ali was the Pesh Imam of the mosque and on his death the defendant continued to be the Pesh Imam

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and was doing the duties as such till the date of suit. The genuineness of Exhibit I is challenged by the plaintiff. The learned City Civil Judge did not record any finding in regard to it but in a later suit between the parties it was found to be not genuine. It is no doubt a document more than thirty years old, but there are certain improbabilities which cast some doubt on the genuineness of the document. It is stated that the defendant was appointed Muthavalli with the consent of Gulam Muhammad who is alleged to have signed the document. From the stone inscription, a copy of which has been filed as Exhibit B in the case, the mosque appears to have been built in 1849, and Exhibit I is dated August 1887. It is improbable that Gulam Muhammad was alive on that date and there is no reliable evidence of his having been alive on that date. The defendant was admittedly a minor of twelve or thirteen in 1887 and it is hardly likely that a minor was appointed either as a Muthavalli or Pesh Imam and under Muhammadan law such an appointment would be invalid. Further, if Gulam Muhammad had been alive, there is no necessity for Kasim Ali to make the appointment and the appointment could have been made by Gulam Muhammad himself. Some of these improbabilities render it unsafe for any Court to act on it. If this document cannot be relied on, there is nothing to show how the defendant came to be appointed and was functioning as Muthavalli and Pesh Imam. The probabilities are that he, being the daughter's son of Kasim Ali, was permitted by the congregation of Pudupet to do the duties of the said offices. There is no denying the fact that, at any rate from 1890 until 1918, for a period of nearly thirty years the defendant was managing the affairs of the mosque and collecting subscriptions and making

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disbursements thereof and generally attending to the affairs of the mosque. He was also functioning as Pesh Imam. In 1918 the then circumstances necessitated a change of management of the mosque and it was thought desirable by the jamait or congregation of Pudupet to have the management put on a sound and legal basis. The main reason which apparently led to it was the trouble they had from the Hindu residents of the locality who wanted to put up a Bajana Mandir near the mosque in respect whereof a litigation was commenced, Original Suit No. 484 of 1918 on the file of the High Court, Madras. The plaint in the said suit was filed on 11th November 1918. In view of this common danger everybody including the defendant conceived the idea of forming a society and getting it registered under the Societies Registration Act and vesting the management of the mosque in a governing body of the society. Accordingly a society was formed and registered under the name and style of Masjiday Muhammad Jamait Managing Committee with twelve members, the defendant being one of them. It was registered on 2nd December 1918. The memorandum of association is marked as Exhibit A-2 in the case and the rules and by-laws as Exhibit A-3. It is clear from them that one of the main objects of the association was to conduct the affairs of the mosque by collecting subscriptions, pay the salaries of the servants and incur expenses for the upkeep of the mosque and do everything which a manager of a mosque is required to do. From the date of the incorporation down to the date of the suit the said society was in undisputed management of the affairs of the mosque and the defendant ceased to function as Muthavalli. It was the society that was collecting subscriptions, paying salaries of the Pesh Imam, Muzzein

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Sahib and the sweeper and directing the performance of the services in the mosque and paying taxes, effecting repairs and generally doing everything which a manager or a Muthavalli of a mosque would do. The defendant was only acting as a Pesh Imam under directions given by the society from time to time and he or his son was for some time acting as a bill collector. In or about June 1932 misunderstandings arose between the defendant and the secretary of the society, apparently due to the fact that the Shafi element in the committee became predominant and wanted to control the institution. At the inception of the society and for some time thereafter the committee members consisted of equal number of representatives from each of the two sects, namely Hanafi and Shafi. In consequence of the preponderance of the Shafi element in the committee, there seemed to have been some attempt at innovation in regard to the recitation of prayers which was resented by the Hanafi section to which the defendant belonged. Ultimately the disputes between the committee members led to the resignation of the defendant from the membership of the society. He tendered his resignation on 5th July 1932 and began to dispute the authority of the committee and purported to abolish it. It may also be noted that meetings and counter meetings were held by the two factions in the committee and one of the factions purported to call a meeting of the Jamait and abolish the committee; *vide* Exhibit XXXI. In consequence of these disputes the plaintiff had to file this suit because the defendant began to interfere in the management of the affairs of the mosque by asserting his powers as Muthavalli. The defendant's case is that it was only with his consent that the society was formed and it could not have been constituted the sole and exclusive

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manager of the mosque in derogation of his right as Muthavalli, that he was the duly constituted Muthavalli and continued to be such. The society, according to him, was not a validly incorporated society and the initial registration thereof under Act XXI of 1860 was illegal and *ultra vires*; further he says that, as the committee had been abolished, even if he ceased to function as Muthavalli during the period the committee was in management, his powers of Muthavalli never terminated and therefore he could function as such and nobody has any right to interfere with his management. He further submits that the committee has also become defunct because the original members who formed the society are all dead and they have not been validly replaced. The plaintiff's case is that the society is a duly incorporated body and that the defendant not having exercised the management for a period of six years from 1918 his rights as Muthavalli, if any, were lost, that he accepted the subordinate position of a servant under the mosque while continuing to be a member of the committee and that he is estopped from questioning the right of the plaintiff to manage the mosque. On the evidence the learned City Civil Judge came to the conclusion that the plaintiff society was properly registered under the Societies Registration Act (XXI of 1860), that the defendant lost his rights as Muthavalli and that the plaintiff would therefore be entitled to the injunction prayed for.

The main ground on which Mr. Rajah Ayyar the Counsel for the defendant-appellant assailed the decision of the learned City Civil Judge is that the plaintiff society is not competent to sue for or claim the relief sought in the plaint. He formulated his contention thus: (i) the society was a religious society and

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therefore incapable of incorporation under the Societies Registration Act as only charitable societies could be incorporated thereunder; and (ii) even if the society was a validly incorporated society it could not acquire by prescription the office of Muthavalli, as the right of a Muthavalli is a personal right which the Muthavalli is incapable of surrendering or relinquishing and the defendant never divested himself of it. In regard to the first contention Mr. Rajah Ayyar submits that both according to the preamble and section 20 of the Societies Registration Act it is only a society formed for a charitable purpose that could be validly registered under the Act, that the plaintiff's society was formed for a religious purpose, namely, the management of the affairs of the mosque and that the purpose being solely religious, the society can in no sense be considered to be a society formed for a charitable purpose or a charitable society within the meaning of the Act. He was frank enough to bring to our notice a decision of the Allahabad High Court reported as *Anjuman Islamia of Muttra* v *Nasi-r-ud-din*(1) which is against the view he is contending for. That was a case of a religious society called the Anjuman Islamia of Muttra registered under the Societies Registration Act. It was contended in that case that the registration of the society was not legal because it was a society formed for religious purposes and not for charitable purposes. This contention was negatived and it was held that a society for religious purposes would ordinarily be a society for charitable purposes and the society in question was a society for charitable purposes and therefore the registration of the said society was legal. Mr. Rajah

(1) (1906) I.L.R. 28 All. 384.

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Ayyar however submitted that that case proceeded upon a view which is not tenable, namely, that the Indian Legislature made no distinction between religious and charitable purposes. In support of his contention that this view is erroneous he referred to a number of statutes framed by the Indian Legislature subsequent to 1860 where the Legislature drew a distinction between charitable and religious purposes in drafting for the purpose of those enactments. The question therefore for our decision is whether the plaintiff society is a charitable society or a society formed for charitable purposes within the meaning of the Societies Registration Act. We are not sure that the Legislature in using the word "charitable" in the Act meant to draw a distinction between a charitable purpose and society and a religious purpose and society. The Societies Registration Act was passed in 1860 when, according to English law, a gift for the advancement of religion or promotion of public worship or providing or maintaining a place of public worship would be a charitable purpose and a society formed for such a purpose would be a charitable society. According to that law, therefore, a religious society would be a charitable society, the only condition required was that it should be for the benefit of the public. Most of the enactments relating to that period were framed by English lawyers well conversant with English law. The Indian enactment which related to the charitable and religious endowments before 1860 were the Bengal, Bombay and Madras Regulations, the Madras Regulation being Regulation VII of 1817. In the heading of the Madras Regulation, the language used is:

"for the support of the mosques, Hindu temples and colleges or other *public purposes*."

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and in the preamble

"for the support of mosques, Hindu temples, colleges and choultries, and for other *pious* and beneficial purposes".

It will be seen from the context that the words "public" and "pious" were meant to connote both religious and charitable institutions. In 1817, according to the law of England, public purposes connoted charitable purposes including religious purposes and the word "pious" was not confined purely to religious purposes because religious purposes were one class of charitable purposes; see *Commissioners for special purposes of Income-Tax* v. *Pemsel*(1). No doubt, in statutes enacted subsequent to the Societies Registration Act the Legislature used both the words "charitable" and "religious", but the definition of those words was expressly stated to be for the purpose of those Acts. The subsequent legislation could hardly therefore be a guide for the interpretation of the term "charitable" in the Societies Registration Act. The question is, what did the term mean in 1860? We however think it unnecessary to go into the question whether an exclusively religious purpose is a charitable purpose and whether a society formed for such a purpose would be a charitable society within the meaning of the Act because, in our opinion, where a society is formed for certain purposes whose paramount object is charitable, the fact that some of the purposes may not be strictly charitable but religious would not render the society any the less a charitable society, if the purpose was one intended to benefit the public or a considerable portion of the public. In the present case the objects of the society are outlined in paragraphs 2 and 3 of Exhibit A-2, thus:

"Towards the expenses for conducting all the affairs of the said Masjiday, the Jamaitdars capable of giving

(1) [1891] A.C. 531, 538, 559.

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subscriptions for ever, must pay subscriptions for the maintenance of Masjiday.

From the amount of the subscriptions received from the Jamaitdars the expenses mentioned in columns 1 and 2 should be met with, and the remaining balance amount should be utilized for the propaganda of Islamic education, for rendering possible pecuniary help to the poor, musaffars and worthy alims and ulemas, for removing their difficulties, for other necessary and proper charities, settled then and there by Hanafi and Shafi and for conducting all affairs and for purchasing immovable properties for the perpetual maintenance of the said Masjiday."

It cannot be denied that the improvement of Islamic education and rendering pecuniary help to the poor musaffars, etc., are charitable purposes. The fact, that one of the objects of the society was also to conduct the affairs of the mosque which does not involve the performance of any religious service by the members of the society cannot render the society a society formed for religious purposes. The society concerns itself only with the management of the secular affairs of the institution. So far as religious services are concerned, which only consist in the recitation of prayers in the mosque, they are done through the Pesh Imam who is paid a salary. What the society does is what exactly a muthavalli could have done and a muthavalli is only concerned with the management of the secular affairs of the mosque. The society does not concern itself with the performance of prayers. There can therefore be no doubt that the paramount object of the society is charitable and therefore the fact that one of the purposes is the management of the affairs of the mosque cannot take away from it the character of the society as a charitable society. We are therefore of the opinion that the plaintiff society is a charitable society within the meaning of the Act and the registration thereunder is perfectly legal and valid.

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In regard to the second point that the plaintiff society has not acquired the right of management we are equally of the opinion that it is also untenable. A muthavalli according to Muhammadan law is only a manager or a superintendent of a religious institution. As already pointed out, he administers the temporal affairs of the institution. His liability is that of a trustee. A muthavalliship can be held by a single individual or two or more individuals, *Mahomed Ghouse Siddikh* v. *Sheik Moideen Siddikh*(1), or by a body of persons constituting a committee; *vide* Tyabji's Muhammadan law, Second Edition, section 499 at page 607. In *Advocate-General of Bombay* v. *Moulvi Abdul Kadir Jitaker*(2) a committee of ten persons was entrusted with the management of a mosque with rules framed to fill up vacancies on the death or removal of any one of them. Therefore there is nothing to prevent an incorporated body performing the functions of a muthavalli. A corporation can be a trustee of a charity; *vide* Tudor on Charities, page 284. It is conceded by Mr. Rajah Ayyar that the right of muthavalli can be lost by adverse possession. There can be no doubt in this case that the defendant has lost his right. It is also not disputed by Mr. Rajah Ayyar that the right to manage a religious institution is a right which is recognizable and enforceable in a Court of law. Such a right can be acquired by prescription. The plaintiff society, having been for a period of fourteen years in undisputed management of the mosque in derogation of the right of the defendant, must be deemed to have acquired the said right. Having surrendered his right in favour of the plaintiff and lost it, the defendant

(1) (1913) 18 M.L.T. 48, 53. (2) (1894) I.L.R. 18 Bom. 401.

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is not entitled to interfere with the plaintiff's management; vide *Jamiat Dawat* v. *Mohammad Sharif*(1).

Another contention that was advanced was that the society must be deemed to have become defunct because most of the original members died and there is no rule providing for filling up vacancies in case of death. It was contended that the only rule for filling up vacancies was rule 6 which does not provide for the contingency of death. We are not inclined to agree with this contention. Rule 6 runs thus:

"At the desire of two-thirds of the members of the committees, and on a motion made by one Jamaitdar and seconded by the others, the committee shall have power to remove one person from one of such sides and appoint another person in his place."

What is contended is that this only confers power of removal and appointment in the vacancies resulting from that removal. It seems to us that the principle underlying this rule is that a power is vested in the committee to co-opt members who are liable to be removed, no matter for what cause; it may be death. In fact from time to time vacancies were filled up and the Registrar of Joint Stock Companies was informed of the change in the membership. The defendant himself was a party to several resolutions filling up vacancies in case of death. We must presume that it was done in pursuance of the power conferred on the committee by rule 6. We must therefore overrule this contention also.

Lastly, it was urged that the understanding come to when the society was formed was that equal numbers of Shafis and Hanafis should be members of the committee but now the Shafi element preponderates and

(1) A.I.R. 1938 Lah. 869, 877.

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dissentions have arisen which, if allowed to continue, would be the ruin of the society and it was contended that there is no provision in the rules as to what should be done in case of dissentions and how the matter should be regulated. All these are matters with which we have no concern. They may be properly agitated before the learned Judge who would be trying the suit which has been filed under section 92 for framing a scheme for the proper management of the mosque. It is open to the learned Judge to take note of all the facts and circumstances and consider whether it would be in the interests of the mosque that this society should be allowed to continue in management or whether any scheme should be framed vesting the management in a committee of individuals instead of in an incorporated society; *vide* Tudor on Charities, Fifth Edition, page 581.

In the result the appeal fails and is dismissed with costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Mockett.

1939, December 8.

BODA SUBBA RAO (PLAINTIFF), PETITIONER,

v.

KANDREGULA NARASIAH (DEFENDANT), RESPONDENT.*

Madras Village Courts Act (I of 1889), ss. 13 and 20—Suit cognizable by Village Court—Village Court open but the District Munsif's Court having jurisdiction closed for the long vacation—Suit filed on reopening day in District Munsif's Court—Suit out of time if filed in village Court but in time if it could be properly instituted in District Munsif's Court—Scope of sec. 20 (A) and sub-sec. (2)—Suit if barred—Indian Limitation Act (IX of 1908) sec. 4—Code of Civil Procedure (Act V of 1908), sec. 15—Effect of.

On 22nd June 1936 the plaintiff filed a suit in a District Munsif's Court for the recovery of the balance due on a promissory note for Rs. 20 which was a suit cognizable by the Village Court under section 13 of the Madras Village Courts Act. The promissory note had been renewed from time to time and the last renewal was dated 12th June 1933. The District Munsif's Court was closed for the long vacation from 9th May 1936 to 19th June 1936. 20th June 1936 was a penultimate Saturday and 21st was a Sunday. On behalf of the defendant it was contended that the Court of the Village Munsif was open during the vacation of the Court of the District Munsif and as such the promissory note became barred on 12th June 1936.

Held: The suit was not barred.

There was no compulsion on the plaintiff to go to a Village Munsif's Court. His right to go to a normal Court subject to normal procedure, i.e., the District Munsif's Court, was not taken away because a Court of a special nature, i.e., a Village Munsif's Court, happened to be open to him.

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

* Civil Revision Petition No. 214 of 1937.

District Munsif of Ramachandrapur in Small Cause Suit No. 162 of 1936.

N. Bapiraju for petitioner.

T. Bhujanga Rao for *M. S. Ramachandra Rao* for respondent.

JUDGMENT.

MOCKETT J.

MOCKETT J.—A short point is raised in this petition on which there is no authority whatever. The plaintiff-petitioner sued the defendant on the balance of a promissory note for Rs. 20. The promissory note is dated 5th July 1927, renewed by payment on 13th June 1930 and again on 12th June 1933 so that it would become barred on 12th June 1936. The District Munsif's Court of Ramachandrapur was closed for the long vacation from 9th May 1936 to 19th June 1936. The 20th was the penultimate Saturday and the 21st was a Sunday and so the petitioner filed his suit on 22nd June 1936. It is not contended that under ordinary circumstances the suit would not be within time; but the point was taken before the learned District Munsif that this was a suit which is cognizable by a Village Court under section 13 of the Madras Village Courts Act. That is so. It is therefore argued that this suit could have been filed in the Court of the Village Munsif which was open during the vacation of the Court of the District Munsif and that it became barred on 12th June 1936 and any period subsequent thereto is not available to the plaintiff. The District Munsif took the view that the plea of limitation on which the defendant relied before him was well-founded. He rested that finding on the fact that

"normally the suit ought to have been filed in the Village Court and simply because the suit is barred by time the

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plaintiff cannot take advantage of the concurrent jurisdiction of this Court to try suits which are primarily triable by Village Courts."

Before me reliance has been placed by both sides on section 20 (A) of the Madras Village Courts Act which states that if a suit which is triable by a Village Court is instituted in the Court of a District Munsif, he may, unless sufficient reasons exist to the contrary, transfer it to the Village Court. I may also refer to sub-section (2). It is argued that the spirit of the Act is that suits of this value should in the first place be tried under the Village Courts Act. There are of course two great differences between the two tribunals. The District Munsif's Court is regulated by the provisions of the Civil Procedure Code. The Court of the Village Munsif is not. The latter view seems to me to be the effect of the decision in *Augustus Brothers* v. *Fernandez*(1). If that is so, I think it is right not to apply section 15, Civil Procedure Code, to a suit of this sort. Section 15, Civil Procedure Code, says:

"Every suit shall be instituted in the Court of the lowest grade competent to try it."

And I think that must refer to Courts subject to the Code. The procedure of the Village Courts is very special and decidedly of a comprehensive character. I notice however that, although the provisions of the Indian Limitation Act will apply to suits under the Village Courts Act (section 20), there is no provision applying the Civil Procedure Code to such suits.

The point which I have to decide appears to have behind it no authority—that I have already indicated—and I must therefore decide the question as a matter of first impression after hearing the interesting arguments of the learned Counsel on either side. In the absence of

(1) (1915) 29 M.L.J. 474.

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authority I do not consider that the period allowed by section 4 of the Limitation Act was intended to be cut down. I do not think that I ought to imply that a litigant should be deprived of his right to go to a normal Court subject to normal procedure because a Court of a very special nature, the Village Court, happened to be open to him. To take away the right given by the Limitation Act requires, I think, some more substantial basis than implication. *Prima facie*, the plaintiff is entitled to sue in the District Munsif's Court. There is no compulsion to go to the Village Munsif's Court. *Prima facie*, owing to the long vacation of the District Munsif's Court and the dates of the promissory note the plaintiff was entitled under section 4 of the Limitation Act to wait until the 22nd June before filing the suit. In the absence of authority I see no reason why that right should be curtailed.

The result is, in my view, this petition should be allowed with costs in this Court; but in the lower Court each side will bear its own costs. The matter will go back for decision by the District Munsif. It will be open to the defendant to raise any points other than the point that the plaintiff had agreed to give up his claim which has already been decided. The defendant indicates that he will rely upon the terms of the Madras Agriculturists Relief Act.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth and Mr. Justice Patanjali Sastri.

1940, January 30.

RAMASWAMI REDDI (PETITIONER-FIRST DEFENDANT), PETITIONER,

v.

ALAGAYAMMAL (RESPONDENT-PLAINTIFF), RESPONDENT.*

Madras Agriculturists Relief Act (IV of 1938), sec. 4 (h)—"Other property", meaning of—Debts due to a woman—When liable to be scaled down under the Act.

The words "other property" in section 4 (*h*) of the Madras Agriculturists Relief Act, 1938, do not mean property other than the debt or debts sought to be scaled down but refer to property other than any debt or debts due to the creditor woman from agriculturists within the meaning of the definition in section 3 (iii) of the Act. The exemption under section 4 (*h*) covers a particular category of debts, limited in their nature and extent, while insisting as a condition of its application that the creditor woman should not have owned, on the date specified, any other property, that is to say, property not falling under that category, apart from property excluded from the explanation. In other words, debts due from agriculturists to a woman on the 1st October 1937 are not to be scaled down under the Act if on that date the principal amount of such debts did not exceed Rs. 3,000 and the woman did not own any property other than such debts apart from her personal belongings.

Decision of KRISHNASWAMI AYYANGAR J. in *Govinda Pillai* v. *Kuppammal*, Civil Revision Petition No. 1072 of 1938 (unreported) not approved.

PETITION under section 115 of Act V of 1908 and section 224, Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Sankaridrug at Salem, dated 28th January

* Civil Revision Petition No. 1112 of 1939.

1939 and made in Interlocutory Application No. 990 of 1938 in Original Suit No. 1115 of 1935.

D. Ramaswami Ayyangar for petitioner.

T. M. Krishnaswami Ayyar and *A. Balasubramania Ayyar* for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by PATANJALI SASTRI J.—The question for determination in this revision petition relates to the construction of section 4 (*h*) of the Madras Agriculturists Relief Act, 1938. The petitioner claiming to be an "agriculturist" applied under the provisions of the Act for the scaling down of the debt due by him under a decree obtained by the respondent. It was not denied that the petitioner was an agriculturist within the meaning of the Act, but the respondent being a woman claimed the benefit of the exemption under section 4 (*h*) of the Act and the question is whether, on a proper construction of that provision, her claim is sustainable.

It is not in dispute that, besides the decree-debt now sought to be scaled down, the respondent is entitled to a half share in a mortgage debt due from another person but has no other property, and that the principal amount of these debts both of which were due on 1st October 1937 did not exceed Rs. 3,000. On these facts it is argued for the petitioner that the respondent is not entitled to the exemption claimed, as she owned on the material date "other property," i.e., her half share in the mortgage debt referred to above, besides the debt sought to be scaled down; while the respondent contends that the words "other property" must be taken to refer to property other than not the debt or debts sought to be scaled down but any debt or debts due to the woman from agriculturists; *see* the definition in section 3 (iii). The provision

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is not happily worded and is not free from ambiguity but on the whole we are of opinion that the contention of the respondent is correct. There is nothing to indicate that the words "any debt or debts" in clause (*h*) refer to the debt or debts in respect of which the application for scaling down has been made. On the other hand the opening words of the section,

> "Nothing in this Act shall affect debts and liabilities of an agriculturist falling under the following heads"

show that the exemption relates to certain classes of debts and has no particular reference to the debt sought to be scaled down. The exemption under section 4 (*h*), as we understand the provision, covers a particular category of debts, limited in regard to the nature and extent, while insisting as a condition of its application that the creditor woman should not have owned on the date specified any other property, that is to say, property not falling under that category apart from property excluded by the explanation. In other words, debts due from agriculturists to a woman on 1st October 1937 are not to be scaled down under the Act if on that date the principal amount of such debts did not exceed Rs. 3,000 and the woman did not own any property other than such debts apart from her personal belongings.

Learned Counsel for the petitioner objects that on the above construction, the inquiry on an application under the Act would have to relate not only to the character of the applicant as an agriculturist but also to the similar character of the various debtors from whom debts might be due to the creditor woman and such a roving inquiry extending beyond the subject-matter of the proceeding could not have been contemplated by the Legislature. The objection is not without force, but, on the other hand, it is to be observed that if the provision were to be construed

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in the manner suggested for the petitioner the exemption under it would become practically illusory. For example, if a woman having no other property had two claims, each for a small sum, say Rs. 100, and an application was made to scale down one of the debts, the existence of the other debt would exclude her from the benefit of the exemption; while if she had only one claim for just under Rs. 3,000, the exemption would apply. A construction which leads to such startling and anomalous results cannot be accepted unless the language used by the Legislature is so clear and unambiguous as to compel its acceptance. It is no doubt true that even on the construction indicated by us above, there would be the anomaly that while a woman owning jewellery or other personal belongings worth a large sum could claim the benefit of the exemption for a debt of, say, Rs. 2,500 due to her, a woman having a claim for a smaller sum but owning one or two cents of land yielding, may be, next to nothing would be excluded from such benefit. This result is no doubt regrettable and was perhaps not intended, but it is unavoidable on the present wording of the provision. That, however, is no reason for adopting the petitioner's construction which would render the exemption more illusory and the anomalies involved in its application more glaring, especially when there is nothing in the language employed to support such construction. Learned Counsel for the petitioner relied on the decision of KRISHNASWAMI AYYANGAR J. in *Govinda Pillai* v. *Kuppammal** where the learned Judge appears to have construed section 4 (*h*) in the manner suggested for the petitioner. The question does not appear to have been fully considered and the learned

* Civil Revision Petition No. 1072 of 1938 (unreported).

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Judge gives no reasons in support of his conclusion and, with due respect, we are unable to agree with it.

As it has not been ascertained whether the mortgage debt due to the respondent and another is a debt due from an agriculturist, the case will have to go back for an inquiry on that matter. If it is found that the debt is also a debt due from an agriculturist, the respondent will be entitled to the benefit of the exemption; if not, such debt must be regarded as "other property" within the meaning of the provision and the respondent will be excluded from it. Costs throughout will abide and follow the result.

N.S.

APPELLATE CRIMINAL.

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

January 24.

PENUBALA MUNI KRISHNAYYA (RESPONDENT), PETITIONER,

v.

PENUBALA AKKULAMMA (PETITIONER), RESPONDENT.*

Code of Criminal Procedure (Act V of 1898), sec. 488—Petitioner directed to pay maintenance, under—Failure to comply with the order without sufficient cause—Sentence of imprisonment awarded—Filing an insolvency petition and obtaining an order for release under sec. 23 (1) of the Provincial Insolvency Act (V of 1920)—Petitioner, if could be released on the strength of the order.

The petitioner was directed by a Joint Magistrate to pay maintenance to his wife under section 488, Criminal Procedure Code. On his failing to comply with the order, the Magistrate found that he had done so without sufficient cause and sentenced him to suffer rigorous imprisonment for one month.

* Criminal Revision Case No. 966 of 1939 (Criminal Revision Petition No. 913 of 1939).

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The petitioner then filed an insolvency petition, obtained an order for his release under section 23 (1) of the Provincial Insolvency Act and, on the strength of that order, made an application to the Joint Magistrate for his release. The Magistrate dismissed the application. On a revision petition filed against that order,

held that the order of the Magistrate was correct.

It is the duty of the Magistrate to find out whether the person ordered to pay maintenance under section 488 has or has not failed without sufficient cause to comply with the order. Neither the protection order nor the adjudication order can be conclusive on this point. The question is one of fact which the Magistrate has to decide for himself.

A Magistrate who has passed a sentence of imprisonment under section 488 (3), Criminal Procedure Code, cannot cancel the sentence merely because an insolvency Court issues an order of protection. The sentence of imprisonment is a punishment inflicted for the breach of the order. A person who has been sentenced under section 488 (3), Criminal Procedure Code, is not a person under "imprisonment in execution of the decree of any Court for the payment of money" within the terms of section 23 (1) of the Provincial Insolvency Act.

Shyama Charan v. *Anguri Devi*(1), followed.

Mehr Khan v. *Mst. Bakht Bhari*(2), *Maung Tin* v. *Ma Hmin*(3) and *Mahomed Ali Mithabhai, In re*(4), referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-divisional Magistrate of Chandragiri Division, dated 29th October 1939, and made in Miscellaneous Case No. 104 of 1938.

N. Rangachari for petitioner.

Public Prosecutor (*V. L. Ethiraj*) for the Crown.

BURN J.

The ORDER of the Court was pronounced by BURN J.—This is an application to revise the order passed by the learned Sub-divisional Magistrate of Chandragiri on 29th October 1939 on an application

(1) I.L.R. [1938] All. 486.
(2) (1928) I.L.R. 10 Lah. 406.
(3) (1933) I.L.R. 11 Ran. 226 (F.B.).
(4) A.I.R. 1930 Bom. 144.

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made to him on 28th October 1939 on behalf of the petitioner. The petitioner is the husband of a woman named Akkulamma in whose favour the learned Joint Magistrate passed an order in Miscellaneous Case No. 104 of 1938 on 7th February 1939 directing this petitioner to pay his wife Rs. 3–8–0 per mensem as maintenance under section 488 of the Criminal Procedure Code. The petitioner did not pay in accordance with that order. Before she could enforce the order, the petitioner filed a suit, Original Suit No. 128 of 1939, in the Court of the District Munsif of Tirupati and obtained an interim injunction restraining his wife from enforcing the order for maintenance. The injunction was in force until 21st July 1939. On that date, the interim injunction was vacated and the petitioner's wife on 24th July 1939 applied to the Joint Magistrate to direct this petitioner to pay Rs. 17–8–0 being the arrears for five months. The learned Joint Magistrate issued a distress warrant and as the money was not realized, he gave notice to the petitioner who appeared before him. The Magistrate found that he had without sufficient cause failed to pay the money due to his wife under the maintenance order. The Magistrate, therefore, sentenced him to suffer rigorous imprisonment for one month or until the amount of the arrears should sooner be paid. This order was passed on 23rd October 1939. On the 24th October the petitioner filed an insolvency petition in the Court of the District Munsif and obtained from him an order for his release under section 23 (1) of the Provincial Insolvency Act. The District Munsif communicated a copy of this order to the Joint Magistrate with a letter, dated 25th October and the petitioner made an application on the 28th October for his release. The learned Joint Magistrate dismissed

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his application for release and this revision petition has consequently been brought.

The contention on behalf of the petitioner is that the protection order passed by the insolvency Court is a decision of a competent civil Court within the meaning of section 489 (2) of the Criminal Procedure Code in consequence of which the Joint Magistrate is compelled to cancel the sentence of imprisonment passed upon this petitioner. There is no authority for this contention. Learned Counsel for the petitioner has referred us to the cases reported as *In the matter of Tokee Bibee* v. *Abdool Khan*(1) and *Halfhide* v. *Halfhide*(2). But we do not think that they have any application. In the earlier case there was no sentence of imprisonment passed at all. In the second case, the protection order had been issued before the sentence of imprisonment was passed and, after the sentence of imprisonment was passed, an adjudication order had been passed and the protection order continued until discharge. Their Lordships of the Calcutta High Court said:

> "In our opinion, the fact that he has been adjudicated an insolvent is conclusive, so long as the order of adjudication stands, that the petitioner is unable to pay his debts. There is also the order of protection. It follows, therefore, that the petitioner being unable to pay his debts, is not guilty of wilful neglect within the meaning of section 488 of the Code of Criminal Procedure."

It is noticeable that there was also no finding by the Magistrate of wilful neglect in that case. The terms of section 488 (3) have since been altered. There is no question now of "wilful neglect". The section reads:

> "If any person so ordered *fails without sufficient cause* to comply with the order, any such Magistrate may, for every

(1) (1879) I.L.R. 5 Cal. 536. (2) (1923) I.L.R. 50 Cal. 867.

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breach of the order, ... sentence such person . . . to imprisonment."

This wording shows that in every case it is the duty of the Magistrate to find out whether the person ordered to pay maintenance under section 488 has or has not failed without sufficient cause to comply with the order. Neither the protection order nor the adjudication order could be conclusive on this point. The question is one of fact which the Magistrate has to decide for himself. Prima facie, of course, it would appear to a Magistrate that an order of protection or an order of adjudication would be sufficient to show that failure to comply with an order to pay maintenance had not been without sufficient cause, but it cannot be said that the Magistrate's hands would be tied by the order of the insolvency Court. Learned Counsel for the petitioner has referred us to the decision of WADSWORTH J. reported as *Yahia, In re*(1). That has no bearing upon the point before us. The learned Judge has held that arrears of maintenance payable in respect of a magisterial order under section 488 of the Criminal Procedure Code constituted a "debt or liability provable in insolvency" within the meaning of section 46 (3) of the Presidency Towns Insolvency Act. The learned Judge has not anywhere suggested that a protection order issued by an insolvency Court would necessarily be conclusive for a Magistrate making an inquiry under section 488 (3) of the Criminal Procedure Code. The matter has been dealt with very clearly by ALLSOP J. of the Allahabad High Court in the case reported as *Shyama Charan* v. *Anguri Devi*(2). The learned Judge has said:

"It has also been urged that the mere fact that the applicant has been adjudicated an insolvent shows that he is

(1) I.L.R. [1937] Mad. 90. (2) I.L.R. [1938] All. 486.

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unable to pay for the maintenance of his wife and that constitutes sufficient cause for non-payment. Here again I am unable to agree. Learned Counsel has suggested that the whole of the insolvent's property vests in the receiver and there is nothing left out of which he can maintain his wife. This argument overlooks the fact that the property of the insolvent which vests in the receiver does not include any property which is exempted by the Code of Civil Procedure, from liability to attachment and sale in execution of a decree. Under the provisions of section 60 of the Code of Civil Procedure as now enacted the salary to the extent of the first hundred rupees and one-half of the remainder of such salary is exempt from such attachment. The applicant would therefore, if he is prepared to do work and earn a salary, be in a position to support his wife."

The learned Judge has also pointed out that

"an order passed by a Magistrate under section 488 (3) of the Code of Criminal Procedure for the imprisonment of a person who fails to pay a maintenance allowance is a sentence of imprisonment."

That is the word used in the Code itself. The learned Public Prosecutor has contended with much force that the Magistrate who has passed such a sentence has no power to cancel his own order. Learned Counsel for the petitioner has discussed the question whether a proceeding under section 488 is "a criminal case" or not. But we think that that is not a relevant discussion. It appears to us that the orders referred to in section 489 (2) which the Magistrate can cancel or vary are orders relating to the amount of maintenance payable. We do not think that it is possible for a Magistrate who has passed a sentence of imprisonment under section 488 (3) to cancel the sentence merely because the insolvency Court has issued an order of protection. The sentence of imprisonment is a punishment inflicted for breach of the order. It cannot be considered, in the terms of section 23 of the Provincial Insolvency Act, that a person who has

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BURN J.

been sentenced under section 488 (3) is under "imprisonment in execution of the decree of any Court for the payment of money." This view derives support from the decisions in *Mehr Khan* v. *Mst. Bakht Bhari*(1), *Maung Tin* v. *Ma Hmin*(2) and *Mahomed Ali Mithabhai, In re*(3). In the last case, it was held that a wife could make an application for maintenance under section 488 of the Criminal Procedure Code in spite of the fact that she had already obtained a decree in the civil Court for maintenance, payments under which were suspended by her husband who had filed an insolvency petition. Moreover even discharge of an insolvent does not free him from liability to obey an order under section 488, Criminal Procedure Code; *vide* section 44 (1) (*d*) of the Provincial Insolvency Act.

For these reasons, we think that the order of the learned Magistrate is correct and this revision petition is dismissed. The petitioner must surrender to his bail to serve out the remainder of the period of imprisonment to which he has been sentenced.

V.V.C.

(1) (1928) I.L.R. 10 Lah. 406. (2) (1933) I.L.R. 11 Ran. 226 (F.B.). (3) A.I.R. 1930 Bom. 144.

APPELLATE CIVIL—FULL BENCH.

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

1940, February 7.

MUTHUVENKATAPATHY REDDY (SECOND RESPONDENT), APPELLANT,

v.

KUPPU REDDI AND FIVE OTHERS (PETITIONERS AND RESPONDENTS 1 AND 3 TO 5), RESPONDENTS.*

Civil Procedure Code (V of 1908), *O.* XXI, *rr.* 89 *and* 92—*Assignment of mortgage in favour of decree-holder,* 31 *days after Court-sale—Court then closed—Balance with poundage and commission deposited in Court on reopening day—Deposit, if valid—General Clauses Act (X of* 1897), *sec.* 10.

In execution of a decree certain immovable properties belonging to the judgment-debtors were sold on 2nd December 1935. The executing Court closed for the Christmas vacation some days before 25th December and reopened on 3rd January 1936. On 2nd January 1936 the judgment-debtors assigned to the decree-holder in part satisfaction of the decree, a mortgage in their favour of the value of Rs. 2,207, leaving a balance of Rs. 10 due under the decree. On the reopening day the judgment-debtors paid into Court this sum of Rs. 10 together with a sum of Rs. 110–12–0, being five per cent of the purchase consideration and a sum of Rs. 137–2–0 required for poundage, and applied under Order XXI, rule 89, Civil Procedure Code, for setting aside the sale. An auction purchaser of one of the items contended that the application did not lie on two grounds : (i) that under Order XXI, rule 89, Civil Procedure Code, the payment by the judgment-debtors to the decree-holder must be in cash and that the assignment of the mortgage did not amount to payment to the decree-holder within the meaning of the rule, and (ii) that the assignment was not a valid payment under the rule as it was made more than thirty days after the sale and that the full amount due under the decree ought to have been deposited in Court on the reopening day.

* Appeal Against Appellate Order No. 109 of 1937 and Civil Revision Petition No. 1188 of 1937.

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Held: (i) the contentions were untenable. The application was competent and the deposit was valid.

Any payment or adjustment made by the judgment-debtor which satisfied the decree-holder is a payment within the meaning of the rule.

Seth Nanhelal v. *Umrao Singh*(1) explained and distinguished.

Case-law reviewed.

(ii) The deposit contemplated by Order XXI, rule 89, Civil Procedure Code, could not in this case be made within thirty days of the date of the sale because the Court was closed, but it was made on the reopening day and was in time.

Per KRISHNASWAMI AYYANGAR J.—The method of payment outside Court to the decree-holder is not governed by Order XXI, rule 92, Civil Procedure Code, and the period of thirty days fixed by it does not apply to such payment.

APPEAL against the order of the District Court of South Arcot, dated 20th April 1937, and made in Civil Miscellaneous Appeal No. 62 of 1936 (Civil Miscellaneous Petition No. 162 of 1936 in Original Suit No. 334 of 1933, District Munsif's Court, Villupuram).

The appeal first came on for hearing before WADSWORTH J. who made the following

ORDER OF REFERENCE:

This appeal raises a question of some importance on which there is a conflict of authority and in my opinion it is desirable that it should be placed before a Bench. The question is whether a judgment-debtor complies with the provisions of Order XXI, rule 89, Civil Procedure Code, when the amount which he deposits for payment to the decree-holder is the amount due after giving credit to an adjustment which is not in fact a cash payment to the decree-holder. There is also a further question arising from the fact that the adjustment in question was made after the period of thirty days from the date of the sale but before the date on which the application to set aside the sale was made with

(1) (1930) L.R. 58 I.A. 50.

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reference to the provisions of section 10 of the General Clauses Act.

The sale was held on 2nd December 1935 and item 2 was purchased by the present appellant who is a stranger. The amount of the decree as specified in the proclamation was Rs. 3,600 and odd. On 1st January 1936, when the thirty days' period expired, the Courts were closed and on the reopening day, 3rd January 1936, the judgment-debtor preferred an application under Order XXI, rule 89, depositing Rs. 247-14-0 to cover the poundage and the five per cent solatium to the purchaser and a sum of Rs. 10 as the balance payable to the decree-holder, after taking credit for an amount adjusted by an arrangement between himself and the decree-holder under which on 2nd January 1936 he mortgaged the property to the decree-holder. It is contended firstly that, assuming that the adjustment in question is a valid receipt for the purpose of rule 89 of Order XXI, it cannot be taken into consideration because it was made more than thirty days after the sale. With reference to this contention, it seems to me that the matter is concluded by the words of rule 89 which are "less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder". The receipt must be after the proclamation and before the application. The application ordinarily is to be made within thirty days but, when by the operation of section 10 of the General Clauses Act it can be made at some later date, it appears to me that any payment made after the proclamation and before the application would be a receipt to be taken into consideration under the terms of rule 89.

The more difficult question is whether an adjustment by a private arrangement between the judgment-debtor and the decree-holder whereby credit is given to a particular amount can be deemed to be a receipt of that amount for which credit can be taken in making the deposit under rule 89. On this question there is a decision of BEASLEY C.J. reported as *Subbayya* v. *Venkata Subba Reddi*(1) which is against the contention of the appellant. The learned Chief Justice held that a mortgage by the judgment-debtor to the decree-holder in satisfaction of the decree may be a sufficient receipt by the decree-holder for the purpose of rule 89 and that it is

(1) 1935 M.W.N. 937.

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not necessary for the judgment-debtor to show that the amount for which he takes credit in making his deposit has been received by the decree-holder in cash. This decision follows a series of Bench decisions of this Court all of which are anterior to the decision of the Privy Council in *Seth Nanhelal* v. *Umrao Singh*(1) to which I shall refer later. The decision of the learned Chief Justice has been followed by the Calcutta High Court in *National Insurance Co., Ltd.* v. *Ezekiel Aaron David*(2) and by implication a similar view may be deduced from a Bench decision in *Jyotish Chandra Ghose* v. *Bireswar Haldar*(3) though the question of the effect of an adjustment as compared with an actual payment was not expressly considered by the Bench. It is however argued that these decisions cannot be reconciled with the decision of the Privy Council in *Seth Nanhelal* v. *Umrao Singh*(1) which must be taken to have destroyed the basis of the decisions upon which the learned Chief Justice relied. Their Lordships of the Privy Council decided that on the rejection of an application under rule 90 the Court is bound under rule 92 to confirm the sale and that the remedy of the judgment-debtor under rule 89 is available only on the deposit being made within the time allowed. They observe that any adjustment between the decree-holder and the judgment-debtor is no ground for setting aside the sale after a third party purchaser has acquired an interest. In the course of their judgment their Lordships expressly disapprove of the decision reported as *Nilkanth* v. *Yeshwant*(4). This decision was to the effect that when, by an extra-judicial arrangement between the decree-holder and the judgment-debtor, the decree-holder reports that the decree has been satisfied there ceases to be a decree capable of execution and a sale held before this adjustment cannot be confirmed. Their Lordships of the Privy Council do not approve of this decision and hold that under the Code, notwithstanding a private arrangement between the decree-holder and the judgment-debtor for the satisfaction of the decree, the sale which has been held must be confirmed unless it is set aside by the procedure laid down in rule 89 and the following rules. It is argued that from this decision it follows that a report of satisfaction

(1) (1930) L.R. 58 I.A. 50. (2) I.L.R. [1937] 2 Cal. 606.
(3) (1935) 61 C.L.J. 313; 39 C.W.N. 829.
(4) A.I.R. 1922 Nag. 248.

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under Order XXI, rule 2, Civil Procedure Code, made after a sale has been held cannot affect the sale which can only be set aside under the provisions of rules 89 to 92 and that when the interest of a third party has been created by the sale no adjustment between the decree-holder and the judgment-debtor can operate to the detriment of the third party. There is a decision of MADHAVAN NAIR J. in *Sorimuthu Pillai* v. *Muthukrishna Pillai*(1) following the Privy Council, in which the learned Judge held that the Court is bound to confirm the sale if no application under rule 89 has been made, even if the decree has ceased to subsist by reason of a decision in appeal passed subsequent to the sale. My attention has also been drawn to an *obiter dictum* of the Privy Council in *Oudh Commercial Bank, Ltd.*, v. *Thakurain Bind Basni Kuer*(2) to the effect that the only provision for the recording of an adjustment under the Code is that contained in Order XXI, rule 2, from which it is argued that Order XXI, rule 89, does not contemplate adjustments. And there is an *obiter dictum* of SULAIMAN C.J. in *Janki Prasad* v. *Lekhraj*(3) to the effect that there must be an actual payment to the decree-holder to satisfy the requirements of rule 89 and that a mere compromise or an admission of receipt by the decree-holder would not suffice to make the deposit of the balance only by the judgment-debtor a sufficient deposit for the purpose of that rule.

The contention of the appellant on these authorities may briefly be summarized. It is this. The only way in which the Court can recognize an adjustment between the decree-holder and the judgment-debtor is by following the procedure laid down in Order XXI, rule 2. This rule has no application when a sale has been held and a stranger has become interested in the property by purchasing that property subject to confirmation. After the sale the confirmation does not depend on the continued subsistence of the decree. It follows automatically unless the procedure prescribed in rule 89 is strictly followed by the judgment-debtor and the sale is set aside. Just as the disappearance of the decree by an appellate decision is not a ground for setting aside a sale, so an adjustment of the decree cannot be a ground for setting aside the

(1) (1932) I.L.R. 56 Mad. 808. (2) (1939) L.R. 66 I.A. 84; I.L.R. 14 Luck. 192.
(3) (1933) I.L.R. 55 All. 697.

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sale. There must be a strict compliance with the requirements of rule 89, and rule 89 requires the judgment-debtor to deposit the full amount of the decree less any amount which may have been received by the decree-holder before the application is made.

It seems to me that this is a contention which has considerable substance and on which it seems desirable that there should be an authoritative decision. I have not yet heard the respondent and I do not think it desirable to express any definite opinion on the merits of the contention on which I have only heard one side. The matter is, however, to my mind one on which a decision of a Bench is desirable. The appeal will therefore be placed before a Bench.

The appeal came on for hearing again before the Full Bench constituted as above.

ON THE REFERENCE:

V. Thyagarajan (*Srinivasaraghavan* & *Thyagarajan*) for appellant.—The case raises two questions involving the interpretation of Order XXI, rules 89 and 92, of the Civil Procedure Code. In execution of a decree fourteen items of immovable properties belonging to the judgment-debtor were sold in Court auction on 2nd December 1935. On 1st January 1936, thirty-one days after the date of sale, when the Court was closed for Christmas vacation the judgment-debtor assigned to the decree-holder a mortgage of the value of Rs. 2 207 leaving a balance of Rs. 10 out of the amount due under the sale-proclamation. On 2nd January 1936, the reopening date, the judgment-debtor deposited in Court the balance of Rs. 10 together with the amounts payable for poundage and five per cent commission and applied under Order XXI, rule 89, Civil Procedure Code, for setting aside the sale. The appellant being an auction-purchaser of one of the items resisted the application on two grounds, viz., the assignment of mortgage did not amount to a valid deposit under Order XXI, rule 89, Civil Procedure Code, and the assignment was not valid for the further reason that it was made one day later than the thirty days prescribed by Order XXI, rule 92, Civil Procedure Code. Both the contentions have been rejected erroneously by the Courts below. The appellant has acquired a valuable right under the sale and that right can be defeated only by a strict compliance with the statutory provisions, viz.,

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Order XXI, rules 89 and 92, Civil Procedure Code. Moreover, as held by the Privy Council in *Seth Nanhelal* v. *Umrao Singh*(1), no adjustment or payment privately between the judgment-debtor and the decree-holder, subsequent to a Court-sale, can be recognized so as to affect the rights of third parties under the sale. Reading the decision of the Privy Council along with the decision in *Nilkanth* v. *Yeshwant*(2), which the Privy Council expressly disapprove of, it will be clear that a sale in execution of a decree cannot be set aside on the ground that there has been a satisfaction of the decree by payment or adjustment subsequent to the sale. Consequently, no payment or adjustment subsequent to the sale should be taken into account in determining the amount of deposit to be paid into Court for setting aside the sale under Order XXI, rule 89, Civil Procedure Code.

[LEACH C.J.—Under that rule it is only the balance, after giving credit for the amount that may have been received by the decree-holder since the date of the proclamation of sale, that is to be deposited in Court.]

It refers to payments made between the date of the sale-proclamation and the date of sale. Credit can be given only to such payments and not to payments subsequent to the sale.

[KING J.—No such limitation as to the time when the decree-holder can receive payment is contained in the rule. If money can be deposited in Court after the sale, why should not payment be made to the decree-holder outside Court ?]

After the sale third parties' rights intervene. There may be other attaching decree-holders who acquire interest in the sale-proceeds.

[KRISHNASWAMI AYYANGAR J.—The rights of attaching decree-holders may not be tenable after the recent decision of the Full Bench in *Nana Rao* v. *Arunachalam Chettiar*(3).]

In any event, under the terms of Order XXI, rule 89, Civil Procedure Code, payment must be in cash. No adjustment can be recognized. The words are "less any *amount* which may, since the date of such proclamation of sale, have been received by the decree-holder". The decisions in *Vedala Lakshminarasimha Charyulu* v. *Pacha Lakshmi-amma*(4) and *Lakshmi Ammal* v. *Sankaran Nair*(5), holding

(1) (1930) L.R. 58 I.A. 50.
(2) A.I.R. 1922 Nag. 248.
(3) I.L.R. [1940] Mad. 526 (F.B.).
(4) 1912 M.W.N. 756.
(5) (1913) 24 M.L.J. 205.

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that under Order XXI, rule 89, Civil Procedure Code, payments to the decree-holder need not be in cash are all prior to the decision of the Privy Council in *Seth Nanhelal* v. *Umrao Singh*(1) which decided that a private adjustment between the decree-holder and the judgment-debtor, subsequent to a Court-sale, cannot be recognized under Order XXI, rule 2 of the Civil Procedure Code.

[LEACH C.J.—The Privy Council were considering in that decision the maintainability of an application under Order XXI, rule 2, Civil Procedure Code, filed long after the expiry of thirty days from the date of Court-sale. They were not considering the terms of Order XXI, rules 89 to 92, Civil Procedure Code, which provide for applications for setting aside Court-sales. They were not called upon to decide the present question whether payment *in kind* instead of *in cash* was valid under Order XXI, rule 89, Civil Procedure Code.]

In *Janki Prasad* v. *Lekhraj*(2) SULAIMAN C.J. took the view that payment under Order XXI, rule 89, Civil Procedure Code, must be in cash. In *Sorimuthu Pillai* v. *Muthukrishna Pillai*(3) it was held that the provisions of Order XXI, rule 89, must be strictly complied with. It was however held by BEASLEY C.J. in *Subbayya* v. *Venkata Subba Reddi*(4) that payment need not be in cash under that rule. I submit the decision is wrong. But this decision was followed by the Calcutta High Court in *National Insurance Co., Ltd.* v. *Ezekiel Aaron David*(5). A similar view was held by the same Court in *Jyotish Chandra Ghose* v. *Bireswar Haldar*(6) and *Mahendra Chandra Das* v. *Parashmani Dasya*(7). In Bombay a strict construction of Order XXI, rule 89, Civil Procedure Code, is enforced; see *Manaji Kuverji* v. *Aramita*(8) and *Dattatraya* v. *Jagannath*(9). In *Trimbak* v. *Ramachandra*(10) it was held that a deposit in Court did not amount to a receipt by the decree-holder under section 310-A of the Code of Civil Procedure, 1882.

(1) (1930) L.R. 58 I.A. 50. (2) (1933) I.L.R. 55 All. 697.
(3) (1932) I.L.R. 56 Mad. 808. (4) 1935 M.W.N. 937.
(5) I.L.R. [1937] 2 Cal. 606.
(6) (1935) 61 C.L.J. 313; 39 C.W.N. 829.
(7) (1937) 68 C.L.J. 264.
(8) (1921) I.L.R. 46 Bom. 171. (9) (1928) 31 Bom. L.R. 433.
(10) (1899) I.L.R. 23 Bom. 723.

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On the second question it is submitted that the assignment of mortgage in favour of the decree-holder having been made on the thirty-first day after the date of Court-sale cannot be availed of for having the sale set aside. Under Order XXI, rule 92, Civil Procedure Code, the deposit in Court must be made within thirty days from the date of the sale. Deposit within the time prescribed under the rule is a condition precedent to setting aside a sale. The Court has no jurisdiction to enlarge the time prescribed. The period of thirty days cannot get extended by reason of the intervention of holidays. Neither section 4 of the Indian Limitation Act (IX of 1908) nor section 10 of the General Clauses Act (X of 1897) applies to the case. Section 4 of the Limitation Act applies only to cases of periods of limitation prescribed by that Act. As regards section 10 of the General Clauses Act, it only enables a person to do on the reopening day of a Court or office what should have been done earlier when the Court or office was closed. It relates to acts or proceedings done or taken in Court or office and does not govern private acts of parties such as assignment of mortgage.

[KRISHNASWAMI AYYANGAR J.—There is no provision of law fixing any period of limitation for payment to or adjustment with a decree-holder outside Court. Article 166 of the Limitation Act governs only applications to Court for setting aside sales. Order XXI, rule 92, Civil Procedure Code, prescribes thirty days for making a deposit in Court.]

T. R. Srinivasa Ayyangar for second respondent.

N. T. Ragunathan for third and fifth respondents.

Other respondents were not represented.

JUDGMENT.

LEACH C.J.

LEACH C.J.—In 1935 the third respondent in this appeal obtained a decree for Rs. 3,575 against the first and second respondents in the Court of the District Munsif of Villupuram. In execution of the decree the third respondent attached and brought to sale fourteen items of immovable properties belonging to the judgment-debtors. One item of property was purchased at the Court auction by the appellant for

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the sum of Rs. 264. The total amount realized for the fourteen properties was Rs. 2,217. The sale took place on 2nd December 1935. On 2nd January 1936 the judgment-debtors assigned to the decree-holder a mortgage which had been executed in their favour. The assignment was in part satisfaction of the amount due under the decree. It is admitted that the value of the mortgage assigned was Rs. 2,207, leaving a balance due under the decree of Rs. 10. The Court closed for the Christmas vacation some days before 25th December and did not reopen until 3rd January 1936. On that date the judgment-debtors paid into Court Rs. 10, the difference between the amount stated in the sale-proclamation and the value of the mortgage assigned to the decree-holder. They also paid into Court Rs. 110–12–0, being five per cent of the purchase consideration and Rs. 137–2–0 the amount required for poundage. These payments into Court were accompanied by an application for an order setting aside the sale under the provisions of Order XXI, rule 89, of the Code of Civil Procedure. It was contended by the appellant that this application did not lie. In the first place it was said that the full amount ought to have been deposited in Court within thirty days of the sale and the non-fulfilment of this condition vitiated the application. In the second place it was said that in order to comply with the provisions of Order XXI, rule 89, the payment by the judgment-debtors to the decree-holder must be in cash and therefore the assignment of the mortgage did not amount to a payment to the decree-holder within the meaning of the rule. The District Munsif decided against the appellant and on appeal his decision was upheld by the District Judge of South Arcot. The present appeal is from the decree of the District Judge.

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Order XXI, rule 89, of the Code of Civil Procedure permits a judgment-debtor to apply to the Court to have a sale of immovable property in execution set aside provided certain conditions are fulfilled. He must deposit in Court for payment to the purchaser a sum equal to five per cent of the purchase money and in addition must deposit for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder. Rule 92 requires these deposits to be made within thirty days from the date of sale. If the deposits are made within the required period the Court is bound to set aside the sale. Under the provisions of Article 166 of the Limitation Act the application for setting aside must be filed within thirty days of the sale. Section 10 of the General Clauses Act states that where, by any Central Act or Regulation made after the commencement of the Act, an act or proceeding is directed or allowed to be done or taken in a Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open. The deposit contemplated by Order XXI, rule 89, could not in the present case be made within thirty days of the date of the sale because the Court was closed, but it was made on the reopening day and was in time by virtue of this provision of the General Clauses Act.

The second question calls for more consideration but, apart from an *obiter dictum* in an Allahabad decision, all the reported cases dealing with this question are

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against the appellant. As I have indicated, he would have it that the judgment-debtor cannot make payment to the decree-holder within the meaning of clause (*b*) of rule 89 unless he tenders cash. In other words, the delivery by the judgment-debtor to the decree-holder of money's worth would not relieve him from the necessity of paying into Court the whole of the decretal amount to entitle him to an order setting aside the sale. This question has been considered by this Court on three occasions. It arose for the first time in *Vedala Lakshminarasimha Charyulu* v. *Pacha Lakshmiamma*(1) which was decided by a Bench composed of ABDUR RAHIM and SUNDARA AYYAR JJ. It was there held that an agreement with the decree-holder's widow to treat a portion of the decree-debt as discharged in consideration of services rendered by the judgment-debtor to her husband was a valid discharge and the actual receipt of cash was not necessary. In *Lakshmi Ammal* v. *Sankaran Nair*(2) BENSON and SUNDARA AYYAR JJ. held that a decree-holder was entitled to waive a portion of the amount due to him and that the waiver operated as payment under rule 89. The decision in *Vedala Lakshminarasimha Charyulu* v. *Pacha Lakshmiamma*(1) was approved of. The question was fully discussed by BEASLEY C.J. in *Subbayya* v. *Venkata Subba Reddi*(3), a case where the facts were similar to the facts in the present case. There, a judgment-debtor put in an application under Order XXI, rule 89, and deposited the required five per cent of the purchase money for payment to the auction-purchaser, but he made no deposit for payment to the decree-holder because the latter had agreed to

(1) 1912 M.W.N. 756. (2) (1913) 24 M.L.J. 205.
(3) 1935 M.W.N. 937.

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accept a mortgage from the judgment-debtor in satisfaction of the amount owing to him under the decree. As in the present case, the auction-purchaser objected and contended that the judgment-debtor was required to deposit the amount in cash. This objection was overruled. The learned Chief Justice considered that the granting of the mortgage was a payment to the decree-holder within the meaning of the rule and expressed the opinion that a decree-holder could if he chose waive the whole of the decretal amount, in which case the judgment-debtor would not be required to make any deposit in Court. The Calcutta High Court shares the opinion of this Court on this question; see *Jyotish Chandra Ghose* v. *Bireswar Haldar*(1) and *National Insurance Co., Ltd.*, v. *Ezekiel Aaron David*(2). In the judgment in the latter decision reference was made to the decision in *Subbayya* v. *Venkata Subba Reddi*(3).

SULAIMAN C.J. expressed an opinion to the contrary in *Janki Prasad* v. *Lekhraj*(4) but we have been given to understand that there are no reported cases which support it and the opinion was certainly *obiter* as cash had been paid in that case. After observing that the question whether the amount had been actually received by the decree-holder was one of fact, the learned Chief Justice said that a mere compromise or admission of the decree-holder would not be sufficient. It would be incumbent on the judgment-debtor to satisfy the Court that the amount not deposited in Court had been actually received by the decree-holder within the time fixed. This case was also considered by BEASLEY C.J. in *Subbayya* v. *Venkata Subba Reddi*(3)

(1) (1935) 61 C.L.J. 313; 39 C.W.N. 829.
(2) I.L.R. [1937] 2 Cal. 606.
(3) 1935 M.W.N. 937. (4) (1933) I.L.R. 55 All. 697.

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LEACH C.J.

and I agree that the opinion expressed in *Vedala Lakshminarasimha Charyulu* v. *Pacha Lakshmiamma*(1) and *Lakshmi Ammal* v. *Sankaran Nair*(2) is preferable.

The learned Advocate for the appellant has placed great reliance on the decision of the Privy Council in *Seth Nanhelal* v. *Umrao Singh*(3) but when the judgment is examined it is quite clear that it has no application in the present case. The facts in that case were these. The sale in execution took place on 15th September 1923. On 10th May 1924 the decree-holders accepted a mortgage in satisfaction of the decretal amount. On 28th June 1924, some nine months after the sale had taken place, an application was filed by the judgment-debtors to the Court for an order regarding the adjustment. The Judicial Committee held that after a sale in execution had taken place no adjustment under the provisions of Order XXI, rule 2, could take place because that rule clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment-debtor and the decree-holder and when no other interests have come into being. Their Lordships did not consider the question whether Order XXI, rule 89, requires a payment by the judgment-debtor to the decree-holder to be in cash. That question did not arise and the questions which did arise are not questions which arise in this case.

In my judgment any payment or adjustment made by the judgment-debtor which satisfies the decree-holder is a payment within the meaning of the rule. In this case the decree-holder was paid most of the amount due to him and the balance, Rs. 10, was deposited into Court by the judgment-debtors when they made the

(1) 1912 M.W.N. 756. (2) (1913) 24 M.L.J. 205.
(3) (1930) L.R. 58 I.A. 50.

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application for setting aside the sale. I hold that the application and the payment into Court were in time and it follows that in my opinion the decision of the District Judge is correct. I would dismiss the appeal with costs of respondents 1 and 2.

KING J.

KING J.—I agree.

KRISHNASWAMI AYYANGAR J.

KRISHNASWAMI AYYANGAR J.—I concur and have little to add except on one aspect of the argument as presented to us by the learned Advocate for the petitioner. His main contention was that payment in cash and in cash only was contemplated by Order XXI, rule 89, of the Code. Such a strict construction is not only not warranted by the words used in the rule but is opposed to the view consistently taken by this Court for a long number of years, as pointed out by my Lord. Nor is there any substance in the contention that the decision of the Privy Council in *Seth Nanhelal* v. *Umrao Singh*(1) has rendered that view no longer tenable.

It was urged that, whatever the form, the payment or what was its equivalent must have been made or done on or before the thirtieth day after the sale, and in no event later. The fact that the Court was closed on the last day of the period should, it was said, make no difference as it provides an excuse only when the thing to be done has to be done in Court as for instance when a petition or other proceeding has to be presented or where a deposit in cash has to be made in Court. But where an applicant chooses a form of payment, as the assignment of the mortgage in the present case, which can or may be done outside Court, he must, in order to qualify himself under the rule, complete the payment in the chosen form before

(1) (1930) L.R. 58 I.A. 50.

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the expiry of the thirty days as he should not be permitted to plead section 4 of the Limitation Act in respect of an act for the doing of which it made no difference whether the Court was closed or open. On this argument though the application under Order XXI, rule 89, would be in time if filed on the day the Court reopened, it must necessarily fail as the condition precedent, namely, the deposit had not been made in time. Two reasons were adduced in support of the argument. First, it was said that the period within which the deposit is to be made, namely thirty days, is a period fixed not by the Limitation Act which contains the ameliorative provision referred to above, but by rule 92 which cannot be affected by the Limitation Act in the absence of anything in the Code itself to the contrary. Secondly, it was urged that section 10 of the General Clauses Act which contains a provision parallel to section 4 of the Limitation Act is equally ineffective in a case of this kind. The first contention ignores the fact that rule 92 fixes a period of thirty days, not for the doing of something outside Court equivalent to a deposit into Court, but for the making of a deposit as such into Court. The former method of payment is not governed by the rule and the period of thirty days fixed by it does not therefore apply to it. The argument would result in the anomaly that there would be two different periods, one fixed by Article 166 for the application and the other by rule 92 for the deposit which may not in all cases synchronize. Such a result could never have been intended by the Legislature. The second argument based on section 10 of the General Clauses Act is open to the same objections. Further this section is by force of the proviso expressly made inapplicable to any act or proceeding to which the Limitation Act applies.

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It appears to me that the true view to take of Order XXI, rule 89, Civil Procedure Code, is that what is done by consent of parties as a substitute for the deposit is to be regarded as its equivalent in every respect and judged by the same principles as those applicable to a deposit. By that consent, what was not in fact a payment in cash is turned into a deposit within the meaning of the rule to be acted upon by the Court in all respects as if it were a payment in cash.

N.S.

INCOME-TAX REFERENCE.

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

THE COMMISSIONER OF INCOME-TAX, MADRAS, PETITIONER,

1940, February 23.

v.

V. NADIMUTHU PILLAI, PATTUKOTTAI, TANJORE DISTRICT (RESPONDENT-ASSESSEE).*

Indian Income-tax Act (XI of 1922), sec. 4 (2)—Remittance from foreign places—Test to find out whether it is out of borrowing there or out of profits—Rule of appropriation—Indian Contract Act (IX of 1872), ss. 59, 60 and 61.

An assessee in British India had considerable house property in Saigon in Indo-China. In the year of account, from 1st April 1935 to 31st March 1936, he had an account in a bank in Saigon and was entitled to overdraw it up to a certain limit. On 1st April 1935 his overdraft amounted to $20,149, a portion of which he had utilized for paying for repairs to his properties and for paying taxes thereon. From time to time he had been making payments into his account from the income from his properties in Saigon and thereby reducing his overdraft. On 7th December 1935 while the overdraft stood at $12,165 he withdrew from his bank account $5,719

* Original Petition No. 220 of 1937.

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(=Rs. 10,000) and remitted the same to British India and thereby increased the overdraft to $17,884. After making the remittance the assessee continued to draw on the account for various purposes and made payments into the account from the rents he received from Saigon properties. The payments into the account from 7th December 1935 to the end of the financial year (31st March 1936) amounted to $11,570 and the financial year closed with his overdraft standing at the figure of $9,441. The assessee's net income from the properties in Saigon for the whole financial year amounted to $18,414 out of which $10,184 represented his net income from 1st April 1935 to 7th December 1935, the date of the remittance. The result of the transactions was that out of the total net income of the properties deposited into the bank, namely, $18,414, the sum of $12,695 remained in the bank and had the effect of reducing the overdraft, and the balance, namely, $5,719, represented the remittance. It also appeared that in the financial year 1933–34 the assessee received a remittance of $8,000 from Saigon through his bankers and out of this amount debited in the account, a portion only, namely, $1,680 (=Rs. 2,300) had been taxed in 1934–35 as a remittance of profit, leaving a balance of $6,320 untaxed in that year.

The question for decision was whether the remittance of $5,719 was assessable to income-tax, and, if so, on what ground.

On behalf of the assessee it was conceded that if the overdraft had been completely discharged by payment in of further profits after the new year had commenced the remittance would be liable to income-tax as profits of that year.

Held: The remittance was liable to income-tax under section 4 (2), Indian Income-tax Act.

Per LEACH C.J. (KING J. concurring).—The assessee had made profits in Saigon far in excess of his remittance to British India. In substance it was not a remittance of borrowed money but one out of profits, since the money for the remittance is ultimately traceable to his income in Saigon.

V.V.R. Firm v. *The Commissioner of Income-tax, Madras*(1), *Commissioner of Income-tax, Madras*, v. *Meyyappa Chettiar*(2) and *Fellowes-Gordon* v. *Commissioners of Inland Revenue*(3) followed.

(1) (1931) 6 I.T.C. 54. (2) (1940) 8 I.T.R. 20; (1940) 1 M.L.J. 543.
(3) (1935) 19 T.C. 683.

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Per KRISHNASWAMI AYYANGAR J.—The income during the year of account was sufficient to discharge the whole of the balance of $6,320 mentioned above and certainly to the extent of the whole of the remittance sought to be assessed to tax. This circumstance converts the remittance which was in its inception a remittance from a capital source into one from an income source.

The rule of appropriation laid down in *Clayton's* case(1) and embodied in sections 59 to 61 of the Indian Contract Act applied.

Fellowes-Gordon v. *Commissioners of Inland Revenue*(2) referred to.

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

T. R. Venkatarama Sastri and *M. Subbaraya Ayyar* for assessee.—The assessee is not a money-lender. He owns properties in Saigon in Indo-China. He had an account with a bank in Saigon and had a right to overdraw it to the limit of $50,000. He used to pay the rental collections from his properties into the above-mentioned account. He used to draw moneys from this account for paying for repairs to his properties and meeting taxes levied thereon. The year of account was 1935–36 and the year of assessment was 1936–37. On 1st April 1935 his overdraft amounted to $20,149. This had been reduced to $12,165 by about 3rd December 1935 by payments into the account. On 7th December 1935 the assessee drew on this account $5,700 (equivalent to Rs. 10,000) and remitted the same to British India and thereby increased his overdraft to $17,865. The question is whether this remittance is assessable to income-tax on the ground that it is a receipt of foreign income. This is not a remittance out of income but a remittance of a borrowing from a bank. The assessee was not liable to income-tax simply because he made profit in foreign parts so long as he did not remit the same into British India. He can spend the profit as he liked in foreign parts. The assessee reduced the overdraft by paying out of profits.

[LEACH C.J.—According to you the Court can only look into the form of the transaction and not to its substance.]

(1) (1816) 1 Mer. 571; 15 R. R. 161. (2) (1935) 19 T.C. 683.

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The Court has power to look into the substance of the transaction. The payment of profits into the overdraft account should be appropriated to earlier debts in order of date according to the rule laid down in *Clayton's* case(1). If that mode of appropriation is adopted, the amount covered by the loan which was remitted to British India would not be wiped out by subsequent payments out of profits in the year of account. If and when the whole or a portion of the loan is wiped out, to that extent the remittance would become a remittance of profit. In *V.V.R. Firm* v. *The Commissioner of Income-tax, Madras*(2) the scheme was held to be a device to evade the payment of income-tax. In the present case the bona fides of the assessee is not questioned. In *Fellowes-Gordon* v. *Commissioners of Inland Revenue*(3) the accounts were not placed in full before the Court and so it was not clear whether the remittance by borrowing on the overdraft account in that case was discharged or not by subsequent payments. In the present case the accounts were produced which showed that the borrowing was not discharged by subsequent payments. The overdraft on the date of the remittance was about $12,000 and the subsequent payments out of profits at the most in the year of account was about $11,000 and odd.

K. V. Sesha Ayyangar for Commissioner of Income-tax.—The present case is covered by *Fellowes-Gordon* v. *Commissioners of Inland Revenue*(3) and the special features adverted to in the argument by Counsel for the assessee were present in that case. The principle of taxation of foreign profits is this: If there is a remittance from foreign places in the year of account and if there were profits there in the said period the remittance should be presumed to be out of profits.

Cur. adv. vult.

JUDGMENT.

LEACH C.J.

LEACH C.J.—The assessee derives income from immovable property, trade in cloth, money-lending and other sources existing within the jurisdiction of the Income-tax Officer, Tanjore Circle. He is also the owner of considerable house property in Saigon

(1) (1816) 1 Mer. 571; 15 R.R. 161. (2) (1931) 6 I.T.C. 54.
(3) (1935) 19 T.C. 683.

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in Indo-China. For some years he has kept an account with the Saigon branch of the Banque Franco-Chinoise and has the right to overdraw it to the limit of $50,000. On 1st April 1935 his overdraft amounted to $20,149. It is unnecessary to embark on an inquiry into the purposes for which the $20,149 was used, but it is common ground that it was used in part for paying for repairs to the assessee's properties in Saigon and meeting taxes levied thereon. The period of account was the year from 1st April 1935 to 31st March 1936 and the assessee's net income from his Saigon properties during that year was $18,414. As the result of payments into his account of the income from these properties he had reduced his overdraft to $12,165 by 30th November 1935. On 7th December 1935, while the overdraft still stood at that figure, he withdrew from the account a further sum of $5,719, the equivalent of Rs. 10,000. The $5,719 represented a remittance which he made to British India, and the question which the Court is called upon to decide is whether this remittance represents a remittance of profits derived from his Saigon properties. After making the remittance the assessee continued to draw on the account for various purposes and to make payments in from the rents he received in Saigon. The payments into the account from 7th December 1935 to the end of the financial year amounted to $11,570 and the year closed with his overdraft standing at the figure of $9,441. It is conceded by the assessee that the $11,570 has been rightly treated as being net income. The assessee says however, that the payments into his banking account both before and after 7th December 1935 should be treated as payments in reduction of the overdraft. He contends that, inasmuch as throughout the year he was stil

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overdrawn in spite of his payments into the account from the income from his properties, the income-tax authorities are bound to treat the remittance of the $5,719 on 7th December 1935 as being a remittance of borrowed money. In the course of his argument Mr. Venkatarama Sastriar admitted that, if the overdraft had been completely discharged by payments in of further profits after the new year commenced, the position would have been different but the overdraft had not been paid off. On the other hand, the income-tax authorities say that the true position cannot be gathered by treating the payments into the account and the withdrawals as being entirely separate transactions. They maintain that the net result of the assessee's payments in and his withdrawals from the account is that he has reduced his overdraft by $12,695 and has remitted the balance of his total profits ($18,414 less $12,695) to British India.

I am unable to accept as being correct the contention of the assessee that payments into the account from his profits must be treated as separate transactions and regarded *in toto* as payments in reduction of the overdraft. I consider that the income-tax authorities are right in saying that the account must be examined as a whole and that when this is done the remittance cannot be treated merely as a remittance of the proceeds of a loan. The principles which govern this case are in my opinion to be found in the decisions in *V.V.R. Firm* v. *The Commissioner of Income-tax, Madras*(1), *Commissioner of Income-tax, Madras* v. *Meyyappa Chettiar*(2) and *Fellowes-Gordon* v. *Commissioners of Inland Revenue*(3).

(19316) I.T.C. 54. (2) (1940) 8 I.T.R. 20; (1940) 1 M.L.J. 543. (3) (1935) 19 T.C. 683.

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In *V.V.R. Firm* v. *The Commissioner of Income-tax, Madras*(1) a Bench of three Judges of this Court considered the case of a Nattukottai Chetty firm which was carrying on a banking business in Rangoon and Saigon with headquarters at Karaikudi in the Madras Presidency. The assessee firm received in Rangoon, which was then in British India, a sum of Rs. 1,00,000 from its agent in Saigon. The agent had been instructed by the office at headquarters to borrow and remit that amount to the Rangoon branch. The remitted sum was made up of borrowings amounting to $59,000 and the realization of outstanding loans. The question was whether the $59,000 represented a remittance of foreign profits. It was found that the Saigon branch had accumulated profits which were more than sufficient to cover the remittance and that it had repaid the whole of the borrowed amount within twenty-eight days. It was held that the $59,000 represented in these circumstances a remittance from profits and not from capital. In *Commissioner of Income-tax, Madras* v. *Meyyppa Chettiar*(2) this Court applied the same principle.

The facts in the case of *Fellowes-Gordon* v. *Commissioners of Inland Revenue*(3) are very similar to the facts in the present case. The assessee there had plantations in Ceylon and during each of the years ending 5th April 1928 and 5th April 1931 was for more than six months resident within the United Kingdom. In the year ending 5th April 1928 he received from his agents in Ceylon for the credit of his account with the National Bank of India, Limited, in London, a total sum of £2,200, and in the year ending 5th April 1931 a total sum of £1,400. His income from his

(1) (1931) 6 I.T.C. 54. (2) (1940) 8 I.T.R. 20; (1940) 1 M.L.J. 543. (3) (1935) 19 T.C. 683.

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plantations in Ceylon during these two years was more than sufficient to meet the cost of the remittances. During the whole of the time when the remittances were taking place the assessee was indebted to his agents in Ceylon with whom he had an account. The account started with a debit balance of some Rs. 35,000 and ended with a debit balance of some Rs. 7,000. In the interval between the commencement and the end of the account there were very great variations, some upwards and some downwards, but at all material times the assessee had an overdraft with his agents. There were other transactions which affected the amount of the balance from time to time, but in so far as the balance was reduced, the reductions were due to no other cause than the payment into the account of income from the assessee's possessions in Ceylon. The case was decided by the Court of Session in Scotland and the Lord President (Lord NORMAND) stated that he was unable to understand on what principle the assessee was to escape income-tax "upon the income arising from his Ceylon possessions on the full amount of the actual sums being remittances received by him in this country and ultimately traceable to his income". The Lord President went on to observe:

"It is suggested that the mere existence of an overdraft precludes his liability to tax on the ground that any money paid out of an overdraft and remitted to this country is the money of the lender and not of the recipient. Learned Counsel for the appellant did not hesitate to say that that would apply although there was a very large income in Ceylon, and an overdraft was specially arranged for the purpose of bringing this alleged principle into play. I am quite unable to accept that proposition. A man may have an income in Ceylon and may receive remittances of that income in this country through an account in which he is debtor during the whole period in which the remittances are made. There is no difference

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between income arising from Ceylon and income arising from this country in that respect. A man may have an income and still be in debt, and the amount of his income may be remitted to him through the hands of his creditor. I can see nothing in the case of *Kneen* (*H.M. Inspector of Taxes*) v. *Martin*(1) which is in any way inconsistent with what I have just said. It is perfectly true that it may not be sufficient to say that you had an income in Ceylon and you have received remittances of less amount than that income in this country. But here the reasonable inference is that what was received in this country was not derived from some realization of capital or from some capital account, but was in truth derived from the income arising from possessions in Ceylon, and I think that the Commissioners, on the facts of the case, were entitled to arrive at the conclusion at which they did arrive, and that the appeal should be dismissed."

As in that case, the assessee in the present case had a debit balance with his bankers at the beginning of the period and a debit balance of lesser extent at the end of the period and it is not suggested, nor can it be, that the inference may here be drawn that the remittance was from the realization of capital. The assessee had made profits in Saigon far in excess of his remittance to British India. By merely increasing his overdraft to pay for the remittance does not mean that the remittance was in substance a remittance of borrowed money. Having made the remittance the assessee paid into the account out of his profits from his properties in Saigon far more than was necessary to meet the cost of the remittance. The Court must look at the substance of the transaction, and if it does that, I consider the proper conclusion to be drawn is that there was here a remittance of profits. If the assessee's contention was to be accepted it would mean that by manipulating an overdraft account kept abroad and keeping it permanently in debt an assessee

(1) (1934) 19 T.C. 33.

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would be able to escape taxation of his remittances of profits. The test is from where did the money for the remittance come and in the words of Lord NORMAND it must be ultimately traceable to his income in Saigon. I can see no difference in principle between the two cases.

I would answer the question referred by saying that on the facts of this case the remittance was properly assessed under section 4 (2) of the Indian Income-tax Act, 1922, as a receipt of foreign income in British India, and I would award the income-tax authorities the usual costs granted by this Court in such cases, namely, Rs. 250.

KING J.

KING J.—I agree.

KRISHNASWAMI AYYANGAR J.

KRISHNASWAMI AYYANGAR J.—The question that has been referred for our decision is :

"Whether on the facts of this case the sum of Rs. 10,000 was properly assessed under section 4 (2) as a receipt of foreign income in British India."

The amount mentioned represents a sum of money remitted to the assessee in British India from Saigon in French Cochin China on 7th December 1935, a date which fell within the year of account 1935–36. The income-tax authorities have included this remittance in the assessable income of the assessee, on the ground that it represented foreign profits received in British India within the meaning of section 4 (2) of the Indian Income-tax Act, 1922. The assessee objected that the remittance was not of income liable to be taxed under the section but came out of capital being the proceeds of a loan borrowed in Saigon : and he therefore claimed that it should be excluded in the calculation of his assessable income. This contention has been negatived by the department, but at the

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request of the assessee, the Commissioner of Income-tax has referred the question set out above for the opinion of this Court.

The Commissioner's conclusion that the remittance was made out of profits available to the assessee in Saigon is obviously in the nature of an inference drawn from facts proved, rather than a finding on a pure question of fact. There is no direct proof adduced to establish a connection between the profits available to the assessee in Saigon and the remittance in question, in the sense that it was wholly or in part identifiable with those profits. But such identification is not necessary, if in substance the remittance is shown to have come out of the profits, and is traceable to that source. The only question, which is of course a question of law, is whether the inference drawn can be said legitimately to follow from the facts found.

The facts found are these : The assessee, a resident of the Tanjore District in this Province, owns extensive immovable properties in Saigon, in French Cochin China, from which he derives income in the shape of rents. In connection with these properties, he has to incur expenses, for taxes, repairs, etc. It also appears from the statement furnished by the Commissioner in response to the requisition contained in our Order, dated 14th November 1938, that the assessee also lends and borrows moneys in Saigon. His monetary transactions are carried on through the agency of the Banque Franco-Chinoise at Saigon which has allowed him an overdraft, at first limited to $15,000 but subsequently increased to $50,000. Into his account with this bank his receipts by way of income from his immovable properties are paid from time to time. Whenever the need arose he drew on the bank, utilizing the money drawn mostly in Saigon but occasionally

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for remittance to this country for his use here. In the beginning of December 1935 the assessee's account with the bank shows that he had overdrawn his account by $12,165·23. The remittance in question was, as I have said, made by the bank on 7th December 1935 and appears as a debit in the account of $5,719·33 which is the equivalent of Rs. 10,000. By reason of the remittance the overdraft swelled to $17,884. Further credits and debits followed according as the assessee paid in or withdrew moneys, and the account shows that there was at the end of the account year, that is on 31st March 1936, a debit balance of $9,441·70 against the assessee.

It has been found as a fact that the net income of the assessee from his Saigon properties during the account year amounted up till the date of remittance to $10,184, the total income at the end of the year being $18,184, so that whichever date is taken there was an available income far in excess of the amount remitted. From this circumstance alone, however, it is not right to infer that what the assessee received was income and not capital. The decision in *Fellowes-Gordon* v. *Commissioners of Inland Revenue*(1) most relied on by the learned Counsel for the Income-Tax Commissioner concedes this position. The Lord President has said in that case :

> "It is perfectly true that it may not be sufficient to say that you had income in Ceylon, and you have received remittance of less amount than that income in this country."

Any other view would inevitably result in consequences which the Statute could never have intended. A person who has income accruing to him in a foreign country is at perfect liberty to keep it there, or to spend or utilize it in that or any other country in any

(1) (1935) 19 T.C. 683.

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way he thinks fit. His liability to tax arises not because he makes the profits, but because he brings or receives them here. It is not necessary that he should receive those profits in the exact form in which they were made, but he must receive them here substantially *as profits*. If the remittance is traceable and is traced to the assessee's foreign profits, there would be ground for holding that the Act is attracted, though even here it is necessary to exercise caution so as to avoid the error pointed out by the Privy Council in *Commissioner of Income-tax, Bombay* v. *Ahmedabad Advance Mills, Ltd.*(1) where machinery purchased in a foreign country with profits made in that country and imported into British India was held not to give rise to a case of profits received within the meaning of section 4 (2) of the Act. The illustrations given in the last paragraph of their Lordship's judgment are instructive, and indicate the danger of regarding traceability by itself as a conclusive circumstance. On the other hand it is equally clear that the mere existence of an overdraft cannot save foreign income from liability to taxation, as money paid out of the overdraft and remitted to this country is not necessarily the money of the lender, and may be that of the recipient. It is easy to imagine cases where, under cover of an overdraft, income might in truth be remitted and received as such. A man might so manipulate his dealings with a bank as to leave a permanent debit balance against himself, and yet be held liable to be taxed on his remittances, if it appears that he took advantage of a banking facility as a convenient shield to conceal a receipt of profits. The position is not altered by the absence of deliberate intent, if the true nature and effect of the payments

(1) I.L.R. [1940] Bom. 332 (P.C.).

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and withdrawals is such as to bring about the same result. There is no abstract rule of law to be applied generally to cases of this kind, and I do not understand the Court of Session to have laid down any such rule in the case cited. The question in each case is, what is the correct inference to be drawn and the Court is entitled to get behind appearance in order to discover the truth.

A man with profits available in a foreign country and wanting to bring them into this country may find it necessary as a measure of convenience to obtain a temporary overdraft, or resort to a temporary borrowing which he proceeds to make good immediately out of his profits. In such a case the remittance, though *in forma specifica* it is a remittance of capital, is in truth a remittance of profits and is taxable as such. The loan or the overdraft as the case may be and its repayment by the assessee out of profits may be so connected together by proximity of time or otherwise as to lead to the reasonable inference that the remittance was in substance a remittance of profits, though to start with it might appear or is made to appear as if it came out of a capital source. The decision of this Court in *V. V. R. Firm* v. *The Commissioner of Income-tax, Madras*(1) and *Commissioner of Income-tax, Madras* v. *Meyyappa Chettiar*(2) are illustrations in point. Granting that ordinarily a remittance of borrowed money is not to be deemed a remittance of profits, BEASLEY C.J. in the former case held that the facts there present, namely, the existence of available profits, the fact of the money being borrowed and remitted on the instructions of the assessee, and its repayment within twenty-eight days out of profits

(1) (1931) 6 I.T.C. 54. (2) (1940) 8 I.T.R. 20; (1940) 1 M.L.J. 543.

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collected, justified the finding that it was a remittance not of capital but of profits.

In this connection it may be mentioned that the learned Counsel for the assessee fairly conceded that a remittance out of borrowed money beginning in a capital source, would be turned into a remittance of profit, the moment profits were realized and applied to the discharge of the loan. Otherwise, it would become possible for an assessee to evade for ever the payment of tax on his foreign income again and again brought into this country by adopting the expedient every time of first borrowing and then utilizing his income for the repayment of the loan borrowed. The presumption underlying the decision in *Scottish Provident Institution* v. *Allan*(1) would come to the rescue of the department in such a case to prevent the Crown being cheated out of its revenue. If there are available profits more than sufficient to cover the remittance, the presumption to start with is that the remittance came out of the profits, though ultimately the question to a large extent is one of fact. If I followed Mr. Venkatarama Sastri aright, his only point was that the conversion of what was originally a capital remittance into a remittance of profits takes place not when the remittance is made but when the profits are applied to the discharge of the loan borrowed and remitted. In my judgment it is the proposition conceded, which I think was rightly conceded, that furnishes the true ground of decision in this case.

If we are to confine our attention to the transactions of the assessee with the Banque Franco-Chinoise during the year of account only, the answer to the reference should in my view be in favour of the assessee. It should be mentioned at the outset that there is no

(1) (1901) 4 T.C. 409, and on appeal 591.

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suggestion in this case that the transactions with the bank were other than what they purport on their face to be. There is no reason to think that the assessee had adopted a device or invented a scheme through the instrumentality of his banking account to find a way of escape from legitimate taxation. If an inference is to be drawn against him, it must be on a proper consideration of the transactions as disclosed in the account. That his ownership of the Saigon properties and his other affairs in that place rendered it genuinely necessary or expedient for him to spend or invest his money there is beyond question. As already mentioned he has had to incur expenses for repairs, taxes, etc., and has also lent and borrowed moneys in the foreign country. These are facts which have not been disputed, and indeed they plainly appear from the evidence before the income-tax authorities. For these transactions he had drawn from his banking account in which all the withdrawals appear as debits against him. The debits amounted on 7th December 1935, the date of the remittance, to the sum of $12,165. The whole of the assessee's income down to that date, as found by the Commissioner, being less than this sum, why is it to be presumed or inferred that the profits did not go in reduction of the overdraft, but were in part remitted to this country? I can see at least two reasons against such an inference being drawn, but none in its favour. It was perfectly open to the assessee to apply his income to the discharge of his debts to the bank on his overdrawn account, with the double advantage of saving himself from the payment of interest to the bank, and income-tax to the Crown. In the absence of evidence to the contrary, a man must be presumed to have done that which was to his advantage, rather than that which would result

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in a detriment. In the second place, and again in the absence of anything to the contrary, when there are debits and credits in an account, the credits should be appropriated towards the discharge of the earlier debits *seriatim* in the order of dates. This is the rule of appropriation laid down in *Clayton's* case(1) and embodied in sections 59 to 61 of the Indian Contract Act, and if this rule is applied to the assessee's account with the bank, there would still remain a debit balance even after appropriating the whole of the year's income towards the debits prior to the remittance. On this footing there would be a total absence of profits from which the remittance could be deemed to have come.

With very great respect, I am unable to agree that *Fellowes-Gordon's* case(2) furnishes a parallel governing the decision of the present case. It was proved and found in that case, as in this, that the assessee had derived profits in Ceylon in the years there in question to an amount in excess of the remittances. The account produced there, unlike in the present case, was of a fragmentary character, showing the debit balances on the various dates of the remittances against the assessee with no information regarding the dealings in the intervening periods. It does not appear from the statement of account there produced, whether or not the whole of the opening balance on 27th April 1927 and 5th July 1930 would be wiped out if the revenue receipts for those years had been appropriated in accordance with the rule in *Clayton's* case(1), whereas in the present case it is quite clear it is the other way about. This difference in facts strikes me as a material one capable of affording a legitimate ground of distinction. It is also to be observed that the chief arguments on behalf

(1) (1816) 1 Mer. 571; 15 R.R. 161. (2) (1935) 19 T.C. 633.

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of the assessee in that case were: (i) that the account showed a debit balance at the date of each of the remittances, and (ii) that it was not material to know from what sources the advances made by his agent were repaid. I may say at once that the first point affords insufficient basis for a correct inference. The second ignores what is in my view an essential source of material information. Against these arguments, the Crown contended, I think quite rightly, that the fact that his current account with his agent was overdrawn at the dates when the remittances were made was not *sufficient* evidence that the remittances were from a capital source. There are indications in the judgment of the Lord President that this insufficiency influenced the decision. He has drawn pointed attention to it by observing as follows :—

"The account starts with a debit balance of some Rs. 35,000 and it ends with a debit balance of some Rs. 7,000. In the interval between the commencement and the end of the account there were great variations, some upwards and some downwards. *We are not exactly informed what other transactions took place in Ceylon which affected the amount of the balance from time to time,* but this much is certain, that, in so far as it was reduced, the reductions were due to no other cause than the payment into the account of his agents, of income from the appellant's possession in Ceylon. It therefore appears that the income in Ceylon was in excess, on the whole, of the total amount of the remittances received in this country by the appellant. That being so, I am unable to understand on what principle he is to escape income-tax upon the income arising from his Ceylon possessions on the full amount of the actual sums, being remittances received by him in this country and *ultimately traceable to his income.*"

The italics are mine. There is no reference in this judgment to the principle of appropriation arising by reason of the rule in *Clayton's* case(1) or the presumed intentions of the party, as the necessary material

(1) (1816) 1 Mer. 571; 15 R.R. 161.

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for the application of the principle was not available. In its absence it would be perfectly legitimate to hold that the presumption arising from *Allan's* case(1) had not been rebutted, and I think that this was the real basis of the Lord President's conclusion. Otherwise, it will be difficult to reconcile the decision with what the Lord President himself stated lower down in his judgment where he pointed out that the existence of profits, and the fact of a remittance are by themselves insufficient.

If the matter stood there, I should be prepared to answer the question referred in favour of the assessee. But the matter does not rest there. From the additional information furnished by the Commissioner it appears that in the year 1933–34 the assessee received a remittance of $8,000 from Saigon through his bankers, and out of this amount debited in the account, a portion only, namely, $1,680 (Rs. 2,300) had been taxed in 1934–35 as a remittance of profit, leaving a balance of $6,320 untaxed in that year. According to the proposition of law conceded by Mr. Venkatarama Sastri and referred to already, if this balance has been wiped out by the revenue receipts of the year 1935–36, it is automatically turned into a remittance from an income source though in origin it was from a capital source. The income during the account year was admittedly sufficient to discharge the whole of that balance and certainly to the extent of the whole of the remittance sought to be assessed to tax. It is this fact which, in my judgment, turns the scale in favour of the Crown and I accordingly agree in the answer given by my Lord though, as I have explained, I rest my decision on a different ground.

G.R.

(1) (1901) 4 T.C. 409.

APPELLATE CIVIL.

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

1939, November 27.

YENAMANDRA JAGANNADHAM (PLAINTIFF), APPELLANT,

v.

THEERTHALA ADILAKSHMI AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu law—Bandhu succession—Madras Presidency—Brother's son's daughter, if heritable bandhu.

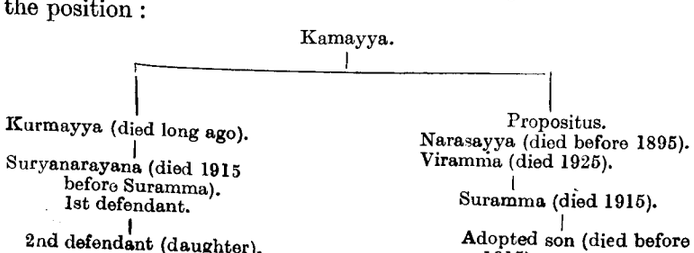
Under the Hindu law as administered in the Madras Presidency a brother's son's daughter is a heritable bandhu and inherits the estate of her paternal great-uncle in the absence of a nearer heir.

APPEAL against the decree of the Court of the Subordinate Judge of Vizagapatam in Appeal Suit No. 197 of 1934 preferred against the decree of the Court of the District Munsif of Rajam in Original Suit No. 157 of 1928.

The second appeal first came on for hearing before WADSWORTH J. who made the following

ORDER OF REFERENCE TO A BENCH:

It seems to me that this appeal, which involves a decision of the question whether a brother's son's daughter is an heir under the Mitakshara law as administered in Madras, should be posted before a Bench, there being no direct authority so far as I am aware. The following genealogical tree shows the position:



* Second Appeal No. 595 of 1936.

The plaintiff (appellant) sues for possession of property formerly enjoyed by Viramma as heir of her husband Narasayya. Plaintiff, a relative of Viramma, put forward a title based on the will of Suramma to whom Viramma had gifted the properties, and on a surrender by the presumptive reversioner, Suryanarayana, who died long before the reversion opened. Quite obviously this title will not prevail against the right of the nearest reversioner to Narasayya's estate. The trial Court found that plaintiff was in possession at any rate during the lifetime of Viramma, that defendants 1 and 2 were not reversioners of Narasayya and that plaintiff was entitled to a decree. The Subordinate Judge abstained from giving any finding on the two additional issues relating to the possession of the plaintiff and the heirship of the defendants 1 and 2 framed by the District Judge before remand but dismissed the suit on the strength of his conclusion that plaintiff had not proved title or adverse possession. He appears to have overlooked the fact that plaintiff is entitled to claim a decree on the strength of his possessory title if defendants 1 and 2 are mere trespassers. With reference to the heirship of second defendant he refers to a statement that there are nearer heirs, viz., the sister of Suryanarayana and her son which statement, so far as I can find, receives no support in the evidence unless it can be deemed that a question asked in cross-examination of P.W. 2 which elicited the reply "I do not know" can be deemed to be evidence. Since the heirship of second defendant was in issue and there is no evidence of nearer heirs, it must be taken that they do not exist, especially in view of the fact that plaintiff pleaded that there were no heirs at all and defendants 1 and 2 pleaded that they were the nearest heirs. If neither of defendants 1 and 2 is found to have title, a remand will be necessary to the lower appellate Court for a finding on the second additional issue.

It cannot, I think, be contended that the widow of a brother's son is an heir. She has no community of blood with the propositus and cannot be a bhinnagotra sapinda. The position of the brother's son's daughter, second defendant, is however different. She is certainly a bhinnagotra sapinda or bandhu within the five degrees. On the authorities, she would be excluded by any male bandhu entitled to succeed. But in the absence of a male heir, can it be said that the brother's son's daughter will not be entitled to inherit to her

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great-uncle? The authorities are summarized in Mayne' Hindu law, Tenth Edition, paragraphs 509 and 510. The learned author quotes *Lakshmanammal* v. *Tiruvengada*(1) and *Venkatasubramaniam Chetti* v. *Thayarammah*(2) and opines that the reasoning of these judgments is unassailable and applies to all descendants, ascendants and collaterals within five degrees. Hitherto the rights of the son's daughter, the daughter's daughter and the sister have been confirmed by legislation, while the rights of the father's sister, brother's daughter and sister's daughter have been recognized by Madras decisions. I do not think that the right of the brother's son's daughter to succeed has ever been expressly recognized or negatived by a Madras authority. But the following propositions seem to be established: (i) A brother's son's daughter is a bandhu within the five degrees, (ii) a female bandhu is not disentitled to inherit, in the absence of a male heir, merely by reason of her sex, and (iii) the heirship of female bandhus is not limited to those mentioned in express texts but is governed by the propinquity of their blood relationship. Granted the truth of these propositions, it seems to follow that in the absence of male heirs a brother's son's daughter would be entitled to inherit.

But the subject being uncovered by authority and the decision being one likely to affect the position of other female bandhus of like degree, it seems to me desirable that the appeal should be placed before a Bench.

The second appeal then came on for hearing before the Bench constituted as above.

G. Chandrasekhara Sastri for appellant.

B. Jagannadha Das for first and second respondents.

Third respondent was not represented.

KRISHNASWAMI AYYANGAR J.

The JUDGMENT of the Court was delivered by KRISHNASWAMI AYYANGAR J.—This is a second appeal which came before WADSWORTH J. in the first instance. The question raised in it related to the right of a brother's son's daughter to inherit under the Hindu

(1) (1882) I.L.R. 5 Mad. 241. (2) (1898) I.L.R. 21 Mad. 263.

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law. The precise question is not covered by authority in this Presidency and for that reason the learned Judge has referred the point for consideration by a Bench.

The appellant was the plaintiff in the trial Court. He instituted the suit for the recovery of possession of property which appertained to the estate of one Narasayya who died some time before 1895. He was succeeded by his widow Viramma who in 1895 entered into an arrangement with the next reversioner Suryanarayana who was her husband's brother's son. By that arrangement, Suryanarayana, in consideration of a sum of rupees one hundred, agreed to Viramma holding the estate as absolute owner—a transaction which is admittedly invalid under Hindu law. Viramma having thus secured, as she probably thought, a valid right to dispose of the estate, made a gift of the property to her daughter Suramma in 1908. The daughter died in 1915 having in her turn purported to bequeath the property in favour of the appellant in this second appeal. The appellant's case thus rests on the arrangement of 1895 which is totally void—a point which is not disputed.

The appellant's case is that he took peaceful possession of the property under the will and continued to enjoy the property undisturbed till 1925. That was the year in which Viramma died. After her death the first respondent, who is Suryanarayana's widow, and the second respondent, his daughter, dispossessed him of the property. The District Munsif decreed the suit. On appeal by the respondents, the District Judge allowed the appeal holding that the second respondent was entitled to retain possession of the property on the ground that she had succeeded to the estate as the next heir of Narasayya. It is admitted that if she is an heir under the Hindu law,

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the appellant must fail, as his rights based on mere possession cannot prevail against those of the true owner. The only question then is whether the second respondent is not the true owner, and whether she has not succeeded to the estate of Narasayya in the events which have happened.

The second respondent is the daughter of a brother's son of the propositus, and is only four degrees removed from Narasayya's father, the common ancestor. She is thus within the prescribed limit of proximity, being less than seven degrees in ascent and descent from the last male owner. Further the test of mutuality is also satisfied as she and Narasayya are sapindas of each other in the Mitakshara sense of the term. Her right to succeed to the estate cannot be questioned except on the ground that being a female she is not within the class of heritable bandhus. But it is now too late in the day to question the proposition that, under the Hindu law as administered in this Presidency, female bandhus are entitled to come in after the male bandhus are exhausted, provided of course they satisfy the other conditions required by law. A series of decisions of this Court commencing from *Kutti Ammal* v. *Radakristna Aiyan*(1) have established their right to rank as heirs under Hindu law. It is true that there has been no direct decision relating to the right of a brother's son's daughter to inherit. But this can make very little difference once it is established, as we hold it to be, that females are not to be disqualified by reason of their sex only. This proposition is firmly established for such a length of time that it is unnecessary to discuss it. The second appeal therefore fails and must be dismissed with costs.

N.S.

(1) (1875) 8 M.H.C.R. 88.

APPELLATE CIVIL.

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

MEENAKSHI AMMAL AND ANOTHER (APPELLANTS), APPELLANTS,

1939, November 8.

v.

MURUGAYYA MOOPPANAR (RESPONDENT), RESPONDENT.*

Hindu law—Inheritance—Illegitimate daughters—Right to succeed to the stridhanam of their mother's mother.

The illegitimate daughters of a Hindu woman are not entitled under Hindu law, apart from special custom, to succeed to the stridhanam of their mother's mother. The general principle of Hindu law is to limit heirship to legitimate issue except in the case of illegitimate sons amongst Sudras in whose favour a special exception has been made in the texts. There is no authority which extends the right of an illegitimate daughter to succeed beyond the right to succeed to her mother's stridhanam.

APPEAL under clause 15 of the Letters Patent against the judgment of VARADACHARIAR J., dated 4th November 1936, and passed in Second Appeal No. 1280 of 1932 preferred against the decree of the District Court of West Tanjore in Appeal Suit No. 261 of 1931—Original Suit No. 42 of 1931, District Munsif's Court, Tiruvadi.

R. Rajagopala Ayyangar for *K. S. Desikan* for appellants.

S. Muthiah Mudaliar for respondent.

JUDGMENT.

LEACH C.J.

LEACH C.J.—The question raised in this appeal is whether the illegitimate daughters of a Hindu woman

* Letters Patent Appeal No. 29 of 1937.

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are entitled to succeed to the stridhanam of their mother's mother, the family being governed by the ordinary Hindu law and not by rules based on custom as in the case of dancing girls. The appellants are the illegitimate daughters of one Dharmu Ammal, who died on 27th April 1921. Dharmu Ammal was the legitimate daughter of one Murugayi Ammal, who left stridhanam property. The appellants claim that under Hindu law they are the nearest heirs of Murugayi who was also survived by Venkatachalam Chetti, the grandson of her sister. It is common ground that if the appellants are not heirs of Murugayi the person entitled to the property is Venkatachala.

The suit out of which this appeal arises was filed by the appellants in the Court of the District Munsif of Tiruvadi with the object of setting aside an alienation of immovable property forming part of Murugayi's stridhanam. The alienation was in favour of the respondent's predecessors-in-title and was made by Venkatachala on 20th July 1910. The District Munsif accepted the appellants' contention that they were the heirs of Murugayi and decreed the suit, but his decision was reversed on appeal by the District Judge of West Tanjore. The appellants then appealed to this Court and their appeal was heard by VARADACHARIAR J. who confirmed the decree of the District Judge. VARADACHARIAR J. pointed out that the general principle of Hindu law was undoubtedly to limit heirship to legitimate issue, but in the case of illegitimate sons amongst Sudras a special exception had been made by the texts. The exception did not, however, extend beyond the illegitimate sons of Sudras. The fact that Courts had recognized as between a mother and her illegitimate daughter the right of inheritance was no warrant for the extension of sapindaship to other relations.

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It has been argued on behalf of the appellants that the following paragraphs from the Mitakshara, Chapter II, section 11, should be read as including both legitimate and illegitimate daughters :—

"(15) On failure of all the daughters, the daughters' daughters take, under this text: 'It will go to the daughters if she leave progeny, etc.'

(16) If there be a multitude of these (and if they be) children of different mothers, and unequal in number, shares should be allotted to them through their mothers, as directed by Gautama: 'Or, according to the mothers, let the special shares (be adjusted) in each class.'

(17) If there be daughters as well as daughters' daughters simultaneously, a trifle only should be given to the daughters' daughters. As has been directed by Manu: 'Such of the daughters of those (daughters) as may exist, even to those something should be given, as may be fit, from the property of the grandmother, on the score of affection'."

This argument is expressly negatived by the decision of this Court (OLDFIELD and SESHAGIRI AYYAR JJ.) in *Meenakshi* v. *Muniandi Panikkan*(1). OLDFIELD J. observed :

"It was then contended that reference to daughters in the Mitakshara should be read as including all daughters, both legitimate and illegitimate, and that all alike should be preferred to the legitimate son, as heirs to their mother. But, firstly, that is not the primary sense of those references and is unauthorized by the rules of interpretation recognized by both English and Hindu law; [vide *Bhimacharya* v. *Ramacharya*(2)]. And next it has not been shown how such a substitution can be carried out or logically limited. Should it, for instance, be extended to the law relating to the daughter's right to inherit from the father in spite of the absence of any special provisions in her favour such as is available in the case of illegitimate sons ?"

SESHAGIRI AYYAR J., after referring to the text conferring a right of heirship on the illegitimate son of a Sudra observed that illegitimate children have no

(1) (1914) I.L.R. 38 Mad. 1144. (2) (1909) I.L.R. 33 Bom. 452.

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place in Hindu law when there are legitimate heirs at least under the Mitakshara system, except in the special case of the illegitimate son of a Sudra.

Before the ordinary rules of succession can be departed from in favour of illegitimate offspring there must be express authority to be found in the ancient texts or some statutory provision. It is conceded that the texts do not go beyond making provision in respect of an illegitimate son of a Sudra and the appellants are not able to rely on any statutory provision. With one exception, the cases which have been quoted to the Court have all had reference to the rights of the daughter, not the grand-daughter, to succeed. It is not disputed by the learned Advocate for the respondent that so far as the daughter is concerned she is entitled under the Hindu law to succeed to her mother's property notwithstanding she is illegitimate. Of course, if there were also a legitimate daughter the illegitimate daughter would be postponed to the legitimate issue.

The case which provides the exception is *Angammal* v. *Venkata Reddy*(1) where the question was whether the degradation of a daughter on account of her adultery put an end to her right to inherit the stridhanam property of her mother. It was held that because the daughter had been living in adultery she did not lose her right to inherit her mother's stridhanam property. On this finding it was held that the daughter's two illegitimate daughters were entitled to their grandmother's stridhanam in preference to their mother's brothers. The question whether the illegitimate daughters were entitled to inherit their grandmother's property was never raised. It was merely assumed that the illegitimate daughters took their mother's place. Therefore the judgment

(1) (1902) I.L.R. 26 Mad. 509.

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in that case cannot be read as deciding the question now before us or accepted as any authority in favour of the appellants' contention.

The learned Advocate for the appellants has drawn the Court's attention to a statement in Sir Hari Singh Gour's Hindu Code, Fourth Edition, page 1149, where it is stated that unchastity and illegitimacy are no bars to succession to stridhanam. This broad statement is based on the decisions of the Bombay High Court in *Advyapa* v. *Rudrava*(1) and *Tara* v. *Krishna*(2). An examination of the judgments in these cases, however, fails to lend support to the statement that illegitimacy is no bar to succession to stridhanam, if by this is meant succession to the stridhanam of a person other than the mother. In the former of these two cases the question was whether under the Hindu law prevailing in the Bombay Presidency a daughter was barred by incontinence from succession to the estate of her father, and it was held that she was not. In the latter case a daughter who had lived by prostitution claimed her father's property as heir to the exclusion of her sisters who were married. The question was whether the rule that an unmarried daughter inherits to her father before his married daughter applied in such a case.

It is clear that there is no authority which extends the right of an illegitimate daughter to succeed beyond the right to succeed to her mother's stridhanam. I consider that the decision of VARADACHARIAR J. is correct and that the appellants are not entitled to have the alienation set aside. They are not heirs of Murugayi and the person who is entitled to her property is Venkatachala who was responsible for the alienation to the respondent's predecessor-in-title.

The appeal will be dismissed with costs.

(1) (1879) I.L.R. 4 Bom. 104. (2) (1907) I.L.R. 31 Bom. 495.

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KRISHNASWAMI AYYANGAR J.

KRISHNASWAMI AYYANGAR J.—I am of the same opinion. I can find no warrant for holding that as a general rule the system of succession under the Mitakshara law is based on any relationship other than relationship through valid marriage and legitimate descent. A qualified right in favour of the illegitimate son amongst Sudras, by choice of the father as it has been described, has been recognized but this is in the nature of an exception and must accordingly be kept within the limits of the exception itself. It is true that an illegitimate daughter has been held to be entitled to inherit the stridhanam property of her mother. This right will however be found on examination to be based not upon any ancient texts or rule of law but upon custom and analogy; see *Mayna Bai* v. *Uttaram*(1). Reference was made by learned Counsel for the appellants to a passage from Yagnavalkya cited in the case mentioned. That passage is:

"A damsel's child is one born of an unmarried woman; he is considered the son of his maternal grand-sire."

This text has reference to the *kanina* son, one of the twelve sons recognized in the ancient law, of whom all except one have long since become obsolete. The passage throws no light on the right of a daughter's daughter to inherit to her grandmother's estate. Even if the text should be held to have validity at the present day it would only mean that a *kanina* son would be entitled to inherit directly as a son to the maternal grandfather's estate. The text, however, has really no bearing on the question which falls to be decided in this case.

N.S.

(1) (1864) 2 M.H.C.R. 196, 201.

APPELLATE CIVIL.

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

1939, October 24.

THE MADURA KALLALAGAR DEVASTHANAM THROUGH ITS TRUSTEE, K. N. RADHAKRISHNA IYER (PLAINTIFF), APPELLANT,

v.

N. SUBBIAH AMBALAM (DEFENDANT), RESPONDENT.*

Water rate—Estates Land Act, Madras (I of 1908), sec. 30—Tank, solum of which vested in landholder—Ryot accustomed to taking water from said tank for raising single crop—Supply in tank augmented by supply through channels from Government source—Ryot taking water from tank for raising second crop which was possible on account of extra supply of water—Landholder making no contribution for extra supply, nor applying under sec. 30 of the Estates Land Act for enhancement—Ryot had paid water cess to Government—Liability of ryot to pay landholder water rate for second crop—Irrigation Cess Act, Madras (VII of 1865), sec. 1A (4)—Effect of—Right of Government to levy water cess from ryot—Effect of, on ryot's liability to pay water rate to landholder for such second crop.

A ryot who used to take sufficient water from a tank belonging to a landholder for the cultivation of a single crop in his holding took water without the landholder's permission for the raising of a second crop. The water in the landholder's tank was augmented by water which Government allowed to flow into it from channels leading from a Government source. The raising of the second crop was only possible in consequence of the increase in the water in the tank resulting from the supply which the tank received from the Government source and the ryot had paid water cess to the Government. The landholder had not made any contribution for the purpose of facilitating the extra supply of water nor had he made any application under section 30 of the Estates Land Act for the enhancement of rent. The landholder filed a suit in the Court

* Second Appeal No. 617 of 1938.

M.K. DEVASTHANAM v. SUBBIAH AMBALAM.

of the Deputy Collector for the recovery of water rate on the basis of the two crops.

Held: The ryot having taken the water for the second crop from the landholder's own tank must pay for it.

The fact that Government water flowed into the landholder's tank did not mean that when that water got there it remained Government water. The water in an estate tank, the solum of which is vested in the landholder, cannot be said to belong to the Government.

Even under the wide and sweeping language of the Madras Irrigation Cess Act, 1865, the right of the Government to levy water cess depends not on the ground that the water belongs to the Government but upon its coming from a source belonging to the Government. The fact that under the Madras Irrigation Cess Act the Government has power to levy water cess from the ryot makes no difference. In regard to payment of water cess section 1A (4) of the Act leaves the position between a landholder and the tenant *inter se* entirely unaffected.

APPEAL against the decree of the District Court of Madura in Appeal Suit No. 99 of 1937 preferred against the decree of the Court of the Deputy Collector of Melur Division at Madura in Summary Suit No. 385 of 1937.

The appeal first came on for hearing before PATANJALI SASTRI J. who made the following

ORDER OF REFERENCE:

This second appeal raises the question whether the applicant as a landholder is entitled to levy any extra charge for water taken by the respondent, a ryot, for the cultivation of a second crop on his holding which is a single crop wet land. It is common ground that it became possible to raise the second crop on the land only because of the supply of Periyar water for which the ryot has paid water cess to the Government and that this Periyar water is stored in the appellant's tank before it is supplied to the respondent for irrigation purposes. It appears to be well settled that ordinarily, if a ryot takes water from the village tank for cultivating a second crop for a holding which is registered as single crop wet land, the landholder is entitled to levy an extra charge; see *The*

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Midnapore Zamindary Co. Ltd. v. *Muthappudayan*(1), *Venkata Rao* v. *Vaithilinga Udayan*(2) and the observations of VARADACHARIAR J. in *Venkataraju* v. *Maharaja of Pithapuram*(3). But the difficulty in this case arises owing to the water supply in the village tank being supplemented by Periyar water for which the respondent has to pay water cess to the Government. It is argued for the respondent that the water used for the cultivation of the second crop was really Government water and not the landholder's water and that therefore the basis of the appellant's claim fails. But I find it difficult to discover any principle underlying the argument that merely because the water, which is normally collected and stored in the landholder's tank and is supplied to the ryot therefrom by means of sluices controlled and regulated by the landholder, is supplemented from a Government source and the ryot is called upon on that account to pay water cess to the Government, the water that is supplied to the ryot for his second crop should be deemed to be Government water so as to disentitle the landholder from claiming an extra charge for such water. On no conceivable theory can the water in an estate tank the solum of which is vested in the landholder be said to belong to the Government, and even under the wide and sweeping language of the Madras Irrigation Cess Act the right of the Government to levy water cess depends not upon the water belonging to the Government but upon its coming from a source belonging to the Government; see *Ayyanna* v. *Secretary of State for India*(4). It seems to me therefore that, on the principle of the series of decisions referred to above, the water flowing into the landholder's tank even from a Government source becomes landholder's water though the fact that such water comes into the tank and is paid for by the ryot may conceivably make a difference as to the quantum of the extra charge leviable by the landholder for the use of such water for a second crop.

The only decision which appears to have considered this question is *Sundaram Pillai* v. *Karuppayee Ammal*(5) but the learned Judges there have spoken with different voices and the consideration of the question was to a certain extent complicated by the contention there raised that such a claim for an extra

(1) (1920) 13 L.W. 387. (2) (1901) 12 M.L.J. 22.
(3) I.L.R. [1938] Mad. 381 (F.B.). (4) (1933) I.L.R. 56 Mad. 696, 699.
(5) (1935) I.L.R. 59 Mad. 5.

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charge would amount to an enhancement within the meaning of section 30 of the Madras Estates Land Act. VENKATASUBBA RAO J. seems to take the extreme view that, even in an ordinary case where no Government water is brought into the tank, the landholder's right to rent must be determined with reference to the sections of the Estates Land Act and that, unless he brings himself within the terms of section 30, he has no right to levy an extra charge for water taken for second crop cultivation on single crop wet lands. It seems to me that this view cannot now be sustained in view of the Full Bench decision in *Venkataraju* v. *Maharaja of Pithapuram*(1) which clearly recognises the existence of the landlord's right to levy extra charge for unauthorised appropriation of water in the landholder's tank quite apart from the provisions of the Estates Land Act; *see* the observations of VARADACHARIAR J. at page 398. RAMESAM J., the other learned judge who took part in *Sundaram Pillai* v. *Karuppayee Ammal*(2), would seem to agree with the earlier cases of this Court holding that in the ordinary case the landlord would be entitled to levy an extra charge for unauthorised user of the water for second crop cultivation and the claim to such a charge would not be an enhancement under section 30 (at page 15). But the learned Judge seems to be of the opinion that where, as in the present case, Government water has been brought into the tank and the ryot pays water cess to the Government, the landlord will have no right to levy an extra charge except by applying under section 30 of the Estates Land Act to the Collector and showing that he has fulfilled the conditions laid down in that section (at page 26). It is difficult however to see why the additional supply of water to the landholder's tank from a Government source and the consequent payment of water cess to the Government by the ryot should so radically affect not only the landlord's right to recover an extra charge for second crop but also the procedure for its recovery.

The question is by no means free from difficulty and, having regard to its general importance to numerous landholders and ryots in the region covered by the Government Periyar project, I think it desirable that there should be an authoritative ruling on the point. I refer this appeal therefore to a Bench and direct it to be placed before the Chief Justice for

(1) I.L.R. [1938] Mad. 381 (F.B.). (2) (1935) I.L.R. 59 Mad. 5.

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orders as to posting it before a Division Bench or a Full Bench as my Lord thinks fit.

The appeal then came on for hearing before the Bench constituted as above.

P. N. Marthandam Pillai and *C. Rangaswami Ayyangar* for appellant.

K. Swaminatha Ayyar for respondent.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The appellant is a landlord and supplies water to his tenants from his own tank. The respondent is one of the tenants, and previous to fasli 1343 he took sufficient water from the tank for the cultivation of one crop on his holding. In faslis 1343, 1344 and 1345 without his landlord's permission he took water for the raising of a second crop. As the result, the appellant filed a suit in the Court of the Deputy Collector, Melur, for the recovery of water rate on the basis of the two crops which the respondent had raised in each of the years mentioned. The Deputy Collector decreed the suit. An appeal then followed to the District Judge of Madura who reversed the Deputy Collector's decision in so far as it related to the additional charge claimed as the result of the tenant using water for the raising of second crops. Throughout it has been common ground that the water in the appellant's tank was augmented by water which Government allowed to flow into it from channels leading from the Periyar dam, which is a Government source. The respondent's case was that he had raised the second crop from water belonging to Government flowing from the appellant's tank. It may be taken that the raising of the second crop was only possible as the result of the increase in the water in the tank resulting from the supply which the tank received from the Periyar dam. The District Judge held that

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the landlord was not entitled to rent based on the second crop unless he could show that he had increased the capacity of the tank by deepening it or widening it or raising its bunds to receive Periyar water so that it might be available to the tenants to raise second crops. The landlord had not done this, but even if he had, he could not, it was said, get anything extra unless he applied under section 30 of the Madras Estates Land Act, 1908, for enhancement of rent. The District Judge also held that the water which the respondent had used for the raising of the second crops was not the landlord's water but water belonging to Government. He expressed the opinion that the extent of the water passing through the landlord's tank could not confer on the landlord any special rights in the absence of proof that he had contributed something for the purpose of facilitating the supply. The appellant, having lost before the District Judge, filed the present appeal which in the first instance came before PATANJALI SASTRI J. who considered that the question was one which should be decided by a Bench.

The decision of the District Judge is erroneous on both the points which I have mentioned. I will take the second point first. The fact that the Government water flowed into the appellant's tank did not mean that when that water got there it remained Government water. It mingled with the appellant's water and it must be regarded as being the appellant's water. I agree with the remarks of PATANJALI SASTRI J. in his referring order that on no conceivable theory can the water in an estate tank, the solum of which is vested in the landholder, be said to belong to the Government and even under the wide and sweeping language of the Madras Irrigation Cess Act the right of the Government to levy water cess depends not

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upon the water belonging to the Government, but upon its coming from a source belonging to the Government. The Government, if it had so desired, could no doubt have prevented its water flowing into the appellant's tank, but it allowed its water to get there and once it got there it passed out of its control and must in law be regarded as the property of the appellant.

When the District Judge delivered his judgment the decision of the Full Bench of this Court in *Venkataraju* v. *Maharaja of Pithapuram*(1) had not been given and the legal position had therefore not then been clarified. In that case, as in this, extra water for a second crop had been taken by a tenant from a landholder's tank without the landholder's permission and the landholder filed a suit before the Deputy Collector for the recovery from the ryot of a sum of money for water taken without his permission. It was held that "rent" as defined in section 3 (11) of the Act included money payable for water taken without permission and the suit was not a suit for enhancement of rent. The decision in *Venkataraju* v. *Maharaja of Pithapuram*(1) clearly governs the present case and the appellant's contention that he is entitled to recover the amount claimed by him for the water taken from his tank for the raising of the second crops in the three years mentioned must be upheld.

The fact that under the Madras Irrigation Cess Act, 1865, the Government has power to levy from the respondent a water cess makes no difference. Section 1 A (4) provides that nothing in the section shall affect the rights and liabilities of the landholder and the ryot *inter se* under any contract, expressed or implied, in regard to the payment of water-cess. Therefore,

(1) I.L.R. [1938] Mad. 381 (F.B.).

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the Act leaves the position of the landholder and the tenant *inter se* entirely unaffected. The respondent having taken water for the second crop from the appellant's own tank must pay for it.

The appeal will be allowed and the order of the Deputy Collector restored with costs here and in the lower appellate Court.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao and Mr. Justice Kunhi Raman.

1939, October 2.

VARADA BHAKTAVATSALUDU AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

DAMOJIPURAPU VENKATA NARASIMHA RAO AND FOUR OTHERS (DEFENDANTS 1 TO 4 AND NIL), RESPONDENTS.*

Hindu law—Joint family—Manager—Eldest member—Presumption that he is manager—Madras Presidency—Indian Limitation Act (IX of 1908), sec. 7—Power of manager to give valid discharge under—Affirmative proof that eldest member acted as manager—If necessary.

The ordinary presumption of Hindu law is that the eldest member of a joint Hindu family acts as the manager. So far as the Madras Presidency is concerned, he can, if he is a major, give a valid discharge under section 7 of the Indian Limitation Act without the concurrence of the other members of the family. In the absence of proof of facts rebutting the said presumption, a Court can presume that he can give a valid discharge under section 7. In such a case, it is unnecessary to

* Appea No. 301 of 1936.

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prove affirmatively that the eldest member did in fact act as the manager.

Jawahir Singh v. *Udai Parkash*(1) and *Ganga Dayal* v. *Mani Ram*(2) distinguished.

APPEAL against the decree of the Court of the Subordinate Judge of Ellore, dated 10th February 1936, in Original Suit No. 6 of 1933.

K. Subba Rao for appellants.

P. Somasundaran for respondents 2, 3 and 5.

Fourth respondent was not represented.

VENKATARAMANA RAO J.

The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—This is an appeal from the judgment and decree of the learned Subordinate Judge of Ellore dismissing the plaintiff's suit on the ground that it was barred by limitation. The relevant facts may be shortly stated. The plaintiffs and the fourth defendant are the sons of one Varada Venkataramanayya. During his lifetime Varada Venkataramanayya as manager of his family entered into a partnership with defendants 1 to 3 for the carrying on of a mill business known as Gopalakrishna Rice Mill. He died on 12th November 1927 without adjusting his accounts with the partnership. This suit has been laid by the plaintiffs who were admittedly minors on 29th October 1931 for a declaration that the partnership which their father carried on with defendants 1 to 3 must be deemed to have been dissolved on 12th November 1927 and for taking an account of the partnership and for payment of such sums as may be found due and payable appertaining to their father's share. The main defence was one of limitation. The suit admittedly was instituted more than three years from the date of the death of Venkataramanayya.

(1) (1925) I.L.R. 48 All. 152 (P.C.). (2) (1908) I.L.R. 31 All. 156.

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In the absence of an agreement to the contrary, the partnership must be deemed to have been dissolved on the date of the death of Venkataramanayya and under Article 109 the suit must be laid within three years from that date. But what the plaintiffs contend is that the plaintiffs were minors on the date of the death of their father and even on the date of suit were admittedly minors and, therefore, under section 6 of the Limitation Act their suit must be deemed to be within time. But the defendants contend in answer that the fourth defendant was the eldest brother of the family and he attained his majority in July 1927, i.e., before the death of their father and he was therefore in a position to discharge all the claims made in the suit and the suit must be held to be barred under section 7 of the Limitation Act. Therefore two main questions have to be decided, viz., (i) whether the fourth defendant attained majority in 1927 or in 1929 as contended by the plaintiffs-appellants in this case and (ii) even assuming that the fourth defendant attained majority in 1927, was he in a position to give a discharge of the plaintiffs' claim. On both the points the learned Subordinate Judge's decision was in favour of the defendants. Mr. Subba Rao, on behalf of the plaintiffs-appellants, contends that the learned Judge was wrong in finding that the fourth defendant attained majority in 1927. He says that the burden of proving that the fourth defendant attained majority in 1927 was on the defendants and they have not satisfactorily discharged the burden of proof which lay on them. He points out that the only material documents in the case are Exhibits III and III-A wherein the fourth defendant's age was described as sixteen in 1925 and therefore he could not have attained majority in 1927. What he says is that in India it must be presumed that

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the people generally give the running year as their age and not the completed year. For this position he relies upon the ruling in *Kunhi Kannan* v. *Devaki*(1). It may be so, but the evidence does not rest on Exhibits III and III-A. Plaintiffs' third witness, the uncle of the plaintiffs and the fourth defendant, was examined on behalf of the plaintiffs and he states that his first son was born in the month of Jyeshta in the year Sadharana, which is between 8th June 1910 and 6th July 1910, and that the fourth defendant was one year or a year and a half older than his first son. This evidence was accepted by the learned Judge in the Court below and on this evidence coupled with the statements contained in Exhibits III and III-A and the deposition of the fourth defendant himself he has come to the conclusion that the fourth defendant must have attained majority at the beginning of 1927. Plaintiffs' third witness is certainly a near relation of the plaintiffs. Mr. Subba Rao contends that the age given by him was mere guess work but we cannot brush aside his evidence on that ground. We are therefore not in a position to disturb the finding of the learned Judge.

The next question is whether the fourth defendant was in a position to give a discharge within the meaning of section 7 of the Limitation Act. Mr. Subba Rao says that if the fourth defendant really acted as manager of the family he was not prepared to dispute the capacity of the fourth defendant to give a valid discharge of the plaintiffs' claim but what he contends is that it is not enough to show that the fourth defendant had attained majority in 1927 but it must also be shown that as a fact he was acting as manager and the evidence in this case does not establish that

(1) 1939 M.W.N. 984.

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fact. It seems to us that, when there is an eldest member of a family, the presumption is that under the Hindu law he is the manager of the family. If he is the manager, under section 7 of the Limitation Act a discharge can be given without the concurrence of the other members of the family so far as the Madras Presidency is concerned, and at any rate that is the *ratio decidendi* of *Doraisami Serumadan* v. *Nondisami Seluvan*(1). What Mr. Subba Rao says is that in that case the learned Judges assumed that the plaintiff had the capacity but they did not purport to decide whether the plaintiff acted as the manager and that under the Privy Council ruling in *Jawahir Singh* v. *Udai Parkash*(2) which confirms *Ganga Dayal* v. *Mani Ram*(3) it must be shown as a fact that the fourth defendant acted as manager. So far as *Ganga Dayal* v. *Mani Ram*(3) is concerned our view is that in that case, even though the elder brother was the manager, he would not be in a position to give a valid discharge of the claim because under the law prevailing in Allahabad no member of an undivided family, even if he is a manager, can alienate his undivided share without the concurrence of the other members. No doubt the case was not rested on that ground. But it seems to us that that case can be distinguished and the Privy Council in *Jawahir Singh* v. *Udai Parkash*(2) merely accepted the decision of the learned Judges of the High Court who purported to follow *Ganga Dayal* v. *Mani Ram*(3) and dissented from *Doraisami Serumadan* v. *Nondisami Seluvan*(1). We cannot take the said Privy Council decision as authority for the position laid down in *Ganga Dayal* v. *Mani Ram*(3) that it must be shown in every case that he has acted as the

(1) (1912) I.L.R. 38 Mad. 118. (2) (1925) I.L.R. 48 All. 152 (P.C.).
(3) (1908) I.L.R. 31 All. 156.

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manager. If anybody wants to displace the ordinary presumption that the eldest member acted as the manager and he was not in a position to give a valid discharge it is incumbent on that person to prove the facts rebutting the said presumption. Mr. Subba Rao says that the evidence in this case showed that the fourth defendant was not acting as manager.

[His Lordship discussed the evidence and concluded.]

On the whole we are not prepared to disturb the finding of the learned Judge that the fourth defendant was in law the manager and also in fact the manager. In view of this finding the appeal fails and must be dismissed with costs. The appellant should pay the court-fee due to Government.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Mockett.

A. R. KRISHNASWAMI AYYAR AND ANOTHER (DEFENDANTS 1 AND 2), APPELLANTS,

v.

THE TRAVANCORE NATIONAL AND QUILON BANK, LTD., REPRESENTED BY MESSRS. J. V. PIRRIE AND C. GILL, PROVISIONAL OFFICIAL LIQUIDATORS AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Indian Contract Act (IX of 1872), *sec.* 143—" *Keeping silence* " —*Meaning of—Surety bond containing clause that entering into composition or giving time by lender will not discharge surety—Effect.*

A surety bond contained the following clause: " It is further agreed that any contract between the borrower and the

* City Civil Court Appeal No. 65 of 1938.

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lender by which the lender makes a composition with or promises to give time or not to sue the borrower will not discharge the surety or sureties." Subsequently the lender agreed to accept a sum of four annas in the rupee in full satisfaction of his claims in the insolvency of the borrower.

Held that the surety was not discharged and that the lender was entitled to receive the balance of the debt from the surety.

Cowper v. *Smith*(1) and *The Union Bank of Manchester* v. *Beech*(2) followed.

Held further that the expression "keeping silence" in section 143 of the Indian Contract Act means "intentional concealment" as distinguished from "mere non-disclosure".

Imperial Bank of India v. *Avanasi Chettiar*(3) and *Balakrishna, V. N. Kirtikar* v. *The Bank of Bengal*(4) followed.

APPEAL against the decree of the Court of the City Civil Judge, Madras, dated 22nd March 1938 and passed in Original Suit No. 325 of 1936.

G. Ramakrishna Ayyar for *S. Athmanathan* for appellants.

V. K. John for respondents.

The JUDGMENT of the Court was delivered by

MOCKETT J.

MOCKETT J.—This is an appeal by the defendants in a suit filed against them in the City Civil Court by the plaintiffs, the Travancore National Bank, Ltd. The cause of action is very simple. It is on a surety bond, Exhibit I, by which the defendants made themselves liable to pay to the plaintiffs the amount due from one K. E. Sodawalla. Under Exhibit I it will be seen that Sodawalla had been declared the successful bidder at the auction chit on 9th February 1935 and that he was paid a sum of Rs. 3,145. The evidence on behalf of the bank was, as given by P.W. 1, that they refused to pay that amount unless, as was their custom,

(1) (1838) 4 M. & W. 519; 150 E.R. 1534.
(2) (1865) 3 H. & C. 672; 159 E.R. 695.
(3) (1929) I.L.R. 53 Mad. 826. (4) (1891) I.L.R. 15 Bom. 585.

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sureties were furnished by the successful bidder of the chit fund. Two such sureties were forthcoming and they are defendants 1 and 2 in this case. They signed a very formidable document, Exhibit I, from which it will be seen that they made themselves liable in as comprehensive terms as possibly could proceed from the draftsman's pen. The term with which we are immediately concerned is contained in clause 9 in which it is said:

"It is further agreed that any contract between the borrower and the lender by which the lender makes a composition with or promises to give time or not to sue the borrower will not discharge the surety or sureties."

In fact under Exhibit II the creditors of Sodawalla, including the Travancore National Bank, the plaintiffs, in an Insolvency Petition No. 541 of 1935 (High Court, Madras) agreed to accept a sum of four annas in the rupee in full satisfaction of their claims; so that there was, as envisaged by clause 9, a composition. The suit was laid for the whole of the amount due under the bond but it was rightly held in the lower Court that a decree could only be given for the amount less the amount received by the bank under the composition, Exhibit II.

It has been argued before us that this composition bond extinguishes the debt to the principal-debtor and therefore there is no debt for which the sureties can be made liable. These very arguments have been put before the Courts in cases where the document was as identical with the document before us as it is possible for it to be with regard to its terms. In *Cowper* v. *Smith*(1) a document such as this was considered and the same arguments, as will be seen from the report, were put before the Court. Lord ABINGER C. B.

(1) (1838) 4 M. & W. 519; 150 E.R. 1534.

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stated that the deed entered into by the debtor was a composition deed and was within the express terms of the guarantee. It authorized the plaintiffs to compound with their debtor. Accordingly, as the surety had expressly contracted to remain liable, notwithstanding the discharge of the principal, it cannot now be contended that the discharge of the principal is an implied discharge of the surety. And with that the other learned Judges concurred. In a further decision, *The Union Bank of Manchester* v. *Beech*(1), where *Cowper* v. *Smith*(2) was considered, POLLOCK C.B. disposed of an argument which has also been put before us in this case. He holds that the only distinction between the case of *Cowper* v. *Smith*(2) and the case before the Bench was that in the case then under consideration there was an absolute release but that in *Cowper's* case(2), although there was not in terms a release, there was what substantially amounted to the same thing. The learned Judge continues:

"Under a composition, a part is taken in satisfaction of the whole. Money accepted as part of a debt is not a composition, but a part-payment. Where there is a release the creditor in effect says to the debtor, 'I release you from your debt'; whereas, if there is a composition only, the creditor in effect says, 'I agree to accept a portion of your debt in satisfaction and discharge of the whole.' The difference, however, is merely technical, and in substance they are the same thing."

It will be seen therefore that the construction of Exhibit I has virtually been dealt with by authority which we are content to follow.

The next point argued before us was that there was a duty on the bank to disclose Sodawalla's overdraft liability at the time the surety was taken. This point was made under two headings; first, on the general

(1) (1865) 3 H. & C. 672; 159 E.R. 695.
(2) (1838) 4 M. & W. 519; 150 E.R. 1534.

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liability of the bank under such circumstances and secondly, a special liability in this case because it was alleged by the witnesses for the defence that in answer to questions by the defence as to the financial position of Sodawalla, the bank representative, P.W. 1, Mr. Kuruvilla, assured the first defendant that Sodawalla's financial position was beyond reproach. It is said by D.W. 2 that Mr. Kuruvilla stated: "His account is one of the best. You need not be anxious. Only the rules require two signatures." With regard to the first aspect the contention of the defendants is clearly negatived by the decision of a Bench of this High Court reported as *Imperial Bank of India* v. *Avanasi Chettiar*(1) where it is laid down that there is no general legal obligation on the part of a bank to volunteer to a surety particulars of one of its constituent's indebtedness, for this is a matter on which the surety has to inform himself. Section 143 of the Contract Act on which the defendants rely is as follows:—

"Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid."

This section has been considered and the High Court of Bombay, in a judgment delivered by SARGEANT C.J. in *Balakrishna, V. N. Kirtikar* v. *The Bank of Bengal*(2), took the view that the expression "keeping silence" in that section clearly implied intentional concealment as distinguished from mere non-disclosure which no doubt was a fatal objection in insurance policies. We agree with that view. In this particular case the facts are very simple. The bank called upon its customer to furnish surety with regard to the payment made under a chit fund. We see no reason to distinguish a payment under a chit fund from any other

(1) (1929) I.L.R. 53 Mad. 826. (2) (1891) I.L.R. 15 Bom. 585.

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obligation and under these circumstances surely it will be for the surety to interrogate the debtor. We agree that there is nothing in the authorities to suggest under such circumstances that the bank is compelled to break the confidence of its constituents and disclose its affairs to the surety. With regard to the second aspect the learned Judge has disbelieved the evidence of the defendants. He is not prepared to accept the story that by fraudulent misrepresentation they were induced to enter into the surety bond and we see no reason to differ from that view.

The result of our conclusion is that this appeal must be dismissed with costs.

G.R.

APPELLATE CIVIL—FULL BENCH.

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

1940, March 4.

E. P. KUMARAVEL NADAR (PETITIONER), PETITIONER,

v.

T. P. SHANMUGA NADAR AND TWO OTHERS (RESPONDENTS), RESPONDENTS.*

Code of Criminal Procedure (Act V of 1898), *ss.* 195 *and* 476—*Order passed by Civil Court under sec.* 476—*Revision petition in High Court—Whether to be filed on the Civil or Criminal side—Criminal Rules of Practice (Madras), Rule* 37—*Validity of.*

On a question raised whether a petition to the High Court against an order passed by a Civil Court under section 476, Criminal Procedure Code, directing or refusing to direct prosecution, should be filed as a Criminal or a Civil Revision Petition,

* S.R. Nos. 32601, 32137 and 28253 of 1939.

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held, that it should be filed as a Civil Revision Petition.

A Civil Court does not cease to be a Civil Court when it is considering an application made to it under section 476, Criminal Procedure Code, and if for the purposes of that application it remains a Civil Court, it must be governed by the provisions of the Code of Civil Procedure and not by those of the Code of Criminal Procedure. The fact that an appeal from an order passed on an application when it has been dealt with by a Civil Court lies to an appellate Civil Court emphasises the Civil character of the Court dealing with the application. Section 439, Criminal Procedure Code, only applies to cases which come before the Criminal Courts within the meaning of the Code of Criminal Procedure.

King-Emperor v. *Karri Venkanna Patrudu*(1) followed. *In re Raju Gupta*(2) overruled.

Case-law reviewed.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure praying the High Court (i) to revise the order of the District Court of Tinnevelly, dated 30th August 1939, and made in Civil Miscellaneous Appeal No. 6 of 1939 preferred against the order of the Court of the Subordinate Judge of Tinnevelly, dated 1st December 1938, and made in Original Petition No. 19 of 1937, (ii) to revise the judgment of the Court of Session, East Tanjore at Negapatam, dated 26th August 1939, and passed in Criminal Appeals Nos. 21 and 22 of 1939 preferred against the order of the Court of the District Munsif of Tiruvarur, dated 26th November 1938, and made in Original Petition No. 7 of 1937 in Original Suit No. 237 of 1932, and (iii) petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of East Tanjore at Negapatam, dated 22nd July 1939, and made in Civil Miscellaneous Appeal No. 7 of 1939, preferred against

(1) (1916) 31 M.L.J. 440 (F.B.). (2) I.L.R. [1939] Mad. 439.

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the order of the Court of the Subordinate Judge of Mayavaram, dated 30th January 1939, and made in Original Petition No. 2 of 1939 in Interlocutory Application No. 52 of 1938 in Original Suit No. 4 of 1936.

N. Rajagopala Ayyangar for *P. S. Raghavarama Sastri* for petitioner.—The question to be decided here is that when a Civil Court passes an order under section 476, Criminal Procedure Code, and an application is filed against that order in the High Court, should it be under section 115 of the Civil Procedure Code, or under section 439 of the Criminal Procedure Code. The powers of the High Court to interfere in revision petitions under section 115, Civil Procedure Code, are very restricted. It is only in cases where the subordinate Courts (*a*) have exercised a jurisdiction not vested in them by law, or (*b*) have failed to exercise a jurisdiction so vested, or (*c*) have acted in the exercise of their jurisdiction illegally or with material irregularity, that the High Court can interfere. But under section 439 of the Criminal Procedure Code, the revisional powers of the High Court are greater. It can interfere on a question of fact as well as on a question of law; *see* section 439, Criminal Procedure Code, [Rule 37 of the Criminal Rules of Practice and Orders of the High Court was referred to]. PANDRANG ROW J. in *In re Raju Gupta*(1) held that the jurisdiction exercised by a Civil Court under section 476, Criminal Procedure Code, is Criminal and revision petitions filed in the High Court against such an order should be on the criminal side. He was of opinion that rule 37 of the Criminal Rules of Practice is *ultra vires*.

[Section 195, Criminal Procedure Code, as it stood before and after the amendment by Act XVIII of 1923 was referred to].

Prior to the amendment a complaint could be filed with the previous sanction of the Court by a private party or by the Court itself. After the amendment the right of a private party to file a complaint is taken away. Only the Court can file a complaint. Before the amendment there was (i) sanction procedure and (ii) complaint procedure. After amendment the second alone remains and the sanction procedure is taken away. By sub-section (3) to section 195, Criminal Procedure

(1) I.L.R. [1939] Mad. 439.

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Code, appeals are provided for. [Sections 476, 476-A, 476-B and 478, Criminal Procedure Code, were referred to.] They lay down the procedure to be followed in cases mentioned in section 195. Though the inquiry is made by Civil Courts, the procedure followed being that of the Criminal Procedure Code, a revision petition lies to High Court on the criminal side and not on the civil side. Section 439, Criminal Procedure Code, sub-section (i) begins by stating that High Court's powers of revision extend to "any proceeding." It includes an inquiry made under section 476, Criminal Procedure Code, by any Civil or Revenue Court. Under that section the powers are not limited as under section 435 where the High Court can call for and examine the record of any proceeding before any inferior Criminal Court only. If the power is restricted under section 439, it ought to have been mentioned expressly as stated in section 435. The Legislature has not chosen to do that. So only a criminal revision petition lies against an order passed by a Civil Court under section 476, Criminal Procedure Code.

In re Chennanagoud(1), a case of sanction procedure under the old Criminal Procedure Code, BHASHYAM AYYANGAR J. held that under sections 435 and 439, Criminal Procedure Code, the High Court cannot interfere with any order passed by any Court other than a Criminal Court and that it could revise the order only under the Civil Procedure Code. The reason for his decision is as follows: A Revenue Court gives or refuses sanction under section 195 of the Criminal Procedure Code in respect of offences therein referred to. If a Revenue Court gives sanction, a higher Revenue Court, which could revoke or refuse to revoke it, is the Board of Revenue to which appeals lie from such Revenue Court. The High Court cannot under section 439, Criminal Procedure Code, revise those proceedings. Consequently the proceedings of a Civil Court also cannot be revised under section 439, Criminal Procedure Code. The Madras High Court has held that except by a *writ of certiorari* it cannot set aside in revision the decision of a Revenue Court; *Raghunadha Patro* v. *Govinda Patro*(2) [*Rajah of Mandasa* v. *Jagannayakulu*(3) was referred to]. If the reasoning of BHASHYAM AYYANGAR J. is upheld, it follows that the High

(1) (1902) I.L.R. 26 Mad. 139. (2) (1928) 55 M.L.J. 798 (F.B.).
(3) (1931) 63 M.L.J. 450 I.L.R. 55 Mad. 883 (F.B.).

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Court cannot revise an order made by a Revenue Court under section 195, Criminal Procedure Code. This would lead to an anamoly, viz., the orders of Civil and Criminal courts under section 195, Criminal Procedure Code, could be revised by the High Court whereas the orders of a Revenue Court under that section cannot at all be revised by the High Court. [*Somayajipad* v. *Emperor*(1) overruling *Eranholi Athan* v. *King Emperor*(2) was referred to.] Proceedings under section 195 are of a Criminal rather than of a Civil nature and section 115, Civil Procedure Code, is not applicable; *Rama Aiyar* v. *Venkatachella Padayachi*(3) and *Janardana Rao* v. *Lakshmi Narasamma*(4).

No doubt in *King Emperor* v. *Karri Venkanna Patrudu*(5) it was held by a Full Bench that the order of a Civil Court granting sanction to prosecute under section 476, Criminal Procedure Code, could be revised by the High Court only under section 115, Civil Procedure Code, and not under section 439, Criminal Procedure Code. SADASIVA AYYAR J., in that case did not approve of the decision *In re Chennanagoud*(6) but he did not want to disturb a practice prevailing for a long time. In view of the later decisions of this High Court, viz., *Janardana Rao* v. *Lakshmi Narasamma*(4) and in *In re Raju Gupta*(7) it is clear that the jurisdiction exercised by a Civil Court under section 476, Criminal Procedure Code, is one of a Criminal nature exercised under the Criminal Procedure Code.

[LEACH C.J.—In *In re Raju Gupta*(7) the attention of the learned Judge was not drawn to the decision of the Full Bench in *King Emperor* v. *Karri Venkanna Patrudu*(5) or the judgment of BHASHYAM AYYANGAR J. in *In re Chennanagoud* (6)].

[Sections 5 and 6 and sections 480 and 488 of the Criminal Procedure Code which deal with contempt of Court and maintenance matters before Criminal Courts were referred to.]

(1) (1909) I.L.R. 33 Mad. 48 (F.B.).
(2) (1902) I.L.R. 26 Mad. 98 (F.B.).
(3) (1907) I.L.R. 30 Mad. 311.
(4) (1933) I.L.R. 57 Mad. 177 (F.B.).
(5) (1916) 31 M.L.J. 440 (F.B.). (6) (1902) I.L.R. 26 Mad. 139.
(7) I.L.R. [1939] Mad. 439.

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The view of the Calcutta High Court is that when a Civil Court passes an order under section 476, Criminal Procedure Code, it could be revised by the High Court only under section 115, Civil Procedure Code, and not under section 439, Criminal Procedure Code; *Emperor* v. *Har Prasad Das*(1) and *Surendranath Maiti* v. *Sushilkumar Chakrabarti*(2). The Allahabad High Court is also of the same opinion; *In the matter of the Petition of Bhup Kunwar*(3). In that case BANERJI J. differed from the other two judges and held that the High Court can revise such proceedings under section 439, Criminal Procedure Code. The Bombay and Lahore High Courts hold that they could interfere with such orders under section 439, Criminal Procedure Code; *Emperor* v. *Bhatu Sadu*(4) and *Dhanpat Rai* v. *Balak Ram*(5).

When a Revenue Court performs the duties of a Civil Court, it attracts the provisions of Civil Procedure Code. [*Nilmoni Singh Deo* v. *Taranath Mukerjee*(6) was referred to.] Similarly when a Civil Court performs the duties assigned to it by the Criminal Procedure Code, the provisions of the latter Code should apply. A Civil Court derives the power of making complaints from the Criminal Procedure Code under section 476. In so doing, it must be deemed to be acting as a Criminal Court. Any revision petition filed in regard to those matters should therefore be only under the Criminal Procedure Code and not under the Civil Procedure Code.

Advocate-General (*Sir A. Krishnaswami Ayyar*) for respondents.—The Court of first instance before which the application for sanction is made is described as a Civil Court. When an appeal is to be preferred therefrom it lies to a Civil Court; *vide* sections 195 and 476, Criminal Procedure Code. So, when a revision petition is filed against those orders it must necessarily be on the Civil side and not on the Criminal side. Section 439, Criminal Procedure Code, is only supplementary to section 435 of that Code. The chapter in which these two sections occur relate to reference and revision of proceedings of *inferior* Criminal Courts. Section 439 (1) does not confer any independent power. Sub-sections 2 to 6 of that section have reference

(1) (1913) I.L.R. 40 Cal. 477 (F.B.). (2) (1931) I.L.R. 59 Cal. 68.
(3) (1903) I.L.R. 26 All. 249 (F.B.).
(4) I.L.R. [1938] Bom. 331 (F.B.)
(5) (1931) I.L.R. 13 Lah. 342 (F.B.).
(6) (1882) I.L.R. 9 Cal. 295 (P.C.).

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only to proceedings in Criminal Courts. In section 439 (1) the word "any proceedings" does not include proceedings in a Civil Court. It refers only to criminal proceedings. The reasoning of BANERJI J., in *In the matter of the Petition of Bhup Kunwar*(1) is not correct. No doubt something can be said in favour of the argument on the other side that as the character of the proceedings is criminal, a revision petition on the Criminal side alone lies. But since the Court which deals with those proceedings is civil, it does not cease to be such, because it deals with proceedings of a criminal nature. Under section 478, sub-section (2) of the Criminal Procedure Code, Civil or Revenue Courts may exercise all the powers of a Magistrate; and proceedings in such inquiry shall be conducted as nearly as may be in accordance with the provisions of Chapter XVIII and of Chapter XXXIII in cases where that chapter applies and shall be *deemed* to have been held by a Magistrate. This section shows that in holding the inquiry it is a Civil Court, but the Legislature thought it necessary to give it the authority of a Magistrate for the purpose. Rule 37 of the Criminal Rules of Practice of the Madras High Court is based on the judgment of BHASHYAM AYYANGAR J., in *In re Chennanagoud*(2). The rule is *intra vires* and is in accordance with the practice of this High Court. The Full Bench decision in *King Emperor* v. *Karri Venkanna Patrudu*(3) states that in cases of this nature only a civil revision petition lies. That decision has not been overruled. In *Janardana Rao* v. *Lakshmi Narasamma*(4) the decision in *King Emperor* v. *Karri Venkanna Patrudu*(3) was not considered and cannot be held to have been overruled thereby. In *In re Raju Gupta*(5) also the learned Judge did not consider the decision in *King Emperor* v. *Karri Venkanna Patrudu*(3). The Calcutta and Allahabad High Courts agree with the Madras High Court that only a civil revision petition lies. The Lahore and Bombay High Courts hold that a criminal revision petition lies. Considering the relative provisions of the Criminal Procedure Code and the long standing practice that has prevailed in the Madras High Court, the balance of convenience is in favour of the view that it is only a civil revision petition that lies against an order

(1) (1903) I.L.R. 26 All. 249 (F.B).
(2) (1902) I.L.R. 26 Mad. 139.
(3) (1916) 31 M.L.J. 440 (F.B.).
(4) (1933) I.L.R. 57 Mad. 177 (F.B.).
(5) I.L.R. [1939] Mad. 439.

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passed by a Civil Court under section 476 of the Criminal Procedure Code.

[*National Telephone Company, Limited* v. *Postmaster-General*(1), and Halsbury's Laws of England, Hailsham Edition, Volume XXXI, page 493, were referred to.]

Cur. adv. vult.

JUDGMENT.

LEACH C.J.

LEACH C.J.—Three matters have been placed before this Full Bench and they can be dealt with conveniently in the same judgment as they all involve the same question. The first case arises out of a suit which was tried by the Subordinate Judge of Tinnevelly. The plaintiff contended that a post card which had been put in evidence by the first and second defendants on the allegation that it had been written by the third defendant to the second defendant was a false document. Subsequently the plaintiff filed an application asking the Court to prosecute the three defendants under the provisions of section 476 of the Code of Criminal Procedure for offences alleged to have been committed under sections 463, 464, 471, 473 and 476 of the Indian Penal Code. The Court dismissed the application and the Subordinate Judge's decision was upheld by the District Judge on appeal. The plaintiff has now asked this Court to revise the order of the District Judge under the provisions of sections 435 and 439 of the Code of Criminal Procedure and to direct the prosecution to take place. In the second case an application was made to the Court of the District Munsif of Tiruvarur by the petitioner, the assignee of a decree, to direct the prosecution of the respondents under sections 206 and 207 of the Indian Penal Code. The application was granted by the District Munsif, but the respondents appealed to the

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

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District Judge of East Tanjore, who reversed the order of the District Munsif. The petitioner asks that the order of the District Munsif be restored by this Court under its powers of revision under sections 435 and 439 of the Code of Criminal Procedure. The third matter arises out of an application filed by the second defendant in a suit in the Court of the Subordinate Judge of Mayavaram against the respondents. The application was rejected by the Subordinate Judge and on appeal to the District Judge of East Tanjore the decision was upheld. The petitioner asks this Court to direct under the provisions of section 115 of the Code of Civil Procedure a complaint to be made.

Rule 37 of the Criminal Rules of Practice and Orders of this Court provides that every application made to a Criminal Court under the provisions of sections 476, 476-A or 485 of the Code of Criminal Procedure and every appeal filed against an order made under these sections, or filed in a Court of Session against an order of a Court of Small Causes in the mufassal under section 486 of the Code of Criminal Procedure shall be registered as a Criminal Miscellaneous Petition and a Criminal Appeal respectively. The rule further directs that such applications or appeals when filed in a Civil Court shall be registered as Civil Miscellaneous Petitions and Civil Miscellaneous Appeals respectively and states that the rule applies to revision petitions also. The question which the Court is called upon to decide is whether the petitions now under discussion shall be registered as criminal or civil revision petitions. In the recent case of *In re Raju Gupta*(1) PANDRANG ROW J. held that the jurisdiction which is exercised by a Civil Court in filing a complaint under section 476 of the Code of Criminal Procedure is a jurisdiction

(1) I.L.R. [1939] Mad. 439.

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exercised under that Code and that revision petitions to this Court should be filed on the Criminal side and not on the Civil side. The learned Judge was of the opinion that rule 37 was *ultra vires*. The question is one of considerable importance because the revisional powers of this Court under the Code of Criminal Procedure are greater than the powers conferred on it by section 115 of the Code of Civil Procedure. Under the latter Code the Court can only interfere when a subordinate Court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity. Under section 439 of the Code of Criminal Procedure the High Court has power to exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428, and therefore has the power to interfere on a question of fact when in its opinion the finding of a subordinate Court is against the weight of evidence. The question now under discussion has been the subject of other decisions of this Court and has also been debated in most of the High Courts of India. I shall in due course refer to the cases which have been quoted to us in argument, but before doing so it is desirable to refer in some detail to the sections of the Code of Criminal Procedure which have bearing on the question.

Section 195 (1) (*b*) of the Code as it now stands states that no Court shall take cognizance of any offence punishable under sections 194, 195, 196, 199, 200, 205 to 211 and 228 of the Indian Penal Code when the offence is alleged to have been committed in or in relation to, a proceeding in Court, except on the complaint in writing of the Court or of some other Court to which the Court is subordinate. Sub-section (1) (*c*)

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contains a similar provision with regard to an offence described in section 463 or punishable under sections 471, 475 or 476 of the Indian Penal Code. Before the Code of Criminal Procedure was amended the section did not require the Court to file the complaint. It only required the Court to give its previous sanction to the complaint being filed. Sub-section (3) of section 195 reads as follows :—

"For the purposes of this section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such Civil Court is situate :

Provided that—

(*a*) Where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate ; and

(*b*) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connexion with which the offence is alleged to have been committed."

Section 476 states that when a Civil, Revenue or Criminal Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195, sub-section (1), clause (*b*) or clause (*c*), which appears to have been committed in or in relation to a proceeding in that Court, the Court may after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint in writing which shall be forwarded to a Magistrate of the first class having jurisdiction, whereupon the Magistrate shall proceed according to law and as if upon complaint made under section 200. Section 476-A permits a superior Court

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to make the complaint where the subordinate Court has omitted to do so, and section 476-B allows appeals from orders made on such matters by the subordinate Court. Section 476-B reads as follows :—

"Any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under section 476 or section 476-A or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the subordinate Court might have made under section 476 and if it makes such complaint the provisions of that section shall apply accordingly."

I have already referred in general terms to section 439 of the Code, but it is necessary to examine its provisions more closely in conjunction with the provisions of section 435. Section 435 states that the High Court or any Sessions Judge or District Magistrate or any Subdivisional Magistrate empowered by the Local Government in this behalf may call for and examine the record of a proceeding before an inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the inferior Court. The section only gives power to call for the record of a proceeding before an inferior Criminal Court. Section 439 reads as follows :—

"(1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence ; and when the Judges composing the Court of Revision are

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equally divided in opinion, the case shall be disposed of in manner provided by section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class.

(4) Nothing in this section applies to an entry made under section 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section 2 of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause, against his conviction."

Although the section does not in terms say that the High Court's powers of revision are confined to criminal cases, it seems to me to be obvious that the section is not intended to travel beyond cases in criminal Courts. Sub-section 1 states that when the record has been called for the Court may enhance the "sentence." Sub-section 2 says that no order under the section shall be made to the prejudice of "the accused" unless he has had an opportunity of being heard. Sub-section 3 deals with the matter of "sentence." Sub-section 4 provides that nothing in the section applies to an entry made under section 273 of the Code or be deemed to authorize the Court to convert a finding of "acquittal" into one of "conviction," and sub-section 5 prohibits the Court

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from exercising revisional powers where the Code gives the right of appeal and no appeal has been preferred.

The only other section which calls for mention, before proceeding to examine the authorities, is section 478, which is to the effect that when any offence contemplated by section 195 is committed before a Civil or Revenue Court, or is brought under the notice of a Civil or Revenue Court in the course of a judicial proceeding, and the case is triable exclusively by the High Court or Court of Session, or the Civil or Revenue Court thinks that it ought to be tried by the High Court or Court of Session, the Civil or Revenue Court may, instead of sending the case under section 476 to a Magistrate for inquiry, itself complete the inquiry and commit or hold to bail the accused person to take his trial before the High Court or Court of Session, as the case may be. For the purpose of an inquiry under this section the Civil or Revenue Court may exercise all the powers of a Magistrate and its proceedings in such inquiry shall be conducted as nearly as may be in accordance with the provisions of Chapter XVIII and of Chapter XXXIII in cases where that Chapter applies, and shall be deemed to have been held by a Magistrate. The fact that the Legislature considered that in such a case the Civil or Revenue Court should be given the powers of a Magistrate is not without significance. The section shows that in holding the inquiry it is still a Civil Court and it is necessary to give it the authority of a Magistrate for the purpose.

Rule 37 of the Criminal Rules of Practice of this Court is based on the judgment of BHASHYAM AYYANGAR J. in *In re Chennanagoud*(1). The learned Judge was

(1) (1902) I.L.R. 26 Mad. 139.

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firmly of the opinion that the High Court cannot under the provisions of sections 435 and 439 of the Code of Criminal Procedure revise an order passed by any Court other than a Criminal Court under clause (*b*) or (*c*) of sub-section 1 of section 195 of the Code according sanction for the prosecution of any person who is alleged to have committed any of the offences referred to in that section. When the judgment of BHASHYAM AYYANGAR J. was delivered, the Code of Civil Procedure, 1882, was in force and the corresponding section to section 115 of the present Code was section 622. While he was of the opinion that the provisions of the Code of Criminal Procedure could not be invoked when there were proceedings in a Civil Court under sections 195 and 476 of the Code of Criminal Procedure he recognized that in a proper case the High Court would have powers of revision under the Code of Civil Procedure.

In *Raghunadha Patro* v *Govinda Patro*(1) this Court held that it had no power under section 115 of the Code of Civil Procedure to interfere in revision with the decision of a Revenue Court, and since that case was decided this Court has not revised decisions of Revenue Courts unless the case was of a nature which justified the issue of a *writ of certiorari*. In *Rajah of Mandasa* v. *Jagannayakulu*(2) which was decided by a Full Bench, doubts were cast on the correctness of the decision in *Raghunadha Patro* v. *Govinda Patro*(1), except so far as Chapter XI of the Madras Estates Land Act, 1908, was concerned, but that decision has not been overruled and has in fact since been followed. On the other hand, the Calcutta High Court has from early days considered that it

(1) (1928) 55 M.L.J. 798 (F.B.).
(2) (1931) 63 M.L.J. 450 ; I.L.R. 55 Mad. 883 (F.B.).

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had power to revise decisions of Revenue Courts. In his judgment in *In re Chennanagoud*(1) BHASHYAM AYYANGAR J. observed that as this Court had no power to interfere with the decision of a Revenue Court under section 195 of the Code of Criminal Procedure it was difficult to see on what principle similar proceedings of a Civil Court could be revised under section 439 of the Code of Criminal Procedure. It has been suggested in the present case that as this Court has no power to interfere with the decision of a Revenue Court, it would mean, if the view of BHASHYAM AYYANGAR J. is to prevail, that an order of a Revenue Court directing proceedings to be instituted for an offence referred to in section 195 of the Code of Criminal Procedure or an order refusing to institute proceedings would not be subject to revision at all. This may very well be the case, but because the Legislature has failed to provide for such an eventuality the Court cannot step in and remedy the defect. That must be left to the Legislature.

It was held by a Bench of three Judges of this Court (OLDFIELD, SADASIVA AYYAR and SESHAGIRI AYYAR JJ.) in *King Emperor* v. *Karri Venkanna Patrudu*(2) that on an application for revision of an order of a Civil Court granting sanction to prosecute under section 476 of the Code of Criminal Procedure the Court's powers of interference are limited to section 115 of the Code of Civil Procedure and therefore the High Court cannot interfere under section 439 of the Code of Criminal Procedure. It is true that SADASIVA AYYAR J. expressed doubt as to the correctness of the decision of BHASHYAM AYYANGAR J. in *In re Chennanagoud*(1), but as the practice of treating such matters as being of the nature of civil revision petitions had

(1) (1902) I.L.R. 26 Mad. 139. (2) (1916) 31 M.L.J. 440 (F.B.).

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existed for fourteen years in this province he did not wish to reopen the question. This decision must be regarded as expressing the law in this province unless it is overruled by a Bench of greater strength or the Legislature interferes.

In *Janardana Rao* v. *Lakshmi Narasamma*(1) a Bench composed of BEASLEY C.J. and BARDSWELL and BURN JJ. held that in an appeal under section 476-B of the Code of Criminal Procedure in a civil proceeding the appellate Court has power, under clauses (*c*) and (*d*) of section 423 of that Code, to remand the matter to the lower Court for proper disposal. The application of the Code of Criminal Procedure is certainly not in keeping with the decision in *King Emperor* v. *Karri Venkanna Patrudu*(2) but as BARDSWELL J., who delivered the judgment of the Bench in *Janardana Rao* v. *Lakshmi Narasamma*(1), said that it was unnecessary to discuss whether the proceedings of a Civil Court under section 476-B could be revised by a High Court under section 439 of the Code of Criminal Procedure, and this in spite of the fact that *King Emperor* v. *Karri Venkanna Patrudu*(2) was mentioned in the order of reference, the conclusion is that it was not intended to question the authority of that decision, illogical though this may be. The basis of the decision in *Janardana Rao* v. *Lakshmi Narasamma*(1) was that the matter was of a criminal rather than of a civil character, but if this were the governing factor, the decision in *King Emperor* v. *Karri Venkanna Patrudu*(2) would be wrong. The Bench which decided *Janardana Rao* v. *Lakshmi Narasamma*(1) could not overrule the decision in *King Emperor* v. *Karri Venkanna Patrudu*(2) and did not purport to do so.

(1) (1933) I.L.R. 57 Mad. 177 (F.B.). (2) (1916) 31 M.L.J. 440 (F.B.).

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In holding in *In re Raju Gupta*(1) that the jurisdiction which is exercised by a Civil Court in filing a complaint under section 476 of the Code of Criminal Procedure is a jurisdiction exercised under that Code and is of a criminal nature PANDRANG ROW J. also did not consider the ruling of the Full Bench in *King Emperor* v. *Karri Venkanna Patrudu*(2) or the judgment of BHASHYAM AYYANGAR J. in *In re Chennanagoud*(3). His judgment was based on *Janardana Rao* v. *Lakshmi Narasamma*(4) and on the decision of the Lahore High Court in *Dhanpat Rai* v. *Balak Ram*(5) and that of the Bombay High Court in *Emperor* v. *Bhatu Sadu*(6).

The opinion of the Calcutta High Court is in agreement with the opinion of this Court as expressed in *In re Chennanagoud*(3) and *King Emperor* v. *Karri Venkanna Patrudu*(2). In *Emperor* v. *Har Prasad Das*(7) a Full Bench of five Judges (JENKINS C.J. and HARRINGTON, STEPHEN, ASUTOSH MOOKERJEE and HOLMWOOD JJ.) held that where an order has been passed by a Civil Court under section 476 of the Code of Criminal Procedure section 439 has no application. The High Court can only exercise the revisional powers under section 115 of the Code of Civil Procedure. This decision was accepted without question in *Surendranath Maiti* v. *Sushilkumar Chakrabarti*(8).

The opinion of the Bombay High Court expressed in *Emperor* v. *Bhatu Sadu*(6) was also that of a Full Bench. The Court held that the reference in section 476-B to section 195 (3) of the Code of Criminal Procedure only determined the forum and not the character of the Court. It was considered that a

(1) I.L.R. [1939] Mad. 439.
(2) (1916) 31 M.L.J. 440 (F.B.).
(3) (1902) I.L.R. 26 Mad. 139.
(4) (1933) I.L.R. 57 Mad. 177 (F.B.).
(5) (1931) I.L.R. 13 Lah. 342 (F.B.).
(6) I.L.R. [1938] Bom. 331 (F.B.).
(7) (1913) I.L.R. 40 Cal. 477. (F.B.).
(8) (1931) I.L.R. 59 Cal. 68.

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Civil Court in passing an order under section 476-B was exercising jurisdiction in a criminal matter, and therefore its order could be revised under section 439 of the Code of Criminal Procedure.

A Full Bench of three Judges of the Allahabad High Court discussed the question in *In the matter of the Petition of Bhup Kunwar*(1). Two of the learned Judges (STANLEY C.J. and BLAIR J.) were of the opinion that in a proceeding under section 476 of the Code of Criminal Procedure arising out of a civil suit the Court had no jurisdiction to revise under section 439 of that Code, but the third learned Judge (BANERJI J.) was of the contrary opinion. BANERJI J. considered that as section 439 gave the High Court the right in "any proceeding" to exercise the powers conferred on a Court of Appeal the section must be deemed to apply to a proceeding in a Civil Court as well as to a proceeding in a Criminal Court. He refused to read section 439 in conjunction with section 435. I do not consider that section 439 can be read alone, but, even when read alone, I consider that there is strong indication that it has reference only to criminal proceedings as I have already pointed out.

The practice of the Lahore High Court has been to treat revision petitions as falling within section 439 of the Code of Criminal Procedure irrespective of whether the order under revision was passed by a Civil, Criminal or Revenue Court and in *Dhanpat Rai* v. *Balak Ram*(2) a Full Bench decided that the practice should not be departed from.

I have said enough to indicate that there has been a great divergence of opinion on the question, but, so far as this Court is concerned, it is at present governed by the decision in *King Emperor* v. *Karri Venkanna*

(1) (1903) I.L.R. 26 All. 249 (F.B.). (2) (1931) I.L.R. 13 Lah. 342 (F.B.).

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Patrudu(1) and this Bench has no power to reverse that decision. Nor do I think it should do so, even if it had the power. As I have indicated, section 439 only applies to cases which come before the Criminal Courts within the meaning of the Code of Criminal Procedure. In my opinion a Civil Court does not cease to be a Civil Court when it is considering an application made to it under section 476, and if for the purposes of that application it remains a Civil Court it must be governed by the provisions of the Code of Civil Procedure and not by those of the Code of Criminal Procedure. The fact that an appeal from an order passed on an application when it has been dealt with by a Civil Court lies to an Appellate Civil Court emphasizes the civil character of the Court dealing with the application. In the wording of the relevant sections of the Code of Criminal Procedure I can find no justification for regarding the Court as being anything but a Civil Court. The position is not a satisfactory one because an application for revision arising out of proceedings in a civil suit must be dealt with on a different basis from a similar application arising out of criminal proceedings, but it is a situation which the Court cannot remedy, but only regret. It is a situation which the Legislature alone can deal with and I trust that in the near future action will be taken.

I hold that the petitions now before the Court should be numbered as civil revision petitions and dealt with on that basis.

KING J.

KING J.—I agree.

KRISHNASWAMI AYYANGAR J.

KRISHNASWAMI AYYANGAR J.—I entirely agree, but inasmuch as it has been suggested in *Dhanpat*

(1) (1916) 31 M.L.J. 440 (F.B.).

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Rai v. *Balak Ram*(1) *per* TEK CHAND J. that the reasons given by BANERJI J. in his dissenting judgment in *In the matter of the Petition of Bhup Kunwar*(2) have not been met, I desire to add a few words. So far as that judgment relied on the practice which then obtained in the Allahabad High Court, it is enough to say that the practice here has been different. In fact it appears that whichever view found acceptance at the hands of the learned Judges who have had to consider the point, it was the result to a large extent of the practice prevalent in the particular Court which was also no doubt sought to be supported by a consideration of the language of the statute. To my mind, the dominant consideration however appears to have been furnished in almost every one of the decided cases by the existing practice of the Court concerned. It will not altogether be out of place for me to examine the correctness of the opposite view, in so far as it has been sought to be supported by what has been called the wider language employed in section 439 as compared with section 435. The suggestion is that, whereas the power to call for records is restricted by section 435 to the proceedings *of an inferior Criminal Court alone*, such a restriction does not find place in section 439 which confers the power of revision on the High Court. That power is given it is said in the case of *any* proceeding, not necessarily the proceeding of an inferior Criminal Court, the record of which has been called for by the High Court, or which has been reported for its orders, or which otherwise comes to its knowledge. In other words, the argument is that while the High Court's power to call for records is a limited power under section 435, limited, it is said, to the proceedings of an inferior Criminal Court, the

(1) (1931) I.L.R. 13 Lah. 342 (F.B.). (2) (1903) I.L.R. 26 All. 249 (F.B.)

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opening words "In the case of *any* proceedings" in section 439 standing unqualified by any such limitation implies a larger power, that is, a power to revise the proceedings of all subordinate Courts civil as well as criminal. I am not however satisfied that there is any substance in this argument. It will be seen on examination that the whole chapter in which these two sections occur is concerned with the subject of reference and revision and regulates the relative procedure to be followed with respect to the proceedings of inferior Criminal Courts only. All the sections in this chapter, except three, namely, sections 439, 440 and 442, refer expressly to subordinate criminal Courts. The two latter sections are purely procedural, relating respectively to the right of audience and the necessity for certification of the order passed on revision to the subordinate Court concerned. If we leave them out of account, section 439 would, if the argument were sound, remain the solitary exception in a chapter which, but for this exception, is concerned purely with the orders of Criminal Courts; and I am naturally disinclined to adopt such a construction unless the language is sufficiently express for the purpose.

Section 439 posits a situation in which the records have been called for under section 435, or a report received under section 438, or a proceeding of a subordinate Court *otherwise* brought to the knowledge of the High Court. By these three modes or any of them information has to reach the High Court before it can proceed to exercise its powers of revision. Plainly here a multiplicity of channels of information is alone contemplated and not a multiplicity in the nature or character of the information itself on which the High Court is to act. The records of an *inferior Criminal*

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Court alone can be called for under section 435. The report under section 438 can again only be in respect of the proceedings of such a Court. Logically it would seem that it must be the proceedings of a similar Court but coming *otherwise* to its knowledge that the High Court is empowered by section 439 to revise. In other words, the section postulates an identity in the nature and character of the proceedings subjected to its revision though there may be a variety in the means of information. The words "or otherwise" occur in sections 436, 437 and 438 in connection with "any records," "any case," and "any proceeding" respectively, and in these contexts it is impossible to imagine Courts other than inferior Criminal Courts being intended. I am constrained to hold, on a comprehensive consideration of the object and scope of the chapter and of the wording of the sections themselves taken as a whole and not in isolation, that there is no support for the opposite construction.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

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

1940, March 4

VATTIPALLE ESWARIAH (APPELLANT—THIRD DEFENDANT), APPELLANT,

v.

VATTIPALLE RAMESWARAYYA AND SEVEN OTHERS (RESPONDENTS—PLAINTIFF AND DEFENDANTS 1, 2 AND 4 TO 8), RESPONDENTS.*

Civil Procedure Code (V of 1908), *O. XLI, rr.* 11 *and* 12—*Admission of appeal—As a whole and not in part only.*

Under the terms of Order XLI, rules 11 and 12, of the Code of Civil Procedure, there are only two courses open to a Court in dealing with an appeal, namely, to dismiss or admit the appeal as a whole. It cannot direct that the appeal be admitted in part only.

Case-law reviewed.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Cuddapah in Appeal Suit No. 17 of 1935 preferred against the decree of the Court of the District Munsif of Nandalur in Original Suit No. 410 of 1930.

V. S. Narasimhachar for appellant.—The second appeal is against a partition decree and relates to a number of items of property. At the time of its admission GENTLE J. allowed the appeal to be admitted in respect of one item only. I submit the order restricting the admission of the appeal in respect of a particular item only is erroneous and is *ultra vires*. Once an appeal is admitted the entire appeal is before the Court. The Bench finally hearing the appeal is not bound by any restrictions made at the time of admitting it. The terms of Order XLI, rules 11, 12 and 16, of the Civil Procedure Code are opposed to any such restrictions being imposed.

* Second Appeal No. 921 of 1936.

ESWARIAH v. RAMESWARAYYA.

Under Order XLI, rules 11 and 12, an appeal must be admitted or rejected as a whole. There is no provision to admit or dismiss an appeal in part. In *Lukhi Narain Serowji* v. *Sri Ram Chandra Bhuiya*(1) it was held that an order confining the hearing of an appeal to some only of the grounds mentioned in the memorandum of appeal was not valid and binding. This decision was approved and followed in *Nafar Sheikh* v. *Emperor*(2) in regard to an appeal under section 422 of the Criminal Procedure Code and the same principle was held to apply. These two decisions were followed by this Court in *Nagalingam Chetty* v. *Pichu Chetty*.* The decision in *Lukhi Narain Serowji* v. *Sri Ram Chandra Bhuiya*(1) was reaffirmed in *Janaki Nath Hore* v. *Prabhasini Dasee*(3). These decisions of the Calcutta High Court were cited with approval by the Bombay High Court in *Krishnaji Shrinivas* v. *Madhusa Appansa*(4), but the Full Bench in that case went further and held that where an appeal involved questions which were severable it could be dismissed in part by an express order to that effect and be admitted in regard to the rest. This view is not justified by the terms of Order XLI, rules 11 and 12, of the Civil Procedure Code and it may give rise to difficulties in drafting the order. The Patna High Court does not agree with the Bombay view; see *Rekha Thakur* v. *Ramnandan Rai*(5). WADSWORTH J., however, seems to follow in *Pyuda Suryanarayanamurthy* v. *Vuppuloori Kamayya Sastry*† the view of the Bombay High Court. In any case, GENTLE J. has not expressly dismissed any portion of the present appeal.

Ch. Raghava Rao for third respondent—Properly construed, the order of GENTLE J. amounts to a dismissal of the appeal in part. The view of the Bombay High Court is correct. The terms of Order XLI, rules 11 and 12, of the Civil Procedure Code do not preclude the dismissal of an appeal in part. A decree may be composite in character and consist of several separable and separate subject-matter. In an appeal against such a decree there is nothing to prevent a Court from admitting some portions of the appeal and dismissing others. It has been held under clause 15 of

* Second Appeal No. 2198 of 1912.
† Second Appeal No. 1141 of 1934.
(1) (1911) 15 C.W.N. 921. (2) (1913) I.L.R. 41 Cal. 406.
(3) (1915) I.L.R. 43 Cal. 178. (4) (1933) I.L.R. 58 Bom. 406 (F.B.).
(5) (1935) I.L.R. 15 Pat. 96.

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the Letters Patent of the Madras High Court that if leave to appeal is granted on some points the appeal must be confined to those points only; see *Bulliraju* v. *Satyanarayanamurti*(1).

[LEACH C.J.—The terms of clause 15 of the Letters Patent are different from those of Order XLI, rules 11 and 12, of the Civil Procedure Code. As the rules stand at present we think that admission or dismissal of an appeal in part is not justified.]

[Counsel then argued on the merits in respect of all the items included in the memorandum of appeal.]

N. Appu Rao for first respondent.

Other respondents were not represented.

JUDGMENT.

LEACH C.J.

LEACH C.J.—This second appeal has been placed before this Full Bench as it raises the important question whether the Court in dealing with an appeal under Order XLI, rule 11, of the Code of Civil Procedure, can direct that it be admitted in part only. The appeal arises out of a suit filed in the Court of the District Munsif of Nandalur for the partition of seventy-two items of property held in common by eight people. The first respondent in the appeal was the plaintiff. A decree for partition was granted by the District Munsif who gave his decision on the claims of the parties to the various items of property. The appellant and the third respondent appealed to the Subordinate Judge of Cuddapah. The Subordinate Judge set aside the allotments of the District Munsif and made fresh allotments. The appellant was dissatisfied with the Subordinate Judge's decision in so far as it related to items Nos. 29, 30, 31, 33, 37 and 38 of the properties and he filed the present appeal which was placed before GENTLE J. on the question of admission. The learned Judge passed an order admitting the appeal only in respect of item No. 30.

(1) (1929) I.L.R. 53 Mad. 405, 416.

ESWARIAH v. RAMESWARAYYA.

LEACH C.J.

In my opinion the learned Judge erred in admitting the appeal only in part. As he considered that there was a question which called for an answer he had no discretion in the matter in view of the wording of Order XLI, rules 11 and 12 (1).

Rule 11 says :

" (1) The appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred."

Rule 12 (1) is in these words :

" Unless the appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal."

By virtue of rule 11 the appellate Court may dismiss the appeal without serving notice on the respondent but if it does not dismiss the appeal summarily it must, by virtue of rule 12 (1), fix a day for hearing "the appeal". There is nothing in either rule which suggests that the Court may admit the appeal in part.

This question has been raised before in this Court and also in the Calcutta, Bombay and Patna High Courts. It was raised apparently for the first time in the Calcutta High Court. In *Lukhi Narain Serowji* v. *Sri Ram Chandra Bhuiya*(1) a Bench of that Court held that it was not competent for a Court of Appeal to restrict the appeal to some specified grounds. Once the appeal is admitted all points in the memorandum

(1) (1911) 15 C.W.N. 921.

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are open to the appellant. This decision was affirmed in *Janaki Nath Hore* v. *Prabhasini Dasee*(1).

A Full Bench of the Bombay High Court considered the matter in *Krishnaji Shrinivas v. Madhusa Appansa*(2). The Court expressed agreement with the view of the Calcutta High Court in *Lukhi Narain Serowji* v. *Sri Ram Chandra Bhuiya*(3) and in *Janaki Nath Hore* v. *Prabhasini Dasee*(1) that it was not open to a Judge to admit an appeal and at the same time to restrict the grounds on which it was to be heard, but it was of the opinion that, if the appeal involved questions which were severable, the Judge could dismiss the appeal in part and admit it in part under Order XLI, rule 11, "just as at the final hearing, the Court may dismiss the appeal in part and allow it in part." There is nothing in Order XLI which permits of severance and therefore I do not share this opinion. It may be desirable to provide for such a course but as the question has to be decided on the present wording of Order XLI, in my judgment there are only two courses open to the Court, namely, to dismiss or admit the appeal as a whole.

In *Rekha Thakur* v. *Ramnandan Rai*(4) the Patna High Court saw no objection, if at the time when the appeal is admitted the Court is informed that the appeal will be confined to certain specified grounds only and that the other grounds are abandoned or if it is conceded on behalf of the appellant that grounds other than those specified are not fit to be urged in appeal, to the Court making a note of the fact. Making a note of the fact is quite a different thing from passing a substantive order. Relying on the Calcutta cases

(1) (1915) I.L.R. 43 Cal. 178.
(2) (1933) I.L.R. 58 Bom. 406 (F.B.).
(3) (1911) 15 C.W.N. 921.
(4) (1935) I.L.R. 15 Pat. 96.

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the Patna High Court held that an appeal cannot be admitted on a limited ground.

There are two decisions of this Court but neither has been reported. The first decision is *Nagalingam Chetty* v. *Pichu Chetty* *. There, SESHAGIRI IYER and KUMARASWAMI SASTRI JJ. followed the decision in *Lukhi Narain Serowji* v. *Sri Ram Chandra Bhuiya*(1). It was pointed out that the direction to the appellant to confine his arguments to particular points while placing him at a disadvantage was calculated to interfere with the prerogative of the Bench hearing the appeal and on principle the Court thought that the restriction was unsustainable. The second case is *Pyuda Surya Narayanamurty* v. *Vuppuloori Kamayya Sastri* † which was decided by WADSWORTH J. The learned Judge appears to have accepted the Bombay opinion that an appeal can be dismissed in part provided that there is an express order of dismissal in part. I have indicated that in my opinion this view is not justified by the terms of Order XLI, rules 11 and 12.

I hold that the appellant is not confined in his appeal to the question raised with regard to item No. 30 but is at liberty to challenge the decree on all the grounds mentioned in his memorandum of appeal.

The Subordinate Judge has omitted to deal with item No. 30 and it is agreed that the appellant is entitled to a one-third share in this piece of property and the first respondent to a one-sixth share The appeal, however, fails in respect of the other items. The appellant has omitted to print the whole of the record and from the parts of the record which

* Second Appeal No. 2198 of 1912.

(1) (1911) 15 C.W.N. 921. † Second Appeal No. 1141 of 1934.

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he has printed he is unable to show that the Subordinate Judge erred in not giving him a greater share in those items. The first respondent has filed a memorandum of objections in respect of items Nos. 32, 34 and 47, but this must also be dismissed as the printed record does not provide material for supporting the objections. The result is that the decree of the Subordinate Court will be modified by granting the appellant a one-third share in item No. 30 and the first respondent a one-sixth share in it. The value of item No. 30 is only Rs. 2–4–0. The appellant has substantially failed and must therefore pay the costs of the third respondent. There will be no order as to costs on the memorandum of objections.

MOCKETT J.—I agree.

KRISHNASWAMI AYYANGAR J.—I agree.

N.S.

APPELLATE CIVIL—FULL BENCH.

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

1940, February 23.

CHIKKANNA CHETTIAR *alias* V. S. NANJAPPA CHETTIAR (PETITIONER-APPELLANT), PETITIONER,

v.

V. S. PERUMAL CHETTIAR AND ANOTHER (RESPONDENTS), RESPONDENTS.*

Land Acquisition Act (I of 1894), *ss.* 3 (*d*) *and* 30—*Reference under sec.* 30 *to Subordinate Judge—Decision appealable.*

An appeal lies from the decision of a Subordinate Judge appointed by the Provincial Government under section 3 (*d*)

* Civil Revision Petition No. 729 of 1938.

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of the Land Acquisition Act, 1894, to decide a dispute referred by a Collector under section 30 of the Act. The Subordinate Judge so appointed to decide a dispute with regard to the allocation of compensation money is a civil Court and proceedings before him are governed by the provisions of the Code of Civil Procedure.

Secretary of State for India v. *Chellikani Rama Rao*(1), applied and followed.

The decision of the Subordinate Judge is a decree. The interpretation of the judgment of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*(2) given by the Full Bench in *Rajagopala Chettiar* v. *H.R.E. Board, Madras*(3) is no longer authoritative in view of the judgment of the Privy Council in *Bhagwati* v. *Ram Kali*(4).

Krishnamoorthi Ayyar v. *Special Deputy Collector of Land Acquisition, Kumbakonam*(5), overruled.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of Salem in Appeal Suit No. 20 of 1935 preferred against the decree in Land Acquisition Case No. 3 of 1931 on the file of the Court of the Subordinate Judge of Salem.

T. M. Krishnaswami Ayyar for first respondent.—There is a preliminary objection to the maintainability of the revision petition. The petitioner conceded in the lower Court that his appeal before it was not competent by reason of the decision in *Krishnamoorthi Ayyar* v. *Special Deputy Collector of Land Acquisition, Kumbakonam*(5) and the appeal was accordingly dismissed. In the circumstances it cannot be said that there has been any failure on the part of the lower Court to exercise jurisdiction. No question of error of jurisdiction is involved in the lower Court's order. The revision petition consequently does not lie.

D. Ramaswami Ayyangar for petitioner.—The appeal was filed at a time when the decision in *Krishnamoorthi Ayyar* v. *Special Deputy Collector of Land Acquisition, Kumbakonam*(5)

(1) (1916) I.L.R. 39 Mad. 617 (P.C.).
(2) (1922) I.L.R. 45 Mad. 320 (P.C.).
(3) (1933) I.L.R. 57 Mad. 271 (F.B.).
4 I.L.R. [1939] All. 460 (P.C.). (5) (1935) I.L.R. 59 Mad. 554.

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had not come. By the time of the hearing of the appeal the decision had been published and the concession was made because the correctness of that decision was not open to dispute in the lower Court. I submit the decision is erroneous and is liable to be reconsidered by this Court. The question involved is one of jurisdiction and relates to the maintainability of an appeal against the decision of a Subordinate Judge on a reference under section 30 of the Land Acquisition Act. Moreover, no objection to the competency of the revision petition was raised before PATANJALI SASTRI J. before whom the petition came for hearing in the first instance.

[LEACH C.J.—We should like to hear the petition on the merits.]

The petitioner and the two respondents who are brothers, each claimed the compensation amount awarded in a land acquisition case. The Subordinate Judge of Salem to whom reference had been made under section 30 of the Land Acquisition Act decided that the first respondent was entitled to the amount. The petitioner thereupon filed an appeal in the District Court of Salem which held that the appeal was incompetent. The revision petition is filed against the order dismissing the appeal. The decision of the Subordinate Judge under section 30 is a decree; see *Ramachandra Rao* v. *Ramachandra Rao*(1). In that case it was held that the decision of the High Court on appeal from the decision of the District Court on a matter relating to the apportionment of the compensation amount was a decree and operated as *res judicata* in a later litigation. The decision being a decree there is a right of appeal conferred by section 96 of the Civil Procedure Code. Under section 13 of the Madras Civil Courts Act the appeal lies to the District Court in this case. The decision in *Mahalinga Kudumban* v. *Theetharappa Mudaliar*(2) is directly in point and it was there held that an appeal lay to the District Court against the decision of a Subordinate Judge on a reference under section 30 of the Land Acquisition Act. So also the decision in *Venkatareddi* v. *Adinarayana Rao*(3). This decision was followed in *Appaswami Vanniyan* v. *Velu Vaidyan**. A different note was however struck in *Bagavathi*

(1) (1922) I.L.R. 45 Mad. 320 (P.C.).
(2) (1928) 56 M.L.J. 387. (3) (1928) I.L.R. 52 Mad. 142.
* (1934) 40 L.W. 37 (Short Notes.)

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Doss Bavaji v. *Sarangaraja Iyengar*(1). That was a case which arose in the City of Madras and the decision was that of the Chief Judge of the Court of Small Causes, Madras. Section 96 of the Civil Procedure Code does not apply to the decision of the Chief Judge of the Presidency Small Cause Court and there is no other provision of law which provides an appeal to the High Court from the decision of that Judge. The decision in *Bagavathi Doss Bavaji* v. *Sarangaraja Iyengar*(1) may be justified on this ground. But even in that decision it was recognized that the Chief Judge was acting as a Court and not as a *persona designata* and that his decision under section 30 of the Land Acquisition Act amounted to a decree. That decision was purported to be followed in *Krishnamoorthi Ayyar* v. *Special Deputy Collector of Land Acquisition, Kumbakonam*(2). This case arose under section 49 of the Land Acquisition Act. It was held that the Subordinate Judge acted as a special Court in deciding a case under that section and that his decision was not appealable. The learned Judges appear to make a distinction between the District Court which is the principal Court of civil jurisdiction and the special judicial officer appointed by the Provincial Government to perform the functions of the Court under section 3 (*d*) of the Act. There is no justification for making such a distinction. To hold that the same adjudication if made by the District Court is appealable but not so appealable when made by a Subordinate Judge is anamolous. It is not correct to state that a Subordinate Judge empowered to act as a Land Acquisition Court is a special Court constituted under the Land Acquisition Act. The notification of the Government constituting Courts of Subordinate Judges as land acquisition Courts is contained in Civil Rules of Practice, Vol. I, page 235, under the heading Jurisdiction of Civil Courts. A Subordinate Judge acts as an ordinary civil Court in deciding land acquisition cases. In the absence of special provisions to the contrary, proceedings in such cases are subject to the same incidents as ordinary proceedings in civil Courts ; see *National Telephone Company, Limited* v. *Postmaster-General*(3) and *Secretary of State for India* v. *Chellikani Rama Rao*(4).

(1) (1931) I.L.R. 54 Mad. 722. (2) (1935) I.L.R. 59 Mad. 554.
(3) [1913] A.C. 546. (4) (1916) I.L.R. 39 Mad. 617 (P.C.).

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Moreover, section 53 of the Land Acquisition Act expressly makes the provisions of the Civil Procedure Code applicable to land acquisition proceedings and the provisions of the Civil Procedure Code relating to appeals from original decrees are specially made applicable by the opening words of section 54 of that Act. Reading section 96 of the Civil Procedure Code together with section 13 of the Madras Civil Courts Act (II of 1873), the appeal to the lower Court in this case is maintainable. The latest decision of KING J. in *Raja of Sivaganga* v. *Karuppiah*(1) is in my favour.

T. M. Krishnaswami Ayyar for first respondent.—The attempt to justify an appeal under section 96 of the Civil Procedure Code is not sustainable. "Decree" has a special meaning under the Civil Procedure Code. It is defined in section 2, clause 2, of the Code. It is an adjudication in a suit and a suit is a proceeding which is commenced by a plaint. Proceedings not so commenced by plaints are not suits and decisions therein are not decrees within the meaning of the Civil Procedure Code. In such cases there is no right of appeal under the Civil Procedure Code unless it is specially conferred by the statute. The decision in *Rajagopala Chettiar* v. *H.R.E. Board, Madras*(2) is conclusive on the point. The Privy Council decision in *Ramachandra Rao* v. *Ramachandra Rao*(3) was considered and interpreted in that case. The distinction between the definition of decree in the Civil Procedure Code of 1882 and in the Code of 1908 was pointed out and it was held that decisions in proceedings other than suits were not decrees. That interpretation is correct and binding on this Court. That decision was followed in *Chelapathi Rao Naidu* v. *H.R.E. Board, Madras*(4). The learned Judges did not consider that the Full Bench decision required reconsideration.

D. Ramaswami Ayyangar intervening.—The decision in *Ramachandra Rao* v. *Ramachandra Rao*(3) has been considered and reaffirmed by the Privy Council in a recent decision in *Bhagwati* v. *Ram Kali*(5). The case arose under the Civil Procedure Code of 1908 and their Lordships say that not only the decision of the High Court on appeal but the decision of the District Court in land acquisition cases

(1) (1938) 49 L.W. 238. (2) (1933) I.L.R. 57 Mad. 271 (F.B.).
(3) (1922) I.L.R. 45 Mad. 320 (P.C.).
(4) I.L.R. [1937] Mad. 189. (5) I.L.R. [1939] All. 460 (P.C.).

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determining disputes relating to title to the compensation amount is a decree. The reasoning in *Rajagopala Chettiar* v. *H.R.E. Board, Madras*(1) based upon the difference in the definition of decree between the Code of 1882 and of 1908 is no longer tenable.

T. M. Krishnaswami Ayyar continuing.—The decision in *Bhagwati* v. *Ram Kali*(2) presents no difficulty. The Judicial Committee were dealing in that case with the applicability of the principle of *res judicata*. Their Lordships were not concerned with the definition of decree under the Civil Procedure Code. The term "decree" is used by their Lordships in contradistinction with the term "award" and no more. The question whether there is any right of appeal in such cases was not before them and has not been considered by them. The Civil Procedure Code makes a distinction between decrees and orders in the matter of appeal. Orders in proceedings other than suits are not decrees and there is no right of appeal in such cases; see *Minakshi* v. *Subramanya*(3) and *Balakrishna Udayar* v. *Vasudeva Ayyar*(4).

[KRISHNASWAMI AYYANGAR J.—These cases arose under the Religious Endowments Act (XX of 1863) and do not relate to questions of title to property. The Privy Council held in *Ramachandra Rao* v. *Ramachandra Rao*(5) that adjudications on disputes to title to property are decrees. There are, further, no provisions in that Act similar to sections 53 and 54 of the Land Acquisition Act.]

The distinction between suits and proceedings is pointed out in *Hansraj Gupta* v. *Official Liquidators of Dehra Dun, etc. Company*(6) and that between decrees and orders in *Ahmed Musaji Saleji* v *Hashim Ebhrahim Saleji*(7).

[KRISHNASWAMI AYYANGAR J.—These decisions do not hold that there must be a suit in order that there may be a decree.]

A decree under the Civil Procedure Code corresponds to a judgment under the English law. It is a decision obtained in an action; see *Onslow* v. *Commissioners of Inland Revenue*(8) and *Tata Iron and Steel Company, Limited* v. *Chief Revenue*

(1) (1933) I.L.R. 57 Mad. 271 (F.B.). (2) I.L.R. [1939] All. 460 (P.C.).
(3) (1887) I.L.R. 11 Mad. 26 (P.C.). (4) (1917) I.L.R. 40 Mad. 793 (P.C.).
(5) (1922) I.L.R. 45 Mad. 320 (P.C.).
(6) (1932) I.L.R. 54 All., 1067, 1074 (P.C.).
(7) (1915) I.L.R. 42 Cal. 914, 924 (P.C.). (8) (1890) 25 Q.B.D. 465.

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authority of Bombay(1). Even in a case where an order is treated as a decree it was held that no appeal lies against the order; see *Perumal* v. *Kondal*(2).

[LEACH C.J.—It will be unfortunate if there is no right of appeal in cases where title to property is adjudicated. Our inclinations are to allow, if we could, such a right. We should however be bound by the decision in *Rajagopala Chettiar* v. *H.R.E. Board, Madras*(3) but for the decision in *Bhagwati* v. *Ram Kali*(4). This decision leaves no room for doubt.]

Even if the decision of the Subordinate Judge is construed as a decree, he is a special judicial officer appointed under the Land Acquisition Act and that Act does not provide for an appeal against an order like the one in the present case. Under section 53 of that Act not all the provisions of the Civil Procedure Code are made applicable to land acquisition cases. It is only such provisions that are not inconsistent with the provisions of the Land Acquisition Act that are made applicable. Section 54 of the Act is the only provision for appeals and there being no other provision the general provisions of the Civil Procedure Code cannot be invoked; see *Rangoon Botatoung Company, Ld.* v. *The Collector, Rangoon*(5). Nor does section 13 of the Madras Civil Courts Act provide for an appeal in such a case. There is no reference to land acquisition Courts in that Act.

Second respondent was *ex parte*.

Cur. adv. vult.

JUDGMENT.

LEACH C.J.

LEACH C.J.—This revision petition raises the question whether an appeal lies from the decision of a Subordinate Judge appointed by the Provincial Government under section 3 (*d*) of the Land Acquisition Act, 1894, to decide a dispute referred by the Collector under section 30 of the Act. That section empowers the Collector to refer to "the Court" a dispute as to the apportionment of the amount of

(1) (1923) I.L.R. 47 Bom. 724 (P.C.). (2) I.L.R. [1939] Mad. 213.
(3) (1933) I.L.R. 57 Mad. 271 (F.B.). (4) I.L.R. [1939] All. 460 (P.C.).
(5) (1912) I.L.R. 40 Cal. 21 (P.C.).

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compensation settled under section 11 or as to the persons to whom the compensation is payable. Section 3 (*d*) defines the word "Court" as meaning a principal civil Court of original jurisdiction, unless the Provincial Government has appointed (as it is empowered to do) a special judicial officer to perform the functions of the Court. In this case the Government of Madras appointed the Subordinate Judge of Salem to perform the functions of the Court under the Act. The petitioner was dissatisfied with the decision of the Subordinate Judge and filed an appeal to the District Judge of Salem, but the District Judge dismissed the appeal on the ground that it was incompetent by reason of the decision of this Court in *Krishnamoorthi Ayyar* v. *Special Deputy Collector of Land Acquisition, Kumbakonam*(1). The petitioner conceded that this was the effect of the decision, but he contends that it does not correctly state the law. He says that the judgments of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*(2) and *Bhagwati* v. *Ram Kali*(3) leave no doubt that an appeal does lie.

Before proceeding to examine the authorities which have been quoted to us in the course of the arguments I will refer to other provisions of the Land Acquisition Act which have bearing on the question under discussion. Section 18 says that any person who has not accepted an award may require the Collector to refer the matter for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the person to whom it is payable, or the apportionment of the compensation among the persons interested. Therefore a person

(1) (1935) I.L.R. 59 Mad. 554.
(2) (1922) I.L.R. 45 Mad. 320 (P.C.).
(3) I.L.R. [1939] All. 460 (P.C.).

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interested can require the Collector to refer a dispute as to the apportionment to the Court, just as the Collector may refer it on his own initiative under the provisions of section 30. As the result of the decision of the Privy Council in *Rangoon Botatoung Company, Ld.* v. *The Collector, Rangoon*(1) section 26 of the Act was amended, and it is now provided that an award made under section 18 shall be deemed to be a decree and the statement of the grounds of the award a judgment within the meaning of section 2, clause 2, and section 2, clause 9, respectively, of the Code of Civil Procedure, 1908. The effect of this amendment is to bring the award within the purview of section 54. Section 31 says that on making an award under section 11 (which relates to the inquiry into the area of the land, the compensation payable for it and the apportionment of the compensation) the Collector shall pay the compensation awarded by him to the persons entitled thereto, unless prevented by one or more of the following contingencies :—(i) If they shall not consent to receive it, or (ii) if there be no person competent to alienate the land, or (iii) if there be any dispute as to the title to receive the compensation or as to the apportionment of it. In such circumstances the Collector shall deposit the amount of the compensation in the Court to which a reference under section 18 would be submitted. Section 53 says that save in so far as they may be inconsistent with anything contained in the Act the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under the Act. Section 54 reads as follows :—

"Subject to the provisions of the Code of Civil Procedure, 1908, applicable to appeals from original decrees, and

(1) (1912) I.L.R. 40 Cal. 21 (P.C.).

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notwithstanding anything to the contrary in any enactment for the time being in force, an appeal shall lie only in any proceedings under this Act to the High Court from the award, or from any part of the award, of the Court and from any decree of the High Court passed on such appeal as aforesaid an appeal shall lie to His Majesty in Council subject to the provisions contained in section 110 of the Code of Civil Procedure, 1908, and in Order XLV thereof."

The petitioner says that a judicial officer appointed under section 3 (*d*) constitutes a Court and that by virtue of the provisions of section 53 and of the saving words "subject to the provisions of the Code of Civil Procedure, 1908, applicable to appeals from original decrees" which precede the restrictive provisions of section 54 there is a right of appeal.

In *Ramachandra Rao* v. *Ramachandra Rao*(1) a dispute arose as to the apportionment of compensation awarded by the Collector. This dispute was decided by the District Court of Tanjore and resulted in an appeal to this Court. In a subsequent suit the title to the land with which the acquisition proceedings were concerned was again disputed and it was this suit which gave rise to the appeal to the Judicial Committee. The area in the subsequent suit was larger than the area with which the acquisition proceedings were concerned, but this did not affect the question of title. The Judicial Committee held that the decision of this Court on appeal from the District Court's order of apportionment operated as *res judicata*. It was argued that the decision of this Court in the proceedings arising out of the land acquisition case could not be regarded as a decree, but their Lordships said that how the proceedings were commenced was a matter which was not material provided that they were instituted in the manner that gave the Court jurisdiction "for

(1) (1922) I.L.R. 45 Mad. 320 (P.C.).

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they ended in a decree made by the High Court and appealable to this Board." The Board in effect held that the decision of the District Judge amounted to a decree and that the decision of this Court was a decree appealable to the Board. As the proceedings had resulted in a decree which had decided the question raised in the subsequent suit the decree operated as *res judicata*. The ground of the decision was stated in these words:

"Such dispute (the dispute regarding apportionment) forms no part of the award and it would indeed be strange if a controversy between two people as to the nature of their respective interests in a piece of land should enjoy certain rights of appeal, which would be wholly taken away when the piece of land was represented by a sum of money paid into Court."

In *Bhagwati* v. *Ram Kali*(1) the Privy Council considered the judgment in *Ramachandra Rao* v. *Ramachandra Rao*(2) and reaffirmed it. Delivering the judgment of the Board, Lord PORTER said:

"In order successfully to establish a plea of *res judicata* or estoppel by record it is necessary to show that in a previous case a Court having jurisdiction to try the question came to a decision necessarily and substantially involving the determination of the matter in issue in the later case.

It was at one time a matter of doubt in India whether the determination of a Court to which a matter has been referred by the Collector under section 18 of the Land Acquisition Act was such a decision. That doubt was resolved by the judgment of this Board in *Ramachandra Rao* v. *Ramachandra Rao*(2) which decided that where a dispute as to the title to receive the compensation has been referred to the Court, a decree thereon not appealed from renders the question of title *res judicata* in a suit between the parties to the dispute. In that case some question arose as to whether any appeal lay to His Majesty in Council in a case where the determination of the Judge ended in an award and not in a decree.

(1) I.L.R. [1939] All. 460, 470 (P.C.).
(2) (1922) I.L.R. 45 Mad. 320 (P.C.).

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The Board took the view that where the matter referred was not the adequacy of the amount of compensation awarded, but a dispute between the persons claiming compensation, involving, it may be, difficult questions of title, the resultant decision was not an award but a decree."

It will now be convenient to refer to the other authorities which have been referred to in argument. In *Mahalinga Kudumban* v. *Theetharappa Mudaliar*(1) DEVADOSS and JACKSON JJ. held that an order passed by a Subordinate Judge on a reference under section 30 of the Land Acquisition Act was a decree within the meaning of section 2, clause 2, of the Code of Civil Procedure and an appeal lay from it under section 96 of the Code, which provides that an appeal shall lie from every decree passed by a Court exercising original jurisdiction to the Court authorized to hear appeals. Section 13 of the Madras Civil Courts Act, 1873, says that regular or special appeals shall, when such appeals are allowed by law, lie from the decrees and orders of a District Court to the High Court and that appeals from the decrees and orders of Subordinate Judges and District Munsifs shall, when such appeals are allowed by law, lie to the District Court, except when the amount or value of the subject-matter of the suit exceeds Rs. 5,000 in which case the appeal shall lie to the High Court. In *Mahalinga Kudumban* v. *Theetharappa Mudaliar*(1) the Court considered the decisions of the Privy Council in *Rangoon Botatoung Company, Ld.* v. *The Collector, Rangoon*(2) and *Ramachandra Rao* v. *Ramachandra Rao*(3). The Land Acquisition Act was similarly interpreted by RAMESAM and VENKATASUBBA RAO JJ. in *Venkatareddi* v. *Adinarayana Rao*(4) which also had reference to an order of a Subordinate Judge under

(1) (1928) 56 M.L.J. 387. (2) (1912) I.L.R. 40 Cal. 21 (P.C.).
(3) (1922) I.L.R. 45 Mad. 320 (P.C.). (4) (1928) I.L.R. 52 Mad. 142.

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section 30. VARADACHARIAR and BURN JJ. followed *Venkatareddi* v. *Adinarayana Rao*(1) in *Appaswami Vannian* v. *Velu Vaidyan.**

There are three decisions of this Court which are in conflict with those I have just mentioned, namely, *Bagavathi Doss Bavaji* v. *Sarangaraja Iyengar*(2), *Rajagopala Chettiar* v. *H.R.E. Board, Madras*(3) and *Krishnamoorthi Ayyar* v. *Special Deputy Collector of Land Acquisition, Kumbakonam*(4). In the first of these cases WALLACE and STONE JJ. held that where the Chief Judge of the Court of Small Causes, Madras, had been appointed the special judicial officer under section 3 (*d*) of the Land Acquisition Act, he did not constitute a "principal civil Court of original jurisdiction," within the meaning of that section, but was a special Court having its own statutory status which did not follow the status of the Court ordinarily presided over by the person who happened to be appointed as its Judge. What the learned Judges here evidently had in mind was that the special judicial officer was the Chief Judge of the Court of Small Causes, a Court governed by a special Act of the Legislature which gives no right of appeal to another Court. An appeal from the decision of a single Judge lies to a Bench of Judges of the Court of Small Causes and the High Court has only powers of revision. It is not necessary to pause to consider whether the judgment in that case is open to question as different considerations apply from those which apply in the present case.

Rajagopala Chettiar v. *H.R.E. Board, Madras*(3) was decided by a Full Bench consisting of MADHAVAN NAIR,

(1) (1928) I.L.R. 52 Mad. 142. * (1934) 40 L.W. 37 (Short Notes).
(2) (1931) I.L.R. 54 Mad. 722. (3) (1933) I.L.R. 57 Mad 271 (F.B.).
(4) (1935) I.L.R. 59 Mad. 554.

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JACKSON and LAKSHMANA RAO JJ. and the case had reference to the question whether there was an appeal to the High Court, either under the Madras Hindu Religious Endowments Act, 1926, or under the Code of Civil Procedure, from an order passed by the District Judge under section 84 (2) of the Madras Hindu Religious Endowments Act. The provisions of that Act have nothing really in common with the provisions of the Land Acquisition Act, but in *Rajagopala Chettiar* v. *H.R.E. Board, Madras*(1) the effect of the judgment of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*(2) was discussed at length, and the respondent places great reliance on the observations made by MADHAVAN NAIR J. as they are to the effect that the Privy Council was only considering whether the order of this Court on appeal constituted a decree within the meaning of the Code of Civil Procedure of 1882. Under the Code of 1882 the word "decree" was defined as "the formal expression of an adjudication upon any right claimed, or defence set up, in a civil Court when such adjudication so far as regards the Court expressing it, decides the suit or appeal." The words "or appeal" have been omitted from the present Code and the Full Bench considered that the presence of these words made all the difference. If the Court had to decide the present petition in the light of the interpretation of *Ramachandra Rao* v. *Ramachandra Rao*(2) in *Rajagopala Chettiar* v. *H.R.E. Board, Madras*(1), we should be bound to hold that an appeal does not lie in a case like the present one. But the matter does not rest there, because in *Bhagwati* v. *Ram Kali*(3) the Privy Council considered its decision in *Ramachandra Rao* v. *Ramachandra Rao*(2) in a

(1) (1933) I.L.R. 57 Mad. 271 (F.B.). (2) (1922) I.L.R. 45 Mad. 320 (P.C.).
(3) I.L.R. [1939] All. 460 (P.C.).

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case which arose after the Code of 1908 came into force, and it has reaffirmed it. *Krishnamoorthi Ayyar* v. *Special Deputy Collector of Land Acquisition, Kumbakonam*(1) was decided by MADHAVAN NAIR and STONE JJ. and the same view of the effect of the decision in *Ramachandra Rao* v. *Ramachandra Rao*(2) was taken. The fact that this opinion was expressed in a case relating to the decision of a special judicial officer appointed under section 3 (*d*) of the Land Acquisition Act led to the conclusion of the Court below that it was binding in the present case.

The latest decision of this Court is that of KING J. in *Raja of Sivaganga* v. *Karuppiah*(3) and was decided after the District Judge had dismissed the petitioner's appeal. This was a reference to the Subordinate Judge under section 30 of the Land Acquisition Act relating to a dispute between a zamindar and a number of ryots with regard to the distribution of compensation awarded in respect of land which had been acquired. My learned brother KING J. considered that the case was governed by the decision of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*(2) and held that an appeal lay, an opinion which I share, although had it not been for the decision of the Privy Council in *Bhagwati* v. *Ram Kali*(4), I should have felt constrained to hold that the interpretation of *Ramachandra Rao* v. *Ramachandra Rao*(2) by the Full Bench in *Rajagopala Chettiar* v. *H.R.E. Board, Madras*(5) was binding on us.

In my opinion all controversy is set at rest by the judgment of the Privy Council in *Bhagwati* v. *Ram Kali*(4). The opinion expressed in *Ramachandra Rao*

(1) (1935) I.L.R. 59 Mad. 554. (2) (1922) I.L.R. 45 Mad. 320 (P.C.).
(3) (1938) 49 L.W. 238. (4) I.L.R. [1939] All. 460 (P.C.).
(5) (1933) I.L.R. 57 Mad. 271 (F.B.).

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v. *Ramachandra Rao*(1) was there re-affirmed, notwithstanding the alteration made by the present Code in the definition of the word "decree". In the light of the recent pronouncement of the Privy Council *Ramachandra Rao* v. *Ramachandra Rao*(1) must be taken to decide that an order, not merely the order on appeal, but an order determining a reference under section 18 or under section 30—it is admitted that there is no difference in principle between the two sections—is to be regarded as a decree and not as an award. It follows that the interpretation of *Ramachandra Rao* v. *Ramachandra Rao*(1) given by the Full Bench in *Rajagopala Chettiar* v. *H.R.E. Board, Madras*(2) can no longer be regarded as being authoritative.

It has been conceded by Mr. T. M. Krishnaswami Ayyar on behalf of the respondent that a judicial officer appointed under section 3 (*d*) cannot be regarded as a *persona designata* and that he constitutes a civil Court. But he says that it is a special Court, not one of ordinary civil jurisdiction, and therefore a right of appeal must be given by the Act under which the Court is constituted or by some other express provision. That the judicial officer who is appointed by the Provincial Government to take the place of the District Judge constitutes a civil Court was recognized in *Krishnamoorthi Ayyar* v. *Special Deputy Collector of Land Acquisition, Kumbakonam*(3). In *National Telephone Company, Limited* v. *Postmaster-General*(4) Lord SHAW of Dunfermline pointed out that in the general case when a Court of Record becomes possessed, by force of agreement and statute, of a reference to it of differences between parties, the whole of the statutory

(1) (1922) I.L.R. 45 Mad. 320 (P.C.).
(2) (1933) I.L.R. 57 Mad. 271 (F.B.).
(3) (1935) I.L.R. 59 Mad. 554.
(4) (1913) A.C. 546.

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consequences of procedure before such a Court ensue. The Subordinate Judge who is appointed under section 3 (*d*) of the Land Acquisition Act to decide a dispute with regard to the allocation of compensation money does not constitute a Court of Record, but admittedly he does constitute a civil Court and on the strength of the decision in the *National Telephone Company's* case(1) it might reasonably be argued that the proceedings before him are governed by the provisions of the Code of Civil Procedure. Support for this argument is to be obtained from the judgment of the Privy Council in *Secretary of State for India* v. *Chellikani Rama Rao*(2). There a claimant whose claim was rejected by the forest settlement officer appealed to the District Court under the Madras Forest Act, 1882, which makes no provision for a second appeal and consequently it was contended that there was no right of further appeal. Their Lordships refused to accept this contention, holding that when proceedings of this character reach the District Court that Court is appealed to as one of the ordinary Courts of the country with regard to whose procedure, orders and decrees the ordinary rules of the Code of Civil Procedure apply. It is not going much further to say that the same principle applies when an Act like the Land Acquisition Act provides for reference of a dispute to the District Court and gives the Provincial Government power to substitute for the District Judge another judicial officer who admittedly decides the dispute as a civil Court. The argument that there is here a right of appeal is made all the stronger by the provisions of sections 53 and 54 of the Act. Any controversy, however, is settled by the decisions of the Privy Council

(1) [1913] A.C. 546.
(2 (1916) I.L.R. 39 Mad. 617 (P.C.).

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in *Ramachandra Rao* v. *Ramachandra Rao*(1) and *Bhagwati* v. *Ram Kali*(2).

I would allow this petition and remit the case to the District Judge with the direction that he shall hear and decide the petitioner's appeal in accordance with law. The petitioner is entitled to his costs.

KING J.—I agree.

KRISHNASWAMI AYYANGAR J.—I agree.

N.S.

APPELLATE CIVIL.

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

1940, February 29.

MADINA BIBI SAHIBA (FIRST DEFENDANT), APPELLANT,

v.

THE ISMAIL DURGA ASSOCIATION THROUGH ITS PRESENT SECRETARY HAJI MOHAMMAD MOULANA SAHIB AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Civil Procedure Code (V of 1908), O. XXI, r. 63—Suit under, for declaring alienation by judgment-debtor as in fraud of creditors—Transfer of Property Act (IV of 1882), sec. 53, governed by—Suit maintainable in representative capacity only—Civil Procedure Code, O. I, r. 8, to be complied with.

A suit under Order XXI, rule 63, Civil Procedure Code, by an attaching decree-holder for setting aside a claim order and for a declaration that an alienation by the judgment-debtor was made in fraud of creditors "nominally and colourably" is governed by section 53 of the Transfer of Property

(1) (1922) I.L.R. 45 Mad. 320 (P.C.).
(2) I.L.R. [1939] All. 460 (P.C.).
* Appeal No. 188 of 1937.

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Act, 1882. Such a suit can be maintained only if it is brought in a representative capacity on behalf of all the creditors and the requirements of Order I, rule 8, Civil Procedure Code, are complied with. There is nothing in section 53 of the Transfer of Property Act incompatible with Order XXI, rule 63, of the Code of Civil Procedure.

APPEAL against the decree of the Court of the Subordinate Judge of Madura in Original Suit No. 31 of 1936.

M. S. Venkatarama Ayyar for *K. V. Srinivasa Ayyar* for appellant.

K. Bhashyam and *V. Minakshisundaram* for first respondent.

Second respondent was not represented.

JUDGMENT.

LEACH C.J.

LEACH C.J.—The appellant is the wife of the second respondent. In 1931 the respondent association obtained two money decrees against the second respondent for an aggregate sum of Rs. 894. In 1934, in execution of these decrees the association attached five houses in Madura as property belonging to the judgment-debtor. The appellant objected to the attachment and her objection was successful. The appellant claimed title to the houses and other properties under a deed of sale executed in her favour by her husband on 16th September 1932. As the result of the removal of the attachment the association filed in the Court of the Subordinate Judge of Madura the suit out of which this appeal arises for a declaration that the deed of sale was executed in fraud of creditors "nominally and colourably". In the meantime the second respondent had been adjudicated an insolvent and permission of the Official Receiver was sought and granted for the institution of the suit. The association, however, did not apply

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for an order under the provisions of Order I, rule 8, of the Code of Civil Procedure permitting it to sue on behalf of all the creditors and in spite of objection proceeded with the suit for its own benefit and not for the benefit of the creditors generally. The association based its claim for the relief on two grounds. In the first place it is said that the transaction was a sham and, in the second place, that the transfer was a fraudulent transaction entered into with a view to defeat and delay the creditors. The alleged consideration for the sale deed was a sum of Rs. 10,000. The Subordinate Judge held that the transaction was not a nominal one as the appellant had given consideration to the extent of Rs. 8,000, but he considered that the transaction constituted a fraud on the creditors as the properties were worth Rs. 18,000. In accordance with this finding he granted the association a declaration that the sale deed was invalid being a fraud on the creditors, and directed that it be annulled. He also vacated the order passed in favour of the appellant in the execution proceedings, but allowed her to rank as a creditor of her husband to the extent of the Rs. 8,000 which she had paid.

The appellant has persisted in her contention that the suit as framed did not lie and she disputes the finding of the Subordinate Judge that the transaction was a fraud on the creditors. If her first contention is sound, it will not be necessary for the Court to consider the merits of the case. The appellant says that it was incumbent upon the association to sue on behalf of itself and all the other creditors of the second respondent and relies on the provisions of section 53 of the Transfer of Property Act. That section says that every transfer of immoveable property, made with intent to defeat or delay the creditors

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of the transferor, shall be voidable at the option of any creditor so defeated or delayed. By the Transfer of Property (Amendment) Act, 1929, the following provision was added to the section :—

> "A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors."

The appellant says that, as this provision has not been complied with, the suit must fail. On the other hand the association says that Order XXI, rule 63, of the Code of Civil Procedure gives to a decree-holder whose attachment has been disallowed the right to have the question decided by suit and the rule must be read entirely independent of the provisions of section 53 of the Transfer of Property Act.

The suit clearly falls within the purview of section 53 of the Transfer of Property Act. It is not a suit merely for a declaration that the transaction is a bogus one but a suit in which the association also seeks to have the transaction set aside on the footing that it is a fraud on the creditors. The association accepts this and does not challenge the finding of the Subordinate Judge that consideration passed from the wife to the husband to the extent of Rs. 8,000. As the suit admittedly falls within section 53, it can only be maintained if the association has obtained the permission of the Court under Order I, rule 8, of the Code of Civil Procedure to sue on behalf of all the creditors. The words "on behalf of, or for the benefit of, all the creditors" in section 53 of the Transfer of Property Act are taken from Order I, rule 8, of the Code of Civil Procedure, which provides

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that where there are numerous persons having the same interest in one suit, one or more of them may, with the permission of the Court, sue or be sued, or defend on behalf of or for the benefit of all persons interested. If a suit has to be brought in a representative capacity, it can only be maintained when it has been instituted in compliance with the provisions of this rule. This was laid down by the Privy Council in *Kumaravelu Chettiar* v. *Ramaswami Ayyar*(1).

Before section 53 of the Transfer of Property Act was amended, there was a conflict in India on the question whether a decree-holder, who was compelled to file a suit as the result of a successful objection to the attachment, was compelled to sue on behalf of himself and all the other creditors. This Court was of opinion that it was not necessary for him to sue in a representative capacity; see *Pokker* v. *Kunhamad*(2) and *Ramaswami Chettiar* v. *Mallappa Reddiar*(3). The decision in the latter case was that of a Full Bench. The Calcutta and the Bombay High Courts were of the opinion that it was necessary for the plaintiff to sue in a representative capacity; see *Hakim Lal* v. *Mooshahar Sahu*(4). The decisions of this Court and that of the Calcutta High Court arose out of suits which followed unsuccessful proceedings in execution. The Bombay cases are *Burjorji Dorabji Patel* v. *Dhunbai*(5) and *Ishvar Timappa* v. *Devar Venkappa*(6). These cases did not arise directly out of execution proceedings, but the Court indicated that a suit of the nature of the present one should be brought in a representative capacity. seems to me that the amendment of section 53

(1) (1933) I.L.R. 56 Mad. 657 (F.C.).
(2) (1918) I.L.R. 42 Mad. 143.
(3) (1920) I.L.R. 43 Mad. 760 (F.B.).
(4) (1907) I.L.R. 34 Cal. 999.
(5) (1891) I.L.R. 16 Bom. 1.
(6) (1902) I.L.R. 27 Bom. 146.

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of the Transfer of Property Act, by the insertion of the provision that a suit instituted by a creditor shall be instituted on behalf of, or for the benefit of, all the creditors, must have been intended to put an end to this controversy. The words in brackets, "which term includes a decree-holder whether he has or has not applied for execution of his decree", which follow the word "creditor" in the section, in my opinion, make this clear. If this is the case the association is clearly out of Court.

But even if the question had to be decided on the reading of section 53, without taking into consideration what has gone before, it would still be difficult to accept the association's argument. As the suit admittedly is one of the nature contemplated by section 53 of the Transfer of Property Act, surely the provisions of that section must be applied, especially as there is nothing in the section incompatible with Order XXI, rule 63, of the Code of Civil Procedure. Section 53 does not take away from the disappointed decree-holder the right to sue. His right to sue is left unaffected. All the section says is that he must sue on behalf of all the creditors, not for himself alone, and this implies no hardship. If the suit is successful and the judgment-debtor has not become insolvent, he has still the right to attach the property. If the judgment-debtor has become insolvent, then the right to attach is gone entirely and the decree-holder can only look to the insolvency Court for payment. The requirement of section 53 saves the filing of unnecessary suits and saves the judgment-debtor from being harassed by other creditors. I hold that it was necessary for the association to sue in a representative capacity and that, not having done so, the suit

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must fail. The same view of the law has been taken by the Calcutta High Court in *Ekkari Ghose* v. *Sidheswar Ghose*(1) and by the Rangoon High Court in *A. K. A. C. T. V. Chettiar* v. *R. M. A. R. S. Firm*(2), *Maung Tun Thein* v. *Maung Sin*(3) and *Asgar Ali* v. *C. V. R. M. Firm*(4).

Mr. Bhashyam has asked that the association be allowed to amend the plaint and turn the suit into a representative one. In support of this application Mr. Bhashyam has pointed to the fact that before the suit was instituted the association had obtained leave from the Official Receiver and the leave was conditional on the association depositing in Court to the credit of the insolvent's estate any amount realized by him as the result of the suit. Mr. Bhashyam has also pointed out that the declaration asked for was a declaration that the disputed transaction was a fraud on the creditors. If the failure to sue in a representative capacity was the result of oversight, the Court might have been disposed in these circumstances to allow the amendment, but that is not the case. The appellant in her written statement raised this very question and an issue was framed on it. The association preferred to contest the validity of the appellant's averment and succeeded in the argument before the Subordinate Judge. Having gone to trial on this issue, it is now far too late in the day for the association to ask for leave to amend. It would be opposed to principle and accepted authority to allow the amendment. The course which the association should have adopted when the question was raised was to apply to the Court for permission

(1) (1935) 62 C.L.J. 548.
(2) (1934) I.L.R. 12 Ran. 666.
(3) (1934) I.L.R. 12 Ran. 670.
(4) (1935) I.L.R. 14 Ran. 81.

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to sue on behalf of all the creditors. This the association did not do and it has only itself to blame for the failure of the suit.

The appeal will be allowed with costs in this Court and below.

KRISHNASWAMI AYYANGAR J.—I agree.

N.S.

APPELLATE CIVIL.

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

1939, December 12.

REDDI KRISHNAN NAIDU AND THREE OTHERS (RESPONDENTS), APPELLANTS,

v.

CHINTALA SOMI NAIDU AND THREE OTHERS (APPELLANTS AND RESPONDENTS 5 AND 6), RESPONDENTS.*

Hindu Law—Debt—Suit against father and sons—Sons exonerated and dismissed from suit—Decree against father alone—Executable against son's interests in joint family property, if.

A decree obtained against a Hindu father after his sons who were impleaded in the suit had been exonerated and dismissed therefrom, can be executed against the sons' interests in the joint-family property. The decision of the Privy Council in *Raja Ram* v. *Raja Bakhsh Singh*(1) has not overruled in any way the decision of the Full Bench in *Periasami Mudaliar* v. *Seetharama Chettiar*(2).

APPEAL under clause 15 of the Letters Patent from the Judgment of KING J., dated 28th October 1938 and passed in Appeal Against Appellate Order No. 39

* Letters Patent Appeals Nos. 97 and 98 of 1938.
(1) (1937) I.L.R. 13 Luck. 61 (P.C.). (2) (1903) I.L.R. 27 Mad. 243 (F.B.).

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of 1936 preferred against the order of the Court of the Subordinate Judge of Vizagapatam, dated 21st August 1935 and made in Appeal Suit No. 181 of 1935 (Appeal Suit No. 283 of 1935, District Court, Vizagapatam) preferred against the order of the Court of the District Munsif of Parvatipur, dated 3rd September 1934 and made in Execution Application No. 611 of 1934 in Execution Petition No. 754 of 1933 in Original Suit No. 52 of 1931 and Appeal under clause 15 of the Letters Patent from the Judgment of KING J., dated 28th October 1938 and made in Appeal Against Appellate Order No. 40 of 1936 preferred against the order of the Court of the Subordinate Judge of Vizagapatam, dated 21st August 1935 and made in Appeal Suit No. 180 of 1935 (Appeal Suit No. 282 of 1934, District Court, Vizagapatam) preferred against the order of the Court of the District Munsif of Parvatipur, dated 3rd September 1934 and made in Execution Application No. 599 of 1934 in Execution Petition No. 754 of 1933 in Original Suit No. 52 of 1931.

V. Govindarajachari for appellants.

D. Narasaraju for *Y. Suryanarayana* for respondents 1 and 2.

Other respondents were not represented.

The JUDGMENT of the Court was delivered by

LEACH C.J.

LEACH C.J.—These two appeals arise out of the same suit and they can be disposed of here in one judgment. The appellants obtained a money decree against the third respondent in the Court of the District Munsif of Parvatipur. The appellants made the third respondent's sons parties to the suit and they are respondents 1, 2 and 4. The suit was on a promissory note executed by the father alone. The sons were joined as defendants on the ground that the debt was incurred for family necessities. The District Munsif dismissed

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the suit, as he was not satisfied that the promissory note was genuine, but on appeal to the District Judge a decree was passed against the father. In the District Court the appellants decided not to ask for a decree against the sons who were dismissed from the suit. In due course the appellants instituted execution proceedings and asked for the attachment and sale of the sons' interests in the family property. The sons objected on the ground that as they had been dismissed from the suit they could not be held liable for their father's debt. The District Munsif upheld their objection, but on appeal the Subordinate Judge held that they could be held liable in execution proceedings. The sons then appealed to this Court. The appeal was heard by KING J. who allowed it, but granted leave to appeal under clause 15 of the Letters Patent.

The Subordinate Judge found that there was no intention on the part of the appellants in allowing the sons to be dismissed from the suit to exonerate them altogether. KING J. reversed the Subordinate Judge's decision because he considered that the authorities which support the Subordinate Judge's decision had in effect been overruled by the decision of the Privy Council in *Raja Ram* v. *Raja Bakhsh Singh*(1). The appellants contend that the learned Judge has misconceived the effect of this decision. They say that it has not in any way altered the law as stated in the decisions of this Court.

It is not necessary to examine all the judgments of this Court which have a bearing on the question; it is sufficient to refer to the Full Bench decision in *Periasami Mudaliar* v. *Seetharama Chettiar*(2) and

(1) (1937) I.L.R. 13 Luck. 61 (P.C.). (2) (1903) I.L.R. 27 Mad. 243 (F.B.).

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to *Periaswami* v. *Vaidhilingam Pillai*(1) and *Doraiswami* v. *Nagasami*(2) which were decided by Division Benches. In *Periasami Mudaliar* v. *Seetharama Chettiar*(3) BENSON, BHASHYAM AYYANGAR and RUSSEL JJ. held that, independently of the debt arising from the original transaction entered into by a father, a decree passed against him in respect of the transaction by its own force creates a debt as against him, which his sons are under the Hindu law under an obligation to discharge, unless they can show that the debt is illegal or immoral. BHASHYAM AYYANGAR J. said :

"But I can see no reason why a suit could not be brought against the son to recover a debt of record due by the father, which debt the father was under an obligation to discharge, quite independently of the cause of action or the alleged original debt on which the suit had been brought against him. . . The whole of the joint family property in the hands of the son must be held liable to satisfy the debt imposed upon the father by the judgment as a solemn debt of record, quite independently of the original cause of action or alleged debt on which the suit against the father had been brought ".

In *Periaswami* v. *Vaidhilingam Pillai*(1) VARADACHARIAR and PANDRANG ROW JJ. considered a case in which the suit was filed against the father and his sons but before judgment was passed the suit was withdrawn as against the sons. The question was whether the sons were liable inasmuch as the debt was a debt binding upon them under the rule of Hindu law. The learned Judges held that the withdrawal of the suit as against the sons did not exonerate them. The result of the withdrawal was not to bring into operation the rule of *res judicata* embodied in section 11 of the Code of Civil Procedure, but only to entail the statutory penalty enacted in Order XXIII, rule 1,

(1) (1937) 47 L.W. 60. (2) A.I.R. 1929 Mad. 898.
(3) (1903) I.L.R. 27 Mad. 243 (F.B.).

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which was that no fresh suit could be instituted against the sons on the same cause of action. Therefore it could not be said that what had happened in the suit amounted to an adjudication that the sons were not liable in respect of the decree debt. *Doraiswami* v. *Nagasami*(1) was decided by COUTTS TROTTER C.J. and PAKENHAM WALSH J. who also held that a decree passed against a father personally after the sons had been exonerated could be executed against the sons' interests in the family property in respect of a decree debt passed against the father.

The facts in *Raja Ram* v. *Raja Bakhsh Singh*(2) on which KING J. based his decisions were these. After the death of a Hindu the sons and grandsons were made defendants in a suit filed by a creditor of the deceased to recover the amount of the debt from their interest in the family properties. Before judgment the grandsons were dismissed from the suit, but it was sought to realise their interests in the property in execution proceedings. The Privy Council held that they were not liable inasmuch as they had been dismissed from the suit. The question of their liability was directly raised and as they had been dismissed from the suit they could not be made liable under the decree passed in it. That case differs from the case now before us in that there the suit was brought against the grandsons after the death of the grandfather against whom no decree had been obtained. The dismissal of the grandsons from the suit amounted to a decision in their favour of the question of their liability. That is not the position here. A decree was passed against the father after the sons had been dismissed from the suit, and the passing of the decree gave to the decree-holders a new right which they could enforce against

(1) A.I.R. 1929 Mad. 898. (2) (1937) I.L.R. 13 Luck. 61 (P.C.).

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the sons. We do not consider that *Raja Ram* v. *Raja Bakhsh Singh*(1) had overruled the decision of the Full Bench in *Periasami Mudaliar* v. *Seetharama Chettiar*(2). In our opinion the decision of the Full Bench remains unaffected and a decree-holder in circumstances like we have here, may proceed to execute the decree against the sons' interests in the family property.

The appeals will be allowed with costs in this Court and in the second appeals but the Advocate's fee will be allowed only in Appeal No. 97 of 1938 of this Court and in the corresponding second appeal. The result is that the decrees of the Subordinate Judge will be restored.

N.S.

APPELLATE CIVIL.

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

1939, December 12.

WILFRID HAZELL SELL (PETITIONER), APPELLANT.*

Indian Succession Act (XXXIX of 1925), ss. 228, 241 and 291—Principal obtaining probate of will in England—Agent applying in India for letters of administration with copy of will annexed—Grant in favour of, without security under sec. 241.

Under section 241 of the Indian Succession Act letters of administration with a copy of the will annexed could be granted without security in favour of an agent who applies on behalf of his principal who had obtained probate of the will in England.

APPEAL from the order of SOMAYYA J., dated 14th day of September 1939, and made in the exercise of

(1) (1937) I.L.R. 13 Luck. 61 (P.C.). (2) (1903) I.L.R. 27 Mad. 243 (F.B.).

* Original Side Appeal No. 51 of 1939.

W. H. SELL, *In re.*

the Original Testamentary Jurisdiction of the High Court in Original Petition No. 164 of 1939.

O. T. G. Nambiar for appellant.

Advocate-General (*Sir A. Krishnaswami Ayyar*), *Government Solicitor* (*H. M. Small*) and *K. S. Rajagopalachari* amicus curiæ.

JUDGMENT.

LEACH C.J.

LEACH C.J.—This is an appeal from an order of SOMAYYA J. directing that letters of administration to the estate of one Edward Carmichael McCankie be issued to the appellant on the furnishing of security under section 291 of the Indian Succession Act. The appellant contends that the learned Judge should have held that he was entitled to letters of administration with a copy of the will annexed under section 241 of the Act, in which case he could not be called upon to furnish security. The deceased died in Littlehampton, England, leaving a will, dated 21st February 1936. Probate of the will was obtained in England. The testator appointed Mrs. Madeline Emily Hawkins his executrix. The executrix was not able to come to India to take out letters of administration and she granted a power of attorney to the appellant to enable him to apply as her agent. Since the Succession Act of 1865 it has been the practice of this Court to grant letters of administration with a copy of the will annexed in cases such as this without requiring security to be furnished. The Court is informed that the same practice has prevailed in the Calcutta and Bombay High Courts. The learned Judge considered that the practice was in conflict with the wording of section 241 and he refused to follow it. He held that the appropriate section was section 228 which meant that security would have to be furnished.

W. H. SELL, *In re.*

LEACH C.J.

Section 228 says that, when a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the province, whether within or beyond the limits of His Majesty's Dominions and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of the authenticated copy of the will annexed. Section 228 is in Chapter I of Part IX of the Act. This chapter contains general provisions with regard to the grant of probate and letters of administration. Section 241 falls in Chapter II which deals with limited grants. This section says that, when an executor is absent from the province in which the application is made and there is no executor within the province willing to act, letters of administration with the will annexed may be granted to the attorney or agent of the absent executor, for the use and benefit of his principal, limited until he obtains probate or gets a grant of letters of administration to himself. In addition to the assistance rendered by the learned Advocate for the appellant the Court has had the assistance of the learned Advocate-General. It has been accepted by Counsel that, unless the executrix in England can avail herself of the provisions of section 241, she must come out to India and apply herself for letters of administration, there being no other section which can be read as permitting of an application being made by an agent in such a case as this. Sections 242 and 243 allow applications by agents but they do not apply here. Section 242 relates to the case where the person to whom, if present, letters of administration with the will annexed might be granted is absent from the province, and section 243 to an application for letters of administration on intestacy.

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LEACH C.J.

I do not think that it could have been the intention of the Legislature to compel an executor living abroad to come to this country to take out letters of administration personally when he has obtained probate of the will in his own country. It might be impossible for him to come to India and then the estate here would have to remain unadministered. Although it has never before been called upon to give a judicial pronouncement on the question, this Court, in common with the other Presidency High Courts, has, as I have already indicated, read section 241 as covering an application for letters of administration with a copy of the will annexed when the original cannot be produced because it is held by a Court abroad as the result of that Court having granted probate. The question was raised in the Calcutta High Court in 1875 and it was decided that section 212 of the Succession Act of 1865, which is the same as section 241 of the present Act, did apply in a case like the present one. The Calcutta case is *In the goods of Leckie*(1). There, a British subject possessed of property both in India and in England died in England leaving a will by which he appointed four persons to be his executors in England and one person to be his executor in India. The English executors obtained probate in England, but the Indian executor renounced. An application was then filed in the Calcutta High Court for letters of administration with the will annexed to be granted to the attorney of the English executors. It was held that the attorney was entitled to the grant. PHEAR J. who decided the case said that it would be in accordance with the practice of the Court that letters of administration with the will annexed should be granted to the attorney of the English executors.

(1) (1875) 15 B.L.R. Appx. 8.

W. H. SELL, *In re.*

LEACH C.J.

In the course of his judgment SOMAYYA J. expressed the opinion that section 241 is intended to apply to the case where the executor is temporarily absent from the province but his return is contemplated. I do not share this opinion. I appreciate that the section might be read, as the learned Judge has read it, as applying only to the case where there is an application for letters of administration with the original will annexed, but to do so is to disregard the scheme of the Act. Inasmuch as it has been read by this Court and other High Courts for so many years in the broader sense and in a sense which avoids anomaly and hardship, I consider the Court would not be justified in insisting on the strict construction.

The learned Judge in the course of his judgment has referred to two cases ; *In the goods of William Ashton*(1) and *Deputy Commissioner of Singhbhum* v. *Jagadish Chandra Deo Dhabal Deb*(2). It has not been suggested at the Bar that the latter case has application and in my opinion it has no bearing. The former case is in point. A Bench of the Allahabad High Court there insisted on the observance of the strict letter of section 212 of the Act of 1865. The argument that the strict letter must be followed is one that cannot be lightly brushed aside, but I consider that it should not prevail in view of the fact it has been read differently for over half a century and that the broader construction is in keeping with the scheme of the Act. Consequently I would allow the appeal and direct that letters of administration be issued to the petitioner under section 241, which means without security.

KRISHNASWAMI AYYANGAR J.

KRISHNASWAMI AYYANGAR J.—I have come to the same conclusion but not without hesitation. But

(1) 1905 All W. N 251.

(2) (1921) 6 P.L.J. 411.

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KRISHNASWAMI AYYANGAR J.

for the uniform practice of this Court and of the Bombay and Calcutta High Courts I should have been inclined to agree with the opinion of SOMAYYA J. which is the same as the opinion expressed by the Allahabad High Court. I do not feel that the language of section 241 is sufficiently clear to set aside this long practice, more especially when a strict interpretation is likely to lead to this result, namely, that there would be no provision in the Act for an agent of an executor in a foreign country to apply for letters of administration in this country in circumstances similar to those present in this case.

Solicitors for appellant :—*King and Partridge.*

G.R.

APPELLATE CIVIL.

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

1939, November 22.

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

v.

V. V. R. ARUNACHALAM CHETTIAR, MANAGER OF TIRUPALATHURAI SIVA DEVASTHANAM AND ANOTHER (RESPONDENTS), RESPONDENTS.*

Hindu Religious Endowments Act, Madras (II of 1927), *sec.* 43—*Dismissal of archaka by trustee—Right of archaka to sue in Court—"Final" in sec.* 43—*Meaning of.*

An archaka of a temple dimissed from his office by the trustee has no right to challenge the correctness of the trustee's action in a Court of law. His remedy is limited by section 43 of the Madras Hindu Religious Endowments Act, 1926,

* Letters Patent Appeal No. 75 of 1938.

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to an appeal to the temple committee or to the Religious Endowments Board as the case may be.

The word "final" in section 43 of the Act has the same meaning as that attaching to it in sections 53 and 54. It means that it is final to the extent even of excluding the right of an office-holder or servant of a temple to challenge the decision in a Court of law.

APPEAL under clause 15 of the Letters Patent against the judgment of WADSWORTH J. in Second Appeal No. 381 of 1934, preferred against the decree of the Court of the Subordinate Judge of Trichinopoly in Appeal Suit No. 24 of 1933 (Original Suit No. 240 of 1928, District Munsif's Court, Kulitalai).

T. V. Muthukrishna Ayyar for appellant.

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

Second respondent was not represented.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises the question whether an archaka of a temple who has been dismissed from his office by the trustee has a right to challenge the correctness of the trustee's action in a Court of law or whether his remedy is limited by section 43 of the Madras Hindu Religious Endowments Act, 1926, to an appeal to the temple committee or to the Religious Endowments Board as the case may be.

The appellant is admittedly a hereditary archaka of the Thiruppalathurai temple in the Trichinopoly district. He is suffering from leucoderma and he was dismissed from his office by the trustee ostensibly on this ground, but it would appear from the findings of both the lower Courts that the trustee was actuated by ill-will towards the appellant. Section 43 (1) of the Act states:

"All office-holders and servants attached to a temple or in receipt of any emolument or perquisite from the temple

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shall be under the orders and control of the trustee; and the trustee may fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of lawful orders, neglect of duty, misconduct or other sufficient cause."

By sub-section 2 an office-holder or servant of a temple other than an excepted temple may appeal to the committee whose decision shall, in the case of a non-hereditary office-holder or servant, be final. By sub-section 3 a hereditary office-holder or servant of a temple other than an excepted temple may prefer an appeal to the Board against the order of the committee on appeal under sub-section (2) and the decision of the Board shall be final. The temple of which the appellant was an archaka is a non-excepted temple, but the appellant did not then appeal to the committee against his dismissal by the trustee, but instituted a suit in the Court of the District Munsif, Kulitalai, for an injunction restraining the trustee from interfering with the appellant's exercise of his office. The District Munsif held that the suit could be maintained and granted an injunction restraining the trustee from interfering with the discharge of the duties of his office. An appeal was filed in the Court of the Subordinate Judge of Trichinopoly, who held that the appellant had no right to suit, and this decision was accepted by WADSWORTH J. on second appeal.

The right of the subject to appeal to the Court to redress a simple wrong can only be taken away by statute. As VARADACHARIAR J. observed in *Kamaraja Pandiya Naicker* v. *The Secretary of State for India in Council*(1), the ordinary rule is 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

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

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such entertainment has been enacted expressly or at least by necessary implication. It is said on behalf of the trustee that the right of the appellant to have recourse to the Court is taken away by section 43. It is also said that section 73 operates as a bar to the suit.

It is not necessary to consider the arguments which have been based on the wording of section 73, because we accept the argument of the respondent that section 43 must be read as taking away the right of the appellant to file a suit. If section 43 stood alone there would be much to be said for the appellant's argument that his right to sue had not been taken away. It might be said that the word "final" in section 43 was only to be read as meaning final so far as an appeal under the Act was concerned and not as intended to shut out the jurisdiction of the Court as was said in *Valli Ammal* v. *The Corporation of Madras*(1), a case which arose under the Madras City Municipal Act of 1904. But section 43 does not stand alone, and when the scheme of the Act and the provisions of sections 53 and 54 are considered, no reasonable doubt can exist that the Legislature has used language which is intended to have the effect of ousting the jurisdiction of the Courts. The scheme of the Act is to put under the control and management of the Board matters relating to temples in this Province. Section 53 gives the temple committee, which is under the control of the Board, power to suspend, remove or dismiss the trustee of a temple. A trustee against whom action has been taken under this section may appeal to the Board, but a hereditary trustee may, in lieu of appealing to the Board, apply to the Court to modify or cancel the order of the committee. The order of the committee shall when there has been no appeal to

(1) (1912) I.L.R. 38 Mad. 41.

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the Board be final, and when an appeal is preferred or an application is made to the Court the order of the Board or of the Court shall be final. Section 54 states:

"(1) A non-hereditary trustee shall cease to hold his office, if he (*a*) is sentenced by a Court to such punishment as is described in sub-section (2) of section 26 and subject to the proviso contained therein;

(*b*) applies to be adjudicated or is adjudicated an insolvent; or

(*c*) ceases to profess the Hindu religion.

(2) A hereditary trustee shall cease to hold his office if he ceases to profess the Hindu religion.

(3) If a hereditary trustee becomes subject to any of the disqualifications described in clause (*a*) or clause (*b*) of sub-section (1), the committee may supersede him and appoint a fit person to administer the temple until the disability of the trustee ceases to exist or another trustee succeeds to the office.

(4) The Board shall, in cases of dispute or doubt, determine whether a trustee is disqualified under this section and its decision shall be final."

There can be no doubt that in a case falling under section 53 or 54 the decision of the Board ousts the jurisdiction of the Court, and unless there is something in section 43 which compels us to place a different meaning on the word "final" used in that section from the meaning attaching to it in sections 53 and 54, we must hold that it is intended to be final to the extent even of excluding the right of an office-holder or servant to challenge the decision in a Court of law. There is nothing in the wording of section 43 which gives any indication that the word "final" is used in a different sense to what it is used in sections 53 and 54. The Court will naturally be averse to closing its doors to a litigant who seeks a hearing, but where the Legislature has used language which clearly indicates its intention

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to take away the right of recourse to Court, effect must be given to the intention.

For the reasons indicated we consider that section 43 of the Act does preclude the appellant from challenging the trustee's action in a Court of law. His remedy is in an appeal to the committee and we understand that such an appeal has since been filed.

The present appeal must be dismissed with costs.

N.S.

APPELLATE CIVIL.

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

1939, November 29.

CHERUTTY *alias* VASU AND ANOTHER, MINORS BY NEXT FRIEND NANGAMPARAMBIL IMBICHUTTY (PLAINTIFFS 3 AND 4), APPELLANTS,

v.

NANGAMPARAMBIL RAVU *alias* KUTTAMAN AND EIGHT OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu law—Maintenance—Hindu coparcener, whether entitled to sue for maintenance—Suit for partition, if necessary—Unmarried daughter of coparcener, if entitled to sue manager for maintenance.

A Hindu coparcener, whether a major or a minor, who is denied maintenance by the head of the family is entitled to sue for maintenance alone: he need not sue for partition.

Observations to the contrary in the decisions of the Bombay High Court in *Himmatsing Becharsing* v. *Ganpatsing*(1), *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh*(2) and *Bhupal* v. *Tavanappa*(3), not followed.

* Letters Patent Appeal No. 98 of 1936.

(1) (1875) 12 Bom. H.C.R. 94. (2) (1877) I.L.R. 2 Bom. 346. (3) (1921) I.L.R. 46 Bom. 435.

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An unmarried daughter of a Hindu coparcener can sue the manager of the joint family for her maintenance. She is not bound to sue her father and proceed against his share only in the joint family properties.

Subbayya v. *Ananta Ramayya*(1), applied and followed.

APPEAL under Clause 15 of the Letters Patent against the Judgment of WADSWORTH J., dated 24th October 1938, and passed in Second Appeal No. 968 of 1934 preferred against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in Appeal Suit No. 176 of 1931 (Appeal Suit No. 398 of 1931, District Court) preferred against the decree of the Court of the District Munsif of Vayitri at Calicut in Original Suit No. 77 of 1930 (Original Suit No. 600 of 1929, District Munsif's Court, Calicut).

K. P. Ramakrishna Ayyar for appellants.

K. Subramaniam for first respondent.

Other respondents were not represented.

JUDGMENT.

LEACH C.J.

LEACH C.J.—This Letters Patent Appeal arises out of a suit filed in the Court of the District Munsif of Vayitri by the appellants and their parents for a decree for maintenance. The first appellant is the son and the second appellant is the daughter of one Nangamparambil Imbichutty and his wife Kalyani. Both the appellants are minors. The parents and their two children constitute one of two branches of an undivided Hindu family of which the first respondent is the manager. The respondents represent the other branch and were all made defendants. The District Munsif held that the parents of the appellants were not entitled under the Hindu law to maintain a suit for maintenance, but that the appellants were, and granted them

(1) (1928) I.L.R. 53 Mad. 84 (F.B.).

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a decree. The respondents appealed to the Subordinate Judge of South Malabar, who gave judgment in their favour. The appellants then appealed to this Court. The appeal was heard by WADSWORTH J. who concurred in the decision of the Subordinate Judge. The appellants' parents accepted the decision of the District Munsif and therefore are not parties to this appeal.

The parties are Tiyyas of South Malabar and it is common ground that the questions arising in the appeal have to be decided according to the ordinary rules of Hindu law. WADSWORTH J. was of the opinion that a major coparcener can never sue for maintenance. When maintenance is denied him his only remedy, he said, is to sue for partition. With regard to a minor coparcener the learned Judge was of the opinion that a suit for maintenance might be filed, provided that he asked in the alternative for a decree for partition. It was for the Court to decide whether the appropriate relief was a decree for maintenance or a decree for partition. The learned Judge considered that the daughter of a coparcener, like her father, can never maintain a suit for maintenance against the manager of the family. He said that her only remedy is to bring a suit against her father and claim maintenance out of his properties joint and separate. Having obtained a decree she would be in a position to sell her father's share in the joint family estate in execution proceedings.

I find myself unable to concur in any of the conclusions of the learned Judge. It is true that there are statements in the latest edition of Mayne's "Hindu Law and Usage" (Tenth Edition, page 825) and in Mulla's "Principles of Hindu Law" (Eighth Edition, page 582) which support the learned Judge in his

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opinion that a major coparcener cannot sue for maintenance, but they are based on certain observations of the Bombay High Court which appear to me to run contrary to decisions of the Privy Council. In passing I may mention that VARADACHARIAR and MOCKETT JJ. in *Subbayya Thevar* v. *Marudappa Pandian*(1) observed it was doubtful whether an adult son could maintain a suit for maintenance against his father when he could sue for partition, but they gave no reasons for the expression of doubt and presumably it was based on the Bombay cases.

Every member of an undivided Hindu family is entitled to be maintained out of the family estate. In *Rama Rao* v. *Rajah of Pittapur*(2) (known as the *second Pittapur* case) Lord DUNEDIN, in delivering the judgment of the Board, dealt with the question of the right of a coparcener to be maintained out of the common property. After pointing out that it was admitted on both sides of the Bar that in an ordinary joint family ruled by the Mitakshara law the junior members, down to the three generations from the head of the family, have a coparcenary interest accruing by birth in the ancestral property, that this coparcenary interest carries with it the inchoate right to raise an action of partition, and that until partition is *de facto* accomplished these same persons have a right to maintenance, Lord DUNEDIN went on to say:

> "It seems clear that this right is an inherent quality of the right of coparcenary, that is, of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, they have a right till they exercise their right to divide, to be maintained out of the property which is common to them who are excluded from the management, and to the head of the family, who is invested with the management."

(1) I.L.R. [1937] Mad. 42.

(2) (1918) I.L.R. 41 Mad. 778 (P.C.).

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The right to maintenance out of joint family property was dealt with again by the Privy Council in *Vellaiyappa Chetty* v. *Natarajan*(1). The question there was whether an illegitimate son of a Sudra was entitled as a member of the family to maintenance out of the joint family property in the hands of the collaterals with whom his father was joint. Sir DINSHAH MULLA in delivering the judgment of the Board pointed out

> " that the illegitimate son of a Sudra by a continuous concubine . . . 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 ; and that where the father has left no separate property and no legitimate son, but was joint with his collaterals, . . . 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."

It is here emphasized that the share of inheritance is not given in substitution of a right to maintenance. As there is a right to maintenance there must be an appropriate remedy when that right is denied. To say that the member of a joint family to whom maintenance has been denied shall cause the family to be divided and the family estate partitioned, or go without anything, is not providing an appropriate remedy for the injustice done to him. He may not want to have the family divided and it may be against his interest to have the family estate partitioned.

In view of the fact that WADSWORTH J. relied on the statements in Mayne and Mulla based on the Bombay decisions it is necessary that I should refer to them. The cases are *Himmatsing Becharsing* v. *Ganpatsing*(2), *Ramachandra Sakharam Vagh* v. *Sakharam Gopal Vagh*(3) and *Bhupal* v. *Tavanappa*(4). In *Himmatsing Becharsing* v. *Ganpatsing*(2) WESTROPP C.J.

(1) (1931) I.L.R. 55 Mad. 1 (P.C.). (2) (1875) 12 Bom. H.C.R. 94.
(3) (1877) I.L.R. 2 Bom. 346. (4) (1921) I.L.R. 46 Bom. 435.

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and KEMBALL J. held that a suit for maintenance out of the ancestral estate by a Hindu son lies against his father when the estate is impartible. The Court did not decide the question of the right of a son to maintenance when he was in a position to sue for partition. The footnote to the report, however, shows that in an earlier case WESTROPP C.J. and MELVILL J. had decided that a suit by one coparcener against the other coparceners for maintenance when the estate was impartible was unsustainable, " unless indeed he were illegitimate, deformed, or idiotic, or suffering from some other disability to inherit, in which case he would not be a parcener entitled to an equal share with the other members of the family, but only a person entitled to a maintenance." It is quite clear from this observation that the opinion of the Bombay High Court was that the right to maintenance was in lieu of a right to share in the estate, but I am not aware that this opinion has been accepted by any other High Court and it appears to me that it is opposed to the principle which the judgments of the Privy Council in the *second Pittapur* case *Rama Rao* v. *Rajah of Pittapur*(1) and in *Vellaiyappa Chetty* v. *Natarajan*(2) have established. In *Ramachandra Sakharam Vagh* v. *Sakharam Gopal Vagh*(3) PINHEY J. regretted that the judgment in *Himmatsing Becharsing* v. *Ganpatsing*(4) allowed a member of a family owning an impartible estate to sue for maintenance, but the decision in that case was eventually accepted. The case of *Bhupal* v. *Tavanappa*(5) had reference to a family owning a partible estate. The plaintiff was a minor member of the family, but his father was alive and therefore under the Hindu law as

(1) (1918) I.L.R. 41 Mad. 778. (P.C). (2) (1931) I.L.R. 55 Mad. 1. (P.C.).
(3) (1877) I.L.R. 2 Bom. 346. (4) (1875) 12 Bom. H.C.R. 94.
(5) (1921) I.L.R. 46 Bom. 435.

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administered in the Bombay Presidency he could not file a suit for partition without the consent of his father. It was held that in such circumstances he was entitled to sue for maintenance because he was in the same position as if the estate were impartible. As the Bombay decisions proceed on the basis that the right to maintenance is given in lieu of a right to share, a position which has never been accepted in this Presidency, they cannot be accepted as correctly stating the law in Madras.

If a major coparcener is entitled to sue for maintenance, and I hold that he is, the right cannot be denied to a minor coparcener and there appears to me to be no support at all for the view that if he does happen to sue for maintenance he must couple with the prayer for that relief a prayer for partition.

The statement that a daughter cannot sue the manager of the family but must proceed against her own father is also unsupported by authority. On the contrary there is the Full Bench decision of this Court in *Subbayya* v. *Ananta Ramayya*(1) which shows that she is entitled to maintain a suit for her maintenance. It was there held that the right of the daughter to her marriage expenses and maintenance was based on her right to or interest in the joint family property, and not based on the natural obligation of a father to maintain his children. The contention that the liability of the joint family during the father's lifetime was only based on the father's obligation to maintain and bear the marriage expenses of his daughters, and the obligation fell upon the joint family through him, was rejected. RAMESAM J. said:

"So far as the joint family property is concerned, the obligation is that of all the members of the family, that is,

(1) (1928) I.L.R. 53 Mad. 84. (F.B.).

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the father and the brothers, and it is not that it was originally the obligation of the father only and through him it has extended to the whole joint family."

I agree with the following observations of CHANDAVARKAR J. in *Naranbhai* v. *Ranchod*(1);

"Apart from authority, there is no reason, founded on sound principle, why a Hindu coparcener, who is excluded from the enjoyment of his joint rights, should be compelled at the instance of the other coparceners or strangers claiming under them and against his will to break up the joint family and forced to a suit for partition."

That would be the position if the judgment now under appeal were to stand. I have said sufficient to indicate that I consider the judgment to be against principle and authority and the appeal must be allowed.

The result is that the case will be remanded to the Court of the Subordinate Judge. His decision was based merely on the issue relating to the maintainability of the suit. There are other issues and these will have to be decided. On the record reaching him the Subordinate Judge will hear and dispose of according to law the appellants' appeal from the judgment of the District Munsif, but as their parents did not appeal from the judgment of the District Munsif the suit will stand dismissed so far as they are concerned. The appellants are entitled to their costs in this appeal and in the second appeal. They will also be entitled to the refund of the court-fees paid in the second appeal and in the Letters Patent appeal.

KRISHNASWAMI AYYANGAR J.

KRISHNASWAMI AYYANGAR J.—I am of the same opinion but shall add a few words on certain aspects of the question argued before us. The Judgment of WADSWORTH J. when analysed seems to be based upon two propositions: (i) that the right of a member

(1) (1901) I.L.R. 26 Bom. 141, 145.

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to maintenance out of joint family assets is only to be recognised where he has no right to enforce partition, and (ii) that the right of an unmarried minor daughter in a joint family to be maintained till marriage is enforceable only against the father and not against the joint family as a whole. The soundness of these propositions is open to question, as there seems to be nothing either in the texts or in the principles of Hindu law to lend support to either of them.

The learned Judge has referred in support of his decision to the statement of law contained in Mayne and in Mulla—see Mayne's Hindu Law and Usage (Tenth Edition, page 825) and Mulla's Hindu Law (Eighth Edition, page 582). While recognising that these statements reflect the view taken in Bombay he accepted them as equally applicable to Madras, as the proposition is found stated in general terms and no Madras authority to the contrary was cited before him. He did notice the decision of the Privy Council in the *second Pittapur* case, *Rama Rao* v. *Rajah of Pittapur*(1), which unambiguously recognises the right of a coparcener to be maintained out of the joint family property, but held however that it is the ordinary rule that a coparcener cannot claim maintenance if he is entitled to claim partition.

Of the three Bombay cases cited in support of the proposition, the first two, *Himmatsing Becharsing* v. *Ganpatsing*(2) and *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh*(3), related to a claim for maintenance by an adult son against the father. The family possessed property which was however not liable to partition, being by nature impartible. The claim

(1) (1918) I.L.R. 41 Mad. 778 (P.C.).
(2) (1875) 12 Bom. H.C.R. 94.
(3) (1877) I.L.R. 2 Bom. 346.

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was upheld. The right of a son to be maintained out of the impartible joint family estate is beyond question, and does not appear to have ever been doubted. Decisions of the highest tribunal and of this Court in *Maharaja of Venkatagiri* v. *Raja Rajeswara Rao*(1) have since authoritatively settled the point. It is plain, therefore, that no exception can be taken to the correctness of the actual decision of the Bombay High Court so far as it went.

The ratio of the decision in the first of these cases, *Himmatsing Becharsing* v. *Ganpatsing*(2), is to be found in the observation of WESTROPP C.J. that

> "no authority was cited . . . . to show that where a son could not enforce a partition with his father, he was prevented from suing the latter for maintenance."

To recognise a right, namely, the right of coparcenary but at the same time to deny a remedy for its infringement is an impossible position and this is what seems to have weighed with the Court. The learned Chief Justice expressly refrained from expressing any opinion as to the right of a son to sue for maintenance, where he might if he chose sue for partition. This he did in spite of the fact that an earlier decision to which he had himself been a party had laid it down that a member of an undivided family could not sue for maintenance, unless by reason of a personal disqualification he was not entitled to sue for partition. The opinion here expressed does seem to support the view which has found favour with WADSWORTH J. but, as I shall presently show, it is no longer tenable. *Ramachandra Sakharam Vagh* v. *Sakharam Gopal Vagh*(3) was a case in which the father was found to be in possession of impartible property, but not of any property in which the

(1) I.L.R. [1939] Mad. 622.
(2) (1875) 12 Bom. H.C.R. 94.
(3) (1877) I.L.R. 2 Bom. 346.

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son could claim a share. MELVILL J. observed that, as a general rule perhaps, a Hindu is not bound to support a grown up son, but held that the liability existed when the family estate is impartible. PINHEY J. agreed but doubted whether it is good Hindu law to say that an adult son in an undivided Hindu family, who is suffering from no disability recognised by that law, can claim a separate maintenance from his father. In the later decision of the Bombay High Court, *Bhupal* v. *Tavanappa*(1), the son sued for separate maintenance as a coparcener in a family consisting of the father, uncle, cousin and step brother and owning joint family property which was partible. He could not, however, on the view of the law as accepted in that Presidency, enforce a partition against a father when the father was joint in estate with his own ancestor or his collaterals and against his consent. The right to partition not existing, the son was held, on the principle of the earlier decisions, entitled to sue for maintenance. In all these cases the right of the son to sue for maintenance was expressly stated to arise on account of the absence of the right to partition. The larger remedy being available, the lesser relief was denied on the footing that the primary and the only true remedy for the excluded parcener was to enforce his right to partition by suit. When this remedy is cut out by reason of a personal disqualification or otherwise, the coparcenary right ordinarily inherent in every member of the family suffers a dimunition and it then finds expression in the inferior remedy of maintenance. The right to maintenance is thus to be regarded as a substitute for the lost right to a share and is in the nature of a secondary

(1) (1921) I.L.R. 46 Bom. 435.

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remedy to be granted in lieu of the primary one where it is not available. This, I think, is the rationale which underlies the decisions of the Bombay High Court. With all respect, I regret to say that such a view of a coparcener's right cannot be sustained either in principle or on authority.

It is well to remember in this connection that a right to maintenance may arise in one of three ways. First, the existence of certain specified personal relationships, independently of the possession of joint property in the person liable, may give rise to the claim. The right in this class of cases is enforceable personally against the person on whom the law casts the burden, and is based on the well-known text of Manu, that

> "the aged parents, a virtuous wife and an infant child must be maintained even by the doing of a hundred prohibited acts."

The right does not extend to remoter relations. The second and the more important ground of claim is that based not on pure relationship, but on membership in a joint family possessed of joint family property. The Privy Council has in the *second Pittapur* case, *Rama Rao* v. *Rajah of Pittapur*(1), examined the jural basis of the right in this class of cases, and declared that it is an inherent quality of the coparcenary property that it should afford the means of sustenance to all the members of the coparcenary while the family remained joint. This is clear from the following observations of their Lordships:

> "This coparcenary interest carries with it the inchoate right to raise an action for partition, and until partition is *defacto* accomplished these same persons (junior members) have a right to maintenance."

(1) (1918) I.L.R. 41 Mad. 778 (P.C.).

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The meaning of this statement is sufficiently explicit. The junior members are entitled to maintenance *until* partition out of the common property where that property is ordinary partible property. The right will cease the moment a partition takes place, for thereafter there is no common property. It will continue to subsist so long as partition does not take place, and in the case of impartible property it is incapable of being terminated. The effect of the texts on the subject is correctly stated in Mayne's Hindu Law (Tenth Edition, page 821) in the following passage:

> "The head of the undivided family is bound to maintain its members, their wives and their children; to perform their ceremonies and defray the expenses of their marriages."

Membership in the family and the existence of joint property are the only conditions to which the right is subject. The third head of claim is based on the text of Yagnyavalkya which imposes a personal disqualification by reason of some defect, such as blindness, impotency, etc. (Yagnyavalkya, ii; 140–142). The defect operates to exclude the sufferer from a share in the inheritance, but, in lieu of it, he is recognised as being entitled to maintenance. This, in my opinion, is the only class of cases in which the right to maintenance can be said to be recognised as a substitute for the right to partition with some justification, though even here the right springs from the existence of joint property subject to the burden of supporting all the members of the family whether entitled to partition or not. But even if there is no impediment to the exercise of the right to partition there can be no logical reason for compelling a member to sue for partition when the head of the family neglects to maintain him. The right of an excluded

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member to sue for joint possession without being obliged to sue for partition is recognised by Article 127 of the Indian Limitation Act. From this it is to my mind clear that partition is not to be regarded as the sole remedy. Joint possession which he can seek is in most cases indistinguishable from maintenance out of the family assets, and it is therefore difficult to maintain a distinction in principle between the two. The logic of the observations of CHANDAVARKAR J. in *Naranbhai* v. *Ranchod*(1), referred to in the judgment of my Lord, appears to my mind to be indisputable.

That the true origin of the right in the second and third classes of cases is the existence of joint property, partible or impartible, scarcely admits of doubt at the present day. It seems to me to be absolutely impossible to get away from the principle laid down by the Privy Council, which is that the right of a junior member in a joint family where the family possesses property is a right which springs from the joint property itself. When the question came to be examined by the Board in a case in *Vellaiyappa Chetty* v. *Natarajan*(2), in which the claim to maintenance was advanced by an illegitimate son of a deceased member of a joint family possessing joint family property, their Lordships used language which removes all further doubt on the point. Referring to the view taken in a decision of this Court in *Ranoji* v. *Kandoji*(3) that the share of inheritance given to the illegitimate son was merely in lieu of maintenance in the case of Sudras, their Lordships made the following observations:

> "On the consideration of the texts and the cases on the subject their Lordships are of opinion that the illegitimate son

(1) (1901) I.L.R. 26 Bom. 141. (2) (1931) I.L.R. 55 Mad. 1 (P.C.).
(3) (1885) I.L.R. 8 Mad. 557.

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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*."

(The italics are mine.)

In the Full Bench decision of this Court in *Subbayya* v. *Ananta Ramayya*(1) the basis of the right of a daughter to maintenance out of the family property was examined and it was again clearly laid down that the obligation was not personal to the father who was along with others a member of the family but that the obligation lay upon the family as a whole, that is to say, *against the family property*. The texts and the decisions were gone into and the learned Judges expressed the opinion that the right of the daughter was the surviving remnant of a larger right she once enjoyed in the joint family property.

These authorities seem to take the question beyond the region of controversy. The right of a coparcener to be maintained out of joint property is merely one of the modes in which the coparcenary right finds expression. That being so, it is not possible to agree with the view that that right is not to be exercised if there is a right to partition. There is no warrant for holding that an excluded member must either sue for partition or be content to remain without being maintained at the expense of the joint family property.

WADSWORTH J. has held that the daughter must institute a suit against the father in the first instance

(1) (1928) I.L.R. 53 Mad. 84 (F.B.).

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and pursue her remedies against his share in the joint family property. This view can be understood only on the theory that the daughter's right to maintenance is based solely on the personal obligation of the father. As I have already indicated, this theory is opposed to the decision in the Full Bench case already referred to. The personal liability of the father furnishes an additional ground of claim over and above the liability of the family property. The former alone can be said to be enforceable against the father and his separate property. The latter gives rise to a right enforceable against the joint family as a whole.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao and Mr. Justice Kunhi Raman.

1939, November 16.

THE OFFICIAL ASSIGNEE, MADRAS, REPRESENTING THE ESTATE OF S.N. FIRM, INSOLVENTS (SEVENTEENTH DEFENDANT), APPELLANT,

v.

NATESAM PILLAI (PLAINTIFF), RESPONDENT.*

Trust—Banking firm—Deposit of moneys in—Disposal of same to await instructions of depositor—Fiduciary relationship—Insolvency of banking firm before receipt of instructions—Depositor entitled to full amount and not merely for dividend—What circumstances will make deposit an ordinary transaction between banker and customer.

A person paid certain sums of money to a banking firm with instructions that the latter should retain the same pending further instructions from him. The banking firm became

* Appeal No. 90 of 1937.

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insolvents before such instructions were given. He had no prior banking transaction with the banking firm. The account books showed that the amounts were credited in anamath or suspense account to await the instructions of the person as regards their disposal. It was also found that when amounts were paid into the bank in current account or fixed deposit generally pass books and cheque books would be given and usually agreements would be entered into regarding the interest payable on the deposits.

Held that the banking firm received the sums in a fiduciary capacity and not as its customer and that, in the insolvency of the banking firm, plaintiff was entitled to recover the full amount from its assets and not merely in the shape of dividends declared by the Official Assignee from time to time.

APPEAL against the decree of the Court of the Subordinate Judge of Trichinopoly, dated 12th December 1936 and made in Original Suit No. 64 of 1935.

T. M. Krishnaswami Ayyar for *K. P. Ramakrishna Ayyar* for appellant.

B. Sitarama Rao for *A. V. Narayanaswami Ayyar* for respondent.

Cur. adv. vult.

KUNHI RAMAN J.

The JUDGMENT of the Court was delivered by KUNHI RAMAN J.—The Official Assignee of Madras who was impleaded as the seventeenth defendant in Original Suit No. 64 of 1935 on the file of the Subordinate Judge's Court of Trichinopoly is the appellant. He was brought on record as representing the estate of defendants 1 to 7 who were adjudicated insolvents in Insolvency Petition No. 345 of 1935 on 6th September 1935. They were members of a joint Hindu family which was carrying on a banking business under the name and style of S.N. Firm which suspended business on 30th April 1935. Between 25th March 1935 and 17th April 1935 the plaintiff-respondent had paid this firm a total sum of Rs. 6,950 at Trichinopoly in the following circumstances. The plaintiff had

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arranged to purchase certain lands in the village of Thiruvarambur from one S. V. Nallasivam Pillai of Tuticorin. When the plaintiff told the third defendant of this plan the latter suggested that the transaction could be arranged through the defendants' branch at Tuticorin which he said was close to Nallaperumal Pillai's shop of that place. The plaintiff's case was that the payment referred to above was made by him under an arrangement that the firm of defendants 1 to 7 should keep the total amount in trust for him until he decided how it should be disposed of. The plaintiff had no prior banking transactions with the defendants' firm. The plaintiff's case was that the amount was not deposited by him with the firm and that, when he made the payment, no relationship of banker and customer arose between him and the firm. On the other hand the defendants' firm received the amount in a fiduciary capacity. He therefore wanted to recover the full amount from the assets of the firm and not merely in the shape of dividends declared from time to time by the Official Assignee.

The claim was resisted in the Court below on the ground that the plaintiff was not entitled to any preferential treatment in respect of the total amount paid by him because it was paid by him as a deposit which was to carry interest at five annas per cent per annum in the ordinary course of the banking business of the firm. This contention of the defendants was negatived by the trial Court which has found on the evidence that the amount was paid by the plaintiff on anamath account on the understanding that the total amount should be paid back to him when he intended to go to Tuticorin or that a draft should be given to him for the total amount to be paid at Tuticorin by the defendants' branch there. The defendants suspended payment before the plaintiff had made up his mind

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as to what course he should adopt. The learned Subordinate Judge states in his judgment, and quite correctly too, that, had the plaintiff adopted the second course and had he taken a draft on the defendants' branch at Tuticorin, the position taken up by the plaintiff at the trial might have been untenable. It might then have been assumed that the transaction was an ordinary banking transaction between the plaintiff and the firm which would have relegated the plaintiff to the position of an ordinary customer of the bank who would have had to take his turn with the other customers of the bank for obtaining satisfaction. On the ground therefore that the bank held the plaintiff's money in a fiduciary capacity, as the result of which the property in the amount did not vest in the Official Assignee, the Court below has recognized the plaintiff's claim to preferential treatment along with such other persons as may be similarly situated. The plaintiff's suit has accordingly been decreed and it is against this decree that the present appeal is preferred.

The learned Advocate for the appellant contends that the money was paid to the bank to be held "at call", that is to say, to be paid back to the plaintiff whenever he demanded payment. He points out that this shows that in fact it was paid into a current account to the credit of the plaintiff and that therefore the plaintiff must be regarded as an ordinary customer of the bank and not as a person who had entrusted money to the bank to be held in a fiduciary capacity.

The learned Advocate for the respondent on the other hand stresses the fact that the plaintiff did not at any time have a banking account with the firm. The amount was paid by the plaintiff at the invitation of the third defendant. No cheque book or pass book was given to the plaintiff by the firm. No entry was made of the payment in the current account or fixed

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deposit register of the bank. The firm did not produce its fair day-book at the trial. No ledger was opened crediting the plaintiff with the amount until, at any rate, 30th April 1935, by which time the bank had already suspended payment. He therefore argues that the payment was made to the firm as bailee or agent and that consequently the view taken by the lower Court is correct.

It must be stated at the outset that the appellant's case that the amount was paid into the plaintiff's current account and that it was to carry interest at five annas per cent has not been substantiated. It seems to us that the test for ascertaining whether there was any fiduciary relationship or only the relationship of banker and customer between the parties is put succinctly in Hart on Banking, Volume 1, Fourth Edition, at page 582, where the decision in *Re : Brown ; Ex parte Plitt*(1) is considered. In that case Julius Plitt handed a cheque to Alexander Brown, a banker, with whom he had no banking account and obtained a receipt to the effect that the cheque was given for collection. Brown was adjudicated bankrupt after he had collected the amount of the cheque and before he had paid the whole of it to Plitt. The trustee claimed the balance of the proceeds of the cheque. CAVE J. observed in the course of the argument :

> "Where the debtor is to collect and remit, there is confidence and trust. Where the debtor is to use and repay on demand, there is no trust."

It was held in that case that the relation between the parties was not the ordinary relation of banker and customer. Plitt had handed the cheque to Brown,

> "for Brown to receive and hold it for him. If so, it is not the ordinary case of banker and customer".

(1) (1889) 60 L.T. Rep. N.S., 397.

In *Burdick* v. *Garrick*(1) Lord HATHERLEY L.C. says as follows :—

"I apprehend that the true rule applicable to these cases is to be found in the case of *Foley* v. *Hill*(2) where it is clearly stated by Lord COTTENHAM, who distinguishes between the confidence reposed in a factor or agent and the confidence reposed in a person who is merely in the position of banker. A mere banker who takes charge of his customer's money is not in any fiduciary relation whatever to him with respect to the particular coins or notes deposited, because it is the ordinary course of trade to make use of them for his own profit. He does make use of them and he invests money deposited with him, and his customer does not require from him those very coins or Exchequer bills which he deposited with him. But in the present case we have an agent who is intrusted with those funds, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner in the purchase of land or stock ; and which moneys the factor or agent is bound to keep totally distinct and separate from his own money ; and in no way whatever to deal with or make use of them. How a person who is intrusted with funds under such circumstance differs from one in an ordinary fiduciary position I am unable to see."

The mere fact that the plaintiff had no prior banking transaction with the defendants' firm will not of course by itself be sufficient to exclude the possibility of the plaintiff having become a customer of the bank when he paid in the amounts. This is made clear in the judgment of the Privy Council in the *Commissioners of Taxation* v. *English, Scottish and Australian Bank*(3). On page 687 occur the following sentences :

"Their Lordships are of opinion that the word 'customer' signifies a relationship in which duration is not of the essence. A person whose money has been accepted by a bank on the footing that they undertake to honour cheques up to the amount standing to his credit is, in the view of their Lordships,

(1) (1870) L.R. 5 Ch. 233, 240. (2) (1848) 2 H.L.C. 28, 35.
(3) [1920] A.C. 683, 687.

a customer of the bank in the sense of the statute, irrespective of whether his connection is of short or long standing. The contrast is not between an habitue and a newcomer, but between a person for whom the bank performs a casual service, such as for instance, cashing a cheque for a person introduced by one of their customers, and a person who has no account of his own at the bank."

See also the opinion of Lord DAVEY in *Great Western Railway* v. *London and County Banking Company*(1).

Again the mere fact that a customer gives directions to a banker to apply in a particular manner moneys standing to his credit will not necessarily make the relationship between the parties fiduciary. This was made clear in the decision reported as *Dharmambal Ammal* v. *Offl. Liq. T.N. & Q. Bank*(2) where money was invested in a bank's savings bank account and a standing order was given that out of this account payments must be made towards certain recurring chit subscriptions payable by the depositor. The scope of the decision in *Farley* v. *Turner*(3) is explained in the judgment in that case, and it was held that the depositor was a customer of the bank and not a person entitled to preferential treatment since no trust was created. The decisions of this Court reported as *The Official Assignee of Madras* v. *Rajam Ayyar*(4), *The Official Assignee of Madras* v. *Melapparangavur Sarvajana Sahaya Nidhi*(5) and *Official Assignee of Madras* v. *Smith*(6) do not lay down any principles opposed to the rulings quoted above.

The account books of the parties in the present case show that the amounts were credited in anamath or suspense account to await the instructions of the plaintiff as regards their disposal. The defendants'

(1) [1901] A.C. 414, 420. (2) 1939 M.W.N., 1063.
(3) (1857) 26 L.J. Ch., 710. (4) (1910) I.L.R., 36 Mad., 499 (F.B.).
(5) (1910) I.L.R., 34 Mad., 125. (6) (1908) I.L.R., 32 Mad., 68.

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oral evidence shows that, when amounts were paid to the bank in current account or fixed deposit, generally pass books and cheque books used to be given and usually agreements used to be entered into regarding the interest payable on the deposits. This procedure was not followed when the plaintiff's moneys were received. Applying the principles of law laid down in the authorities quoted above we hold that the amounts were received by the bank in a fiduciary capacity and not as between a bank and its customer and that consequently the view taken by the lower Court is correct. The appeal therefore fails and must be dismissed with costs payable out of the estate.

G.R.

APPELLATE CIVIL.

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

1939, December 4.

KONA ADINARAYANA (FIRST DEFENDANT), APPELLANT

v.

DRONAVALLI VENKATASUBBAYYA AND TWO OTHERS (PLAINTIFFS), RESPONDENTS.*

Specific performance—Contract for sale of land by members of joint Hindu family—Minor member attaining majority before date of suit—Suit, if maintainable by members.

In a suit by the members of a joint Hindu family for specific performance of a contract for sale of land, signed by the major members and by the managing member as guardian of the minor, the defendant contended that the suit did not lie as one of the vendors was a minor. At the time of the institution of the suit the minor member had attained majority.

* Letters Patent Appeal No. 75 of 1937.

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Held, the suit was maintainable. The plaintiff in a suit for specific performance of a contract is entitled to a decree, if at the time of the hearing he can show a good title although he had not a good title at the time of the contract.

The principle of the decisions in *Hoggart* v. *Scott*(1) and *Salisbury* v. *Hatcher*(2), applied and followed.

APPEAL preferred under clause 15 of the Letters Patent to the High Court against the decree of VENKATARAMANA RAO J. in Second Appeal No. 726 of 1935 preferred against the decree of the Court of the Subordinate Judge of Masulipatam in Appeal Suit No. 27 of 1935 (Original Suit No. 272 of 1933, District Munsif's Court, Gudivada).

P. Somasundaram for appellant.

M. S. Ramachandra Rao for *P. Satyanarayana Rao* for respondents.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The appeal arises out of a suit for specific performance of a contract for sale of land tried in the Court of the District Munsif of Gudivada. The respondents were the plaintiffs. On 4th August 1930 by a contract in writing the respondents agreed to sell three quarters of an acre of land in the Kistna District at the price Rs. 1,095. The respondents are brothers and are members of an undivided family. The third respondent was a minor at the time the contract was entered into. The contract was signed by the major brothers and by the first respondent as the manager of the family and as the guardian of the minor. The appellant went into possession immediately after the execution of the contract and admittedly he has remained in possession and has enjoyed the rents and profits ever since. The suit for specific performance was filed on 4th August 1933.

(1) (1830) 1 Russ & M. 293 ; 39 E.R. 113.
(2) (1842) 2 Y & C.C.C. 54 ; 60 R.R. 26.

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The appellant, although he was in possession and was treating the land as his own, set up the defence that the suit for specific performance would not lie as one of the vendors was a minor. His attitude in the circumstances can only be described as that of a very dishonest person. At the time of the institution of the suit the minor member of the vendor family had reached majority. The District Munsif granted the respondents a decree, but on appeal the Subordinate Judge of Masulipatam held that the major brothers alone were entitled to sue for specific performance. Accordingly, he limited the decree to two-thirds of the land on payment of two-thirds of the purchase consideration. The appellant then appealed to this Court and the first and second respondents filed a memorandum of cross objections. The appeal was heard by VENKATARAMANA RAO J. who restored the decree of the District Munsif, but gave a certificate permitting of this Letters Patent Appeal.

In holding that the respondents were entitled to maintain a suit for specific performance the learned Judge relied on the decisions in *Hoggart* v. *Scott*(1) and *Salisbury* v. *Hatcher*(2). In the first of these cases it was held that a plaintiff in a bill for the specific performance of a contract was entitled to a decree if at the time of the hearing he could shew a good title, although he had not a good title at the time of the contract. LEACH M. R. observed:

"The defendant, if he had thought fit, might have declined the contract as soon as he discovered that the plaintiffs had no title; and he was not bound to wait until they had acquired a title; but, he not having taken that course, it is enough that at the hearing a good title can be made."

(1) (1830) 1 Russ. & M. 293; 39 E.R. 113.
(2) (1842) 2 Y & C.C.C. 54; 60 R.R. 26.

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In *Salisbury* v. *Hatcher*(1) KNIGHT BRUCE V.C. said:

"In cases of specific performance the want of mutuality is a consideration generally material, but it is contrary to principle and authority to say that perfect mutuality is requisite in order to call a Court of Equity into action. There are cases in which plaintiffs have had a decree for specific performance against defendants who, when the bill was filed, were not in a condition to enforce specific performance in their own favour. Where no legal invalidity affects the contract, the enforcement of it in this Court is matter of judicial discretion."

In that case, the purchaser not having rejected the purchase as soon as he had ascertained the real interest of the vendor and the vendor later having acquired a perfect title, a decree for specific performance was passed.

As VENKATARAMANA RAO J. has pointed out, inasmuch as the appellant remained in possession of the land and did not repudiate the contract, the right to repudiate must be deemed to have been waived. There is nothing in the law of India which prevents the application of the principle applied in *Hoggart* v. *Scott*(2) and *Salisbury* v. *Hatcher*(1) and I consider that those principles have direct application here. It would indeed be regrettable if the Court could not give to the respondents the relief they asked against the injustice which they have suffered at the hands of the appellant. At no stage has he repudiated the contract but he has refused to pay the price of the land which he has enjoyed for over nine years.

The appeal will be dismissed with costs throughout. N.S.

(1) (1842) 2 Y. & C.C.C. 54; 60 R.R. 26.
(2) (1830) 1 Russ. & M. 293; 39 E.R. 113.

ORIGINAL JURISDICTION.

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

1939, December 15.

K. DASARADHARAMA REDDY (CREDITOR), PETITIONER,

v.

SYED RAHIMTULLA HUSSANI AND ANOTHER (PETITIONER 1 AND NIL), RESPONDENTS*.

Debt Conciliation Act, Madras (XI of 1936), sec. 4 (1)—Application under, to Debt Conciliation Board by insolvent without leave of Insolvency Court—If competent—Provincial Insolvency Act (V of 1920), sec. 28 (2)—Writ of certiorari.

An application to a Debt Conciliation Board when the debtor is an insolvent and the Insolvency Court has not given its consent is in direct contravention of section 28 (2) of the Provincial Insolvency Act and is incompetent. The position is the same whether the application to the Debt Conciliation Board is made by the insolvent or by a creditor.

Venkayya v. *Sambayya*(1), approved.

PETITION praying that in the circumstances stated therein the High Court may be pleased to issue a *writ of certiorari* calling for records in A.P.P. No. 47 of 1938 on the file of the Debt Conciliation Board, Nellore, and to quash the proceedings therein, dated 13th December 1938, preferred therefrom to the High Court.

P. Chandra Reddy for petitioner.

Respondents were not represented.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The rule *nisi* must be made absolute. The respondent Board has entirely misconceived the law. On 15th March 1935 one Rahimtulla Hussani

* Civil Miscellaneous Petition No. 2270 of 1939.

(1) 1938 M.W.N. 667.

was adjudicated in the Court of the Subordinate Judge of Nellore. On 28th June 1938 he filed an application to the respondent Board for settlement of his debts under section 4 (1) of the Madras Debt Conciliation Act, 1936. The applicant had not obtained his discharge and is still an insolvent. The petitioner objected to the Board entertaining the application on the ground that the applicant's estate had vested in the Official Receiver. The leave of the insolvency Court has not been obtained for the filing of the petition and the Official Receiver was not a party to it. Thereupon, the Board directed notice to be issued to the Official Receiver who replied that he could not be made a party to the application as the applicant had not obtained the consent of the insolvency Court.

The Board overruled the objection and refused to accept the decision of this Court in *Venkayya* v. *Sambayya*(1), which was in point. In that case PANDRANG ROW J. held that an application to a Debt Conciliation Board, when the debtor was an insolvent and the insolvency Court had not given its consent, was in direct contravention of section 28 (2) of the Provincial Insolvency Act. The applicant happened to be a creditor and the respondent Board considered that that made all the difference. This is an opinion which certainly cannot be accepted. The position is the same whether the application to the Debt Conciliation Board is made by the insolvent or by a creditor. The debtor's estate has become vested in the Official Receiver and the Provincial Insolvency Act requires that it shall be administered by the insolvency Court. An insolvency takes away the jurisdiction of the Debt Conciliation Board.

(1) 1938 M.W.N. 667.

DASABADHA-RAMA v. RAHIMTULLA.

LEACH C.J.

The order of the Board contains other statements which are equally open to objection but it is not necessary to discuss them. It is sufficient to say that in the circumstances the Board had no jurisdiction to accept the petition and the proceedings must be quashed. The petitioner is entitled to his costs and we fix the Advocate's fee at Rs. 50.

N.S.

APPELLATE CIVIL.

Before Sir Sidney Burn, Officiating Chief Justice, and Mr. Justice Krishnaswami Ayyangar.

1940, January 2.

N.K.R.M.N. NAGAPPA CHETTIAR AND SEVEN OTHERS (PLAINTIFFS 2 TO 5 AND DEFENDANTS 3 TO 6), APPELLANTS,

v.

RAJA SRIMANTHU MUTHU VIJAYA RAGHUNATHA DORAISINGAM *alias* GOURI VALLABHA THEVAR, ZAMINDAR OF SIVAGANGA, THROUGH HIS AUTHORIZED AGENT AND DIWAN R. M. SUNDARAM AND ANOTHER (DEFENDANTS 1 AND 7), RESPONDENTS.*

Court of Wards Act, Madras (I of 1902), sec. 49—Notice under, on behalf of Hindu temple—Sufficiency of—Names and addresses of managers, if to be stated—Hindu idol—Juristic entity.

A Hindu idol is a juristic entity with the power of suing and being sued. The real plaintiff in a suit on behalf of a Hindu temple is its presiding Deity. A notice of suit on behalf of a Hindu temple, under section 49 of the Madras Court of Wards Act is not therefore open to objection for the reason only that the names and addresses of the managers of the temple are not stated therein. It is sufficient if the notice mentions the name of the temple and of the village in which it is situated.

* Letters Patent Appeal No. 13 of 1939.

NAGAPPA v. ZAMINDAR OF SIVAGANGA.

Pramatha Nath Mullick v. *Pradyumna Kumar Mullick*(1), applied and followed.

APPEAL under clause 15 of the Letters Patent against the judgment and decree of WADSWORTH J., dated 12th January 1939, and passed in Second Appeal No. 1076 of 1936 preferred to the High Court against the decree of the District Court of Ramnad at Madura in Appeal Suit No. 216 of 1933 (Original Suit No. 131 of 1929, Sub-Court, Devakottai).

S. V. Venugopalachari for appellants.

M. E. Rajagopalachari for first respondent.

Other respondents were not represented.

KRISHNASWAMI AYYANGAR J.

The JUDGMENT of the Court was delivered by KRISHNASWAMI AYYANGAR J.—This is an appeal under the Letters Patent from the judgment of WADSWORTH J. who confirmed on second appeal the decision of the District Judge, Ramnad, reversing the judgment of the Subordinate Judge of Devakottai in Original Suit No. 131 of 1929 on his file. The suit had been instituted by the trustees and hukdars of three temples in the village of Naganathapuram for a declaration that the boundaries fixed by the survey authorities between the village of Veeriyanendal belonging to the temples and the adjacent village of Senjai belonging to the Zamindar of Sivaganga were wrong and for the rectification of those boundaries in accordance with the true rights of the parties. At the time of the survey and at the date of the suit the Sivaganga zamindari was under the management of the Court of Wards and the latter were accordingly joined as the first defendant in the suit. The Court of Wards however dropped out of the litigation after the disposal of the suit in consequence of the zamindar having assumed possession of the estate. The zamindar

(1) (1925) I.L.R. 52 Cal. 809 (P.C.).

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stepped into their place in the lower appellate Court and has since been contesting the claim of the plaintiffs. The Subordinate Judge decreed the suit disallowing all the contentions raised by the Court of Wards. One of those contentions was that the suit was incompetent as the condition precedent to the institution of a suit against the Court of Wards, namely, the issue of a proper notice under section 49 of the Madras Court of Wards Act, had not been fulfilled. A registered notice, Exhibit M in the case, had been given to the Court of Wards before suit, but it was attacked as being defective in material particulars and therefore invalid. Differing from the trial Court, the learned District Judge on appeal upheld that contention and accordingly dismissed the suit. A second appeal was preferred to this Court and it came on before WADSWORTH J. He concurred with the decision of the learned District Judge and dismissed the second appeal. Leave was however given by the learned Judge for preferring a Letters Patent appeal against his judgment and the appeal accordingly now comes before us.

The notice in question is as follows :—

"To

1. The District Collector of Ramnad and Agent of the Court of Wards, Sivaganga Estate at Madura.
2. The Estate Collector, Court of Wards, Sivaganga Estate, Sivaganga.

Sir,

On behalf of the devasthanams of Perumal Koil, Sivan Koil and Pillayar Koil, etc., in Naganathapuram and the trustees thereof, V. N. Venkatachalam Chettiyar and others I hereby give you notice under the provisions of the Court of Wards Act as follows :— "

The notice then proceeds to set out the cause of action and the relief claimed. The only defect in the notice which is said to invalidate it is that it does not contain a proper description of the names and the places of

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abode of the intending plaintiffs. In particular it is said that whereas there are five plaintiffs who joined in instituting the suit, the name of one of them alone namely Venkatachalam Chettiyar, is mentioned in the notice and the names of the others have been entirely omitted : nor has the address even of Venkatachalam Chettiyar been given. It is clear that if the suit is to be regarded as a suit by the trustees, the notice must be held defective as the requirements of section 49 have not been satisfied. In the light of the decision of the Privy Council in *Bhagchand Dagadusa* v. *Secretary of State for India*(1) full effect must be given to the language of the statute and it is not permissible to put a liberal construction upon that language or to say that it will be enough if there is a substantial compliance with the conditions of the section. The statute has laid down certain definite formalities to be observed as a preliminary to a suit against the Court of Wards and we cannot whittle down the effect of section 49 by adopting a liberal or beneficient interpretation.

The appellants have however placed before us an argument which to our mind appears to have great force. They contend that the notice fully complies with the requirements of section 49 inasmuch as the names and address of the devasthanams which are the real plaintiffs are mentioned which, it is urged, is all that is required by the statute. In the case of such temples it is now settled that the presiding Deity is a juristic entity having itself the right to sue and be sued. In *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*(2) Lord SHAW delivering the judgment of the Privy Council laid down the law on the point in these terms :

"A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and

(1) (1927) I.L.R. 51 Bom. 725 (P.C.). (2) (1925) I.L.R. 52 Cal. 809 (P.C.).

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the recognition thereof by Courts of law, a 'juristic entity.' It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the Deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. It is unnecessary to quote the authorities, for this doctrine, thus simply stated, is firmly established."

It follows that the real plaintiffs in the suit are the presiding Deities of the devasthanams mentioned. Although the managers are often described as trustees they are not trustees in law as the devasthanam properties are not vested in them in trust. A notice which complies with the requirements of section 49 so far as the temples are concerned cannot therefore be said to be open to objection for the reason that the names and addresses of the managers have not been stated. In the notice in question the names of the temples are mentioned as also the village in which they are situate. This, in our opinion, is a sufficient compliance with section 49 even on a stric tconstruction.

It is true that in the cause-title to the plaint the names of the managers are mentioned as plaintiffs without reference to the temples or the presiding Deities. In paragraph 3 of the plaint it is however stated that the plaintiffs are some of the trustees and hukdars of the devasthanam consisting of the Perumal koil, Sivan koil and Pillayar koil, etc., in Naganathapuram, Karaikudi. In paragraph 4 the further statement occurs that the village of Veeriyanendal belongs to and is in the enjoyment of the said devasthanam. Looking at the plaint as a whole, it is absolutely clear that no personal rights of the plaintiffs were asserted in the suit. Although the names of the managers are mentioned as the plaintiffs and although they have been described in the plaint as trustees,

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it is clear in the eye of the law that they are merely the managers, the Deities themselves being the true plaintiffs in fact. The proper form of a suit where a Deity figures as a party has been the subject-matter of consideration by a Full Bench of the Allahabad High Court in *Jodhi Rai* v. *Basdeo Prasad*(1). The proposition was there laid down that inasmuch as an idol is a juristic person capable of holding property, a suit in respect of property in which an idol is interested is properly brought or defended in the name of the idol, although *ex necessitate rei* the proceedings in the suit must be carried on by some person who represents the idol, usually the manager of the temple in which the idol is installed.

Regarding the suit, as we must regard it, as a suit instituted by the presiding Deities of the three temples we must hold that a notice issued on behalf of the devasthanams stating their names and the village in which they are situate is a proper notice within section 49 of the Madras Court of Wards Act. It follows that the appeal must be allowed and the decree of the learned Subordinate Judge restored except in regard to the portion of Survey No. 13 in Veeriyanendal village claimed in the suit but not referred to in the notice. The respondents must pay the costs of the appellants both in this Court as well as in the District Court.

N.S.

(1) (1911) I.L.R. 33 All. 735 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Wadsworth and Mr. Justice Patanjali Sastri.

1940, April 26.

VENDOOR THAZHATH PARAVAN *alias* CHERIAD AND ANOTHER (RESPONDENTS—DECREE-HOLDERS), PETITIONERS,

v.

VENTHRAYIL TARWAD KARNAVAN GOPALAN NAIR (PETITIONER-JUDGMENT-DEBTOR), RESPONDENT.*

Madras Agriculturists Relief Act (IV of 1938) ss. 8 and 9—Purchase money paid under abortive sale—Decree for refund with interest—Interest awarded as damages—If could be scaled down under the Act—Debt when incurred—Principles of scaling down under the sections.

A suit for recovery of the purchase money paid under an abortive sale is a suit for money had and received to the plaintiff's account and the basis of such a suit is an implied or imputed contract. Where in such a suit a decree is passed subsequent to 1st October 1932 in respect of a sale made and purchase money paid before that date for refund of the purchase money together with interest thereon from the date of its payment, the amount of the decree including interest is liable to be scaled down under the provisions of section 8 of the Madras Agriculturists Relief Act and not under those of section 9 of the Act. In a sale which fails *ab initio* for want of consideration the liability of the vendee to refund the purchase money arises on the date when he receives the amount.

The fact that interest is awarded by Court as damages does not exclude the operation of the provisions of the Madras Agriculturists Relief Act. Whatever the nature of the liability to pay the principal sum, whether it originates in contract or in tort, the compensation awarded for wrongful

* Civil Revision Petition No. 95 of 1939.

withholding of its payment is "interest" within the meaning of the Act and is liable to be scaled down thereunder.

Mottai Meera v. *Abdul Kadir*(1), explained and distinguished.

Hanuman Kamat v. *Hanuman Mandur*(2), applied and followed.

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 South Malabar at Calicut dated 3rd September 1938 and made in Original Petition No. 20 of 1938 in Small Cause Suit No. 432 of 1934.

N.R. Sesha Ayyar for petitioners.

T.K. Raman Nambisan for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by PATANJALI SASTRI J.—This is a petition to revise the order of the Court of the Subordinate Judge of South Malabar amending the decree obtained by the petitioner in Small Cause Suit No. 432 of 1934 on the file of that Court, under section 19 of the Madras Agriculturists Relief Act, 1938.

PATANJALI SASTRI J.

The respondent sold some trees to the petitioner on 29th September 1931 for Rs. 400 but before the petitioner could cut and carry them away, a third party successfully asserted a paramount claim to them and the sale to the petitioner therefore failed to take effect. The petitioner thereupon sued for the recovery of the amount of Rs. 400 "with interest at twenty-four per cent per annum from 29th September 1931". The Court, however, allowed interest at twelve per cent only and passed a decree for Rs. 538-5-3 for principal and interest till 20th August 1934, the

(1) I.L.R. [1939] Mad. 525. (2) (1891) I.L.R. 19 Cal. 123 (P.C.).

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date of the suit and Rs. 94-9-4 on account of costs with further interest at six per cent on the aggregate amount from 4th November 1936 the date of the decree. The respondent applied to the Court below under section 19 of the Act claiming to be an agriculturist for scaling down the decree debt aforesaid in accordance with the provisions of the Act. There is no dispute that the respondent is an agriculturist as defined by section 3 (ii) of the Act. But it was contended for the petitioner that there was no relationship of debtor and creditor created between the parties when the sum of Rs. 400 was paid by the petitioner as the price of the trees, that no interest was payable on that sum, and the Court having allowed interest only as damages, it was not "interest" which could be scaled down under the Act. It was said therefore that the only relief that the respondent would be properly entitled to was under section 9 of the Act in respect of the interest that was payable from the date of the decree, namely, 4th November 1936. Alternatively, it was also urged that section 8 was not in any case applicable as the liability in question must be deemed to have been incurred only when the consideration for the sale failed, that is to say, when the third party claiming paramount title to the trees successfully prevented the petitioner from cutting and carrying them away by obtaining an injunction from the Court, which was admittedly some time after 1st October 1932; so that even assuming that the interest awarded under the decree prior to the date of suit was liable to be scaled down under the Act, it should be scaled down in accordance with the provisions of section 9 and not section 8. We are of opinion that both these contentions are unsustainable.

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Learned Counsel urged that no interest would be payable under the law in respect of the plaintiff's claim for refund of the purchase money and the liability to pay the sum awarded as interest arose only on the date of the decree. It is unnecessary, in our view, to consider whether interest could be awarded on a claim for recovery of purchase money where a contract of purchase fails to take effect, as in this case a decree has been passed awarding interest and it is no longer open to the petitioner to question such award. It must therefore be taken that the petitioner's claim for the purchase money was a claim in respect of which interest was payable. The fact that the Court awarded interest as "damages" cannot, in our opinion, exclude the operation of the provisions of the Act. The Act nowhere defines "interest" and it must be remembered that "interest" is sometimes payable even where there is no agreement to pay it. The Interest Act provides for "interest" being allowed, subject to certain conditions, as damages for wrongful withholding of payment of sums due, and illustrations (*n*) and (*r*) to section 73 of the Indian Contract Act contemplate "interest" being awarded as compensation for loss or damage caused by a breach of contract in certain cases. It seems to us, therefore, clear that whatever be the nature of the liability to pay the principal sum, whether it originates in contract or in tort, the compensation awarded for wrongful withholding of its payment can appropriately be regarded as "interest" and is thus liable to be scaled down under the Act.

The petitioner's learned Counsel cited *Mottai Meera* v. *Abdul Kadir*(1) as being contrary to this view. We are however clear that the case has no bearing on

(1) I.L.R. [1939] Mad. 525.

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the question we are now considering. That was a case where a co-owner in possession of common funds had realised interest by their investment, and in a suit for partition he was directed to pay to the other co-owners their shares of such funds including the interest earned. An application having been made for relief under Act IV of 1938, the Court held that the liability enforced by the decree was not a "debt" within the meaning of the Act. It was pointed out that the interest awarded in such cases could be regarded either as an accretion to the fund liable to be divided or compensation for breach of trust payable under section 23, read with sections 90 and 95, of the Trusts Act, the application of Act IV of 1938 being excluded in either case. It is obvious that the position here is entirely different. The petitioner's suit for recovery of the purchase money paid under an abortive sale was one for money had and received to his account; see *Hanuman Kamat* v. *Hanuman Mandur*(1); and it cannot be disputed that the basis of such an action is an implied or imputed contract, at all events in circumstances like those of the present case which plainly exclude any hypothesis of tort or trust. The decision cited has therefore no application here.

As regards the alternative contention that section 8 does not apply to this case because the liability to refund the price must be held to have arisen only after 1st October 1932 when an injunction was obtained against the petitioner, it is to be observed that this is not a case where the petitioner got anything under the sale of which he was subsequently deprived. It is not denied that before the petitioner could cut any of the trees, the person

(1) (1891) I.L.R. 19 Cal. 123, 126 (P.C.).

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claiming paramount title intervened and successfully prevented the petitioner from doing so by obtaining an injunction from Court. The case is thus one where there never was any consideration and the sale failed *ab initio*. The liability to refund the purchase money therefore arose when it was received by the respondent, i.e., on 29th September 1931 [see *Hanuman Kamat* v. *Hanuman Mandur*(1) already referred to] and falls under section 8 of the Act.

The revision petition is dismissed with costs.

V.V.C.

APPELLATE CRIMINAL.

Before Mr. Justice Lakshmana Rao.

PUBLIC PROSECUTOR, APPELLANT,

v.

CHELLIAH TEVAN AND ANOTHER (ACCUSED), RESPONDENTS. *

1940, August 9.

Madras Borstal Schools Act (V of 1926), sec. 7—Sub-Magistrate submitting proceedings under sec. 7 (1) with opinion that it is proper to detain the convicted persons in a Borstal School—Powers of Joint Magistrate under sec. 7 (2).

Where a Sub Magistrate, under section 7 (1) of the Madras Borstal Schools Act (V of 1926), submitted the proceedings in a case to the Joint Magistrate to whom he was subordinate, with his opinion that the respondents, who were adolescent offenders, were proper persons to be detained in a Borstal School, and the Joint Magistrate acquitted them,

(1) (1891) I.L.R. 19 Cal. 123 (P.C.).

* Criminal Appeal No. 172 of 1940.

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held that it was not permissible to the Joint Magistrate to acquit them.

Under section 7 (1) of the Act a conviction has to be recorded before the proceedings are submitted as otherwise there would be no "adolescent offender" and when the proceedings reach the Joint Magistrate he has to deal with a person who has been convicted. The powers conferred by section 7 (2) of the Act are neither appellate nor revisional, and the order permissible under that provision is only such as can be passed upon a convicted person.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondents (accused) by the Joint Magistrate of Tuticorin in Calendar Case No. 173 of 1939 on his file.

Public Prosecutor (*V. L. Ethiraj*) for appellant.

N. T. Ragunathan for respondents.

JUDGMENT.

LAKSHMANA RAO J.

LAKSHMANA RAO J.—The respondents were convicted by the Sub Magistrate of Tuticorin for offences punishable under sections 323, 324 and 114 of the Indian Penal Code and the proceedings were submitted to the Joint Magistrate of Tuticorin under section 7 (1) of the Madras Borstal Schools Act with the opinion of the Sub Magistrate that the respondents who are adolescent offenders as defined in section 2 (1) of the Act are proper persons to be detained in a Borstal School. The Joint Magistrate acquitted the respondents and the question is whether this is permissible.

The proceedings were submitted under section 7 (1) of the Madras Borstal Schools Act which provides that when a Magistrate not empowered to pass sentence under that Act is of opinion that an adolescent offender is a proper person to be detained in a Borstal School he may without passing sentence

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record such opinion and submit his proceedings and forward the adolescent offender to the District Magistrate or Sub-divisional Magistrate to whom he is subordinate and the Joint Magistrate to whom the proceedings are submitted has to dispose of the case as prescribed in section 7 (2) of the Madras Borstal Schools Act. That section provides that he may make such further enquiry (if any) as he may think fit and pass such sentence or order dealing with the case as he might have passed if the adolescent had been tried by him, and, as pointed out in *Public Prosecutor* v. *Gurappa Naidu*(1), with reference to the analogous provision in section 380 of the Code of Criminal Procedure, it is not permissible to the Joint Magistrate to acquit the accused. A conviction has to be recorded before the proceedings are submitted under section 7 (1) of the Madras Borstal Schools Act as otherwise there would be no "adolescent offender" and when the proceedings reach the Joint Magistrate he has to deal with a person who has been convicted. The powers conferred by section 7 (2) of the Madras Borstal Schools Act are neither appellate nor revisional, and the order permissible under section 7 (2) is only such as can be passed upon a convicted person. The order of acquittal is therefore set aside and the case will go back to the Joint Magistrate for disposal according to law.

V.V.C.

(1) (1933) I.L.R. 57 Mad. 85.

APPELLATE CIVIL—FULL BENCH.

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

1940, March 6.

PAVAYI AND THREE OTHERS (PLAINTIFFS), APPELLANTS,

v.

PALANIVELA GOUNDAN AND TWENTY OTHERS (DEFENDANTS), RESPONDENTS.*

Indian Limitation Act (IX of 1908), *ss.* 19 *and* 20—*Acknowledgment or part-payment by mortgagor after transferring mortgaged property, if binding on transferee—English decisions, applicability of.*

A mortgagor who has lost all interest in the mortgaged property cannot bind by an acknowledgment under section 19 or by a payment of principal or interest under section 20 of the Indian Limitation Act, 1908, the person on whom his interest has devolved, whether the devolution is of the whole of the mortgaged properties or only of a part thereof. In order to be binding on the assignee, the acknowledgment or payment must be made before the person making it has parted with his interest in the property to the assignee.

Opinion of MUKERJEE J. in *Surjiram Marwari* v. *Barhamdeo Persad*(1) and *Yagnanarayana* v. *Venkata Krishna Rao*(2) approved and followed.

Muthu Chettiyar v. *Muthuswami Ayyangar*(3) and *Narayana* v. *Venkataramanna*(4) overruled.

There is no fundamental difference between the provisions of sections 19 and 20 of the Indian Limitation Act and the corresponding provisions of the English Act and the English decisions under those provisions are applicable to cases under the Indian Act.

Bolding v. *Lane*(5) and *Newbould* v. *Smith*(6) applied and followed.

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* Second Appeal No. 665 of 1936.

(1) (1905) 1 C.L.J. 337.
(2) A.I.R. 1925 Mad. 1108.
(3) (1932) I.L.R. 55 Mad. 758.
(4) A.I.R. 1935 Mad. 899.
(5) (1863) 1 De G.J. & S. 122; 46 E.R. 47.
(6) (1886) 33 Ch. D. 127.

APPEAL against the decree of the Court of the Subordinate Judge of Salem in Appeal Suit No. 5 of 1935, preferred against the decree of the Court of the District Munsif of Sankaridrug at Salem in Original Suit No. 33 of 1933.

The appeal came on for hearing in the first instance before HORWILL J. who made the following

ORDER OF REFERENCE:—

The first defendant and his father executed a mortgage in favour of the plaintiffs' assignors. The equity of redemption was brought to sale in execution of a simple money decree and was purchased by the assignor of defendants 17 to 20. After the equity of redemption had been assigned and after the plaintiffs had lost their personal remedy against the first defendant's father, the latter made a small payment towards interest. If this payment is a payment within the meaning of section 20 of the Limitation Act or an acknowledgment within the meaning of section 19, this suit is in time; otherwise the suit is barred by limitation. The lower appellate Court found that section 20 of the Limitation Act did not save the suit from the bar of limitation.

Section 20 says that a fresh period of limitation shall be computed from the time of payment "where interest on a debt . . . is before the expiration of the prescribed period, paid as such by the person liable to pay the debt . . ." This payment was not made within the prescribed period and it was made by a person who had ceased to be under any legal liability to pay the debt. Section 20 does not use the word 'legal,' but it is difficult to see in what way the word 'liable' can be used except as legally liable. It would therefore seem from the natural interpretation of section 20 that that section has no application. It is argued that, if section 20 does not apply, then section 19 would and that this payment can be considered to be an acknowledgment. Section 19 says "Where before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, . . . a fresh period of limitation

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shall be computed from the time when the acknowledgment was so signed." In the first place, any act or statement of a person who is not prejudiced by a statement that a debt still exists cannot be said to be an acknowledgment in the ordinary sense of that word. An acknowledgment is an admission against one's own interest that a certain fact or state of affairs is true. Moreover, section 19 further requires that the acknowledgment should be by the party against whom such property or right is claimed. Clearly after the transfer of the property, no property or right could be claimed against him.

The Lord Chancellor in *Bolding* v. *Lane*(1), in dealing with an almost similar case, refers to such a contention as being monstrously unjust and says: "If it (the decision) be well-founded, then, according to the true intent and meaning of this statute, the right of one man may be taken away by the act of another. . . . The mortgagor or his representative who may have no interest whatever in the lands shall be enabled . . . to charge the estate anew with any amount of arrears of interest as against the second and subsequent mortgagees." Obviously the interpretation sought to be put upon sections 19 and 20 in this Court would open the door to a great deal of fraud. A person who has no interest in the property would naturally not be at all reluctant to state that the debt still existed, and a mortgagee desirous of obtaining some such statement which would bind the person really interested in the property would have no difficulty in obtaining. An antedated statement would make the mortgagee to avoid the bar of limitation.

In all the cases of this Court and other High Courts where any opinion on this question has been expressed at all, with the exception of RAMESAM J.'s judgment in *Narayana* v. *Venkataramanna*(2), learned Judges have seen the danger of accepting a statement by a person no longer interested against a party interested. SADASIVA AYYAR J., in *Lakshmanan Chetty and another* v. *Muthaya Chetty and others*(3), observes that an acknowledgment is binding "provided the mortgagor had a substantial interest in the mortgage contract." PANDALAI J., in a Bench decision *Muthu Chettiyar* v. *Muthuswami*

(1) (1863) 1 De G.J. & S. 122; 46 E.R. 47.
(2) A.I.R. 1935 Mad. 899.
(3) (1919) 40 M.L.J. 126.

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Ayyangar(1) says that he thinks that the mortgagor must be at least personally liable or a portion of the property should remain unsold for an acknowledgment to be binding. In all these cases which have been quoted the mortgagor had retained some interest. Cases in which a mortgagor without any interest at all has made an acknowledgment must necessarily be very small; for a mortgagee would be unlikely to seek an acknowledgment from a person who had lost his interest except for some fraudulent reason. The remarks of the District Munsif even in this case suggest a fraudulent collusion between the mortgagee and the mortgagor to the detriment of the assignee of the equity of redemption.

RAMESAM J. expressing the opinion of the Bench in *Narayana* v. *Venkataramanna*(2), a case very similar to the one before me, takes an opposite view. Some distinction is sought to be drawn between the case considered by RAMESAM and STONE JJ. and the present case. Here the transferee of the equity of redemption obtained title in court-auction and the original mortgagor was under no liability to give him a good title, whereas in *Narayana* v. *Venkataramanna*(2) the sale was a private one; and it is argued that as the vendor was interested in seeing that the vendee had a good title, he still retained an interest in the property and that the acknowledgment was not therefore by a person who had no interest at all. RAMESAM J. however does not make this distinction and his judgment presupposes that in that case the mortgagor had no interest whatever. He does not however think that any injustice is done to the vendee by an acknowledgment by the vendor and he says: "We do not see any injustice in so holding in this country where we have got a law of registration and every purchaser or incumbrancer can easily know of the existence of any prior mortgage. The subsequent purchaser or incumbrancer who knows the existence of a mortgage ought also to know the possibility of the mortgage being kept alive by acknowledgment or payment and as he purchased only the equity of redemption it cannot be said that he is disappointed. He gets what he bargained for. He has no right to expect that the mortgage would become barred and he can make a profit in the transaction."

There is therefore a conflict of opinion on the question whether a mortgagor who has no longer an interest in the

(1932) I.L.R. 55 Mad. 758.
(2) A.I.R. 1935 Mad. 899.

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mortgaged property can by a payment or an acknowledgment save limitation against the person having an interest in the equity of redemption.

Let the papers be sent to the Registrar to be placed before my Lord the CHIEF JUSTICE for posting this appeal before a Bench.

The case came on for final hearing before the Full Bench constituted as above.

ON THE REFERENCE :—

S. S. Ramachandra Ayyar for appellants.—The question that arises for consideration is whether a payment towards interest on a mortgage debt and endorsement thereof on the mortgage document could be relied upon for saving limitation in respect of a suit for sale upon the mortgage when the payment and the endorsement were made by the mortgagor after the equity of redemption in the mortgaged property had been sold and the personal remedy against him had become barred. The appellants are assignees of a mortgage dated 12th November 1913. In execution of a money decree against the mortgagors, the equity of redemption in the mortgaged property was sold on 16th January 1919 to the money decree-holder. Subsequent to the said sale one of the mortgagors paid a sum of Rs. 200 towards interest and made an endorsement of the said payment on the mortgage document on 16th December 1920. The present suit on the mortgage was filed on 9th December 1932 and the question is whether the payment and the endorsement could save the suit from the bar of limitation. Payment of interest saves limitation under section 20 of the Limitation Act and the endorsement amounts to an acknowledgment of liability within the meaning of section 19 of the Act. Endorsement of payment towards interest means that the principal is still due and amounts to an acknowledgment of the entire debt; see *Narayana Iyer* v. *Narayana Iyer*(1) and *Udaypal Singh* v. *Lakshmi Chand*(2). In *Jaganadha Sahu* v. *Rama Sahu*(3) it was held that an endorsement of payment on a promissory note was an acknowledgment of the debt due on the promissory note. Similarly, it was decided in *Visvanatha*

(1) 1937 M.W.N. 1312. (2) (1935) I.L.R. 58 All. 261, 269 (F.B.). (3) (1914) 17 M.L.T. 80.

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Santhasingaro v. *Ramachandra Mardraja Deo*(1) that payment of a sum accompanied by a letter that the sum may be credited to the lease account was a clear admission, that rent was then due, from which an implied promise to pay whatever was actually due under the lease may be inferred. A mortgagor can make a payment or an acknowledgment so as to bind the purchaser of the equity of redemption even after the personal remedy against himself has got barred. The expiry of the period of limitation bars the remedy only; it does not extinguish the debt; see Halsbury's Laws of England, Hailsham Edition, Volume XX, page 602. Under section 25 of the Indian Contract Act a barred debt is still recognized to be good consideration for a contract and a creditor can make lawful appropriations in respect of such a debt under section 60 of that Act. The mortgagor is the person who entered into the mortgage contract. Even after the personal remedy becomes unenforceable against him he is a proper party to the mortgage suit and has a right to redeem the mortgaged property on paying the mortgage amount. He is therefore a person liable to pay the debt within the meaning of section 20 of the Limitation Act. There is further nothing in that section to indicate that there must be a subsisting liability of the mortgagor when the mortgagor makes the payment. In the absence of fraud there is no reason why a payment or an acknowledgment made by a mortgagor should not bind the purchaser of the mortgaged property. The purchaser derives his title from the mortgagor and takes the property subject to the existing mortgages. The equities are in favour of the view that any payment or acknowledgment by the mortgagor should bind the purchaser for the purpose of limitation. The Calcutta High Court has held in *Krishna Chandra Saha* v. *Bhairab Chandra Saha*(2) and in *Domi Lal Sahu* v. *Roshan Dobay*(3) that a mortgagor can make an acknowledgment under section 19 and a payment under section 20 of the Limitation Act and keep a mortgage debt alive against the purchaser of one of the mortgaged properties. In *Velayudam Pillai* v. *Vaithialingam Pillai*(4) BENSON and SUNDARA AYYAR JJ. held that payment of interest on a promissory note by a donor, after a gift made by him in favour of a universal donee, was binding on the latter and kept

(1) (1914) 17 M.L.T. 78. (2) (1905) I.L.R. 32 Cal. 1077. (3) (1906) I.L.R. 33 Cal. 1278. (4) (1912) 24 M.L.J. 66.

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alive the debt against him. In *Lakshmanan Chetty and another* v. *Muthaya Chetty and others*(1), SADASIVA AYYAR and BURN JJ. held that a mortgagor whose interest in the mortgaged property or liability under the mortgage contract did not wholly cease to exist could make a valid acknowledgment in respect of the mortgaged property for saving limitation. The decision in *Muthu Chettiyar* v. *Muthuswami Ayyangar*(2) recognized that a mortgagor can, after parting with the mortgaged property, make an acknowledgment binding on the purchaser of the property. A similar view was taken by RAMESAM and STONE JJ. in *Narayana* v. *Venkataramanna*(3). The terms of section 19 are wider than section 20 of the Limitation Act. Under section 19 an acknowledgment of liability can be made by the mortgagor and every person deriving title from him is bound by it. The decision in *Lakshmi Naidu* v. *Gunnamma*(4) holds that even a part payment of principal avails, not only against the person making the payment but against others also, on the principle of implied agency.

M. Krishna Bharathi for respondents.—No arguments under section 19 of the Limitation Act were addressed in the Courts below. The appellants confined their contention to payment of interest under section 20 of the Act. The terms of the endorsement relied upon as constituting an acknowledgment of liability are not before the Court and without knowing the actual wording of the endorsement it will be difficult to decide whether there is an acknowledgment or not. In any event, I submit that a mortgagor, who has completely lost his interest in the whole of the mortgaged property and has ceased to be personally liable under the mortgage debt, cannot bind the purchaser of the property whether by way of making a payment under section 20 or by way of an acknowledgment under section 19 of the Limitation Act. In either case the purchaser is not affected by the act of the mortgagor. The cases cited for the appellants are all cases where the mortgagor had still some interest in making the payment or acknowledgment. There is no decision which has gone the length of holding that even in such circumstances as are present in this case a mortgagor can bind a purchaser by an acknowledgment or a payment. To hold that a person who

(1) (1919) 40 M.L.J. 196.
(2) (1932) I.L.R. 55 Mad. 758.
(3) A.I.R. 1935 Mad. 899.
(4) (1934) I.L.R. 58 Mad. 418.

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has lost all interest in a transaction can still make an acknowledgment or payment so as to affect prejudicially the rights of third parties is to open the door wide for commission of fraud. The observations of Lord WESTBURY in *Bolding* v. *Lane*(1) are apposite and support my contention. The decision in *Newbould* v. *Smith*(2) also takes the same view. There is no material difference between the English and the Indian provisions in regard to this point. In *Askaram Sowkar* v. *Venkataswami Naidu*(3) WALLIS C.J. held that the provisions of the English and Indian statutes are practically identical. Construing section 19 of the Limitation Act, MOOKERJEE J. held in *Surjiram Marwari* v. *Barhamdeo Persad*(4) that, in order that an acknowledgment by a mortgagor may be operative against the purchaser of the equity of redemption, it must be made before the sale. This view was followed by the Madras High Court in *Yagnanarayana* v. *Venkata Krishna Rao*(5). In section 20 of the Limitation Act, the words "person liable to pay" mean a person against whom the liability could be legally enforced, that is to say, a person against whom an executable decree or order for payment could be passed in respect of the liability. A person cannot be said to be liable to pay when the liability has become time-barred. In *Pangudaya* v. *Uthandiya*(6) it was held that a Hindu manager cannot after partition make a payment under section 20 of the Act so as to bind the other members of the family, even in regard to a debt incurred by him before partition. The mortgagor is a purely formal party in a mortgage suit where he has no interest left in the mortgaged property and the personal remedy against him has become barred. No relief can be obtained against him in such a suit.

S. S. Ramachandra Ayyar in reply:—The decision in *Surjiram Marwari* v. *Barhamdeo Persad*(4) is not followed in later decisions of the Calcutta High Court. The correctness of the decision in *Yagnanarayana* v. *Venkata Krishna Rao*(5) is doubted in *Muthu Chettiyar* v. *Muthuswami Ayyangar*(7). The English law of acknowledgment is different from the Indian law and the English decisions are not applicable to cases under the Indian Limitation Act.

Cur. adv. vult.

(1) (1863) 1 De G.J. & S. 122; 46 E.R. 47.
(2) (1886) 33 Ch. D. 127.
(3) (1920) I.L.R. 44 Mad. 544.
(4) (1905) 1 C.L.J. 337.
(5) A.I.R. 1925 Mad. 1108.
(6) I.L.R. [1928] Mad. 968
(7) (1932) I.L.R. 55 Mad. 758.

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LEACH C.J.

JUDGMENT.

LEACH C.J.—This appeal raises a question of limitation and one of some difficulty. The appellants filed a suit in the Court of the District Munsif of Salem to enforce a mortgage which had been created on 12th November 1913 by a Hindu father and his son. The appellants are the assignees of an interest in the mortgage. Under the terms of the mortgage deed the debt became payable in one year. On 16th January 1919 a creditor of the mortgagors obtained a money decree against them and in execution of that decree purchased the equity of redemption. On 16th December 1920 the first mortgagor paid to the mortgagees Rs. 200 towards the amount of interest then due in respect of the mortgage debt. A record of this payment was endorsed on the deed and signed by the first mortgagor. A suit to enforce the mortgage was filed on 9th December 1932. The question which arises is whether the payment of the Rs. 200 on 16th December 1920 saves the suit from being barred by the law of limitation. That the personal remedy against the mortgagors is barred is conceded, but it is said that inasmuch as the payment of the Rs. 200 towards interest was made within eight years of the creation of the mortgage a fresh period of limitation started, and the suit having been filed within twelve years from the date of the payment of interest the appellants are entitled to have the property sold in order to realize what is due to them. The District Munsif held that the payment of interest on 16th December 1920 did operate to save limitation and granted the appellants a decree. On appeal the Subordinate Judge of Salem held that the suit was out of time.

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The Subordinate Judge's decision was based on his interpretation of section 20 of the Limitation Act which says that where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. By the Indian Limitation (Amendment) Act, 1927, a proviso was inserted to the effect that after 1st January 1928 acknowledgment of the payment must be in the handwriting of, or in a writing signed by, the person making the payment. As I have indicated there was such an acknowledgment in writing by the first mortgagor, but as this was not necessary at the time the Rs. 200 was paid the mere payment would have been sufficient if the section applied. In this Court it has been contended on behalf of the appellants that both sections 19 and 20 can be called in aid to save limitation. Section 19 states that where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability has been made in writing signed by the party against whom the property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was signed.

For the respondent it has been argued that inasmuch as the mortgagors had parted with all their interest in the properties as the result of the court auction on 16th January 1919 they were not personally liable to pay the mortgage debt, and therefore did not come within section 20 of the Limitation Act. On the same basis it was contended that they

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were not in a position to give an acknowledgment of liability within the meaning of section 19. There are several decisions of this Court bearing on the question which has also been raised before the Calcutta High Court. I will state the effect of these decisions and then discuss the principle involved in the light of certain English decisions which, in my opinion, also have bearing.

The decisions of this Court are those given in *Velayudam Pillai* v. *Vaithialingam Pillai*(1), *Yagnanarayana* v. *Venkata Krishna Rao*(2), *Muthu Chettiyar* v. *Muthuswami Ayyangar*(3) and *Narayana* v. *Venkataramanna*(4). In *Velayudam Pillai* v. *Vaithialingam Pillai*(1) a person executed a deed of gift of the whole of his property. After the gift had been made he paid interest in respect of the amount due on a promissory note signed by him before the date of the gift. BENSON and SUNDARA AYYAR JJ. held that by reason of the provisions of section 20 of the Limitation Act the payment was sufficient to keep alive the debt against the universal donee. In *Yagnanarayana* v. *Venkata Krishna Rao*(2) COUTTS TROTTER C.J. and RAMESAM J. considered that a person who was a party to a mortgage contract could make an acknowledgment even after his interest in the properties had ceased, but they added that the acknowledgment bound only him or persons claiming through him, i.e., assignees from him after the acknowledgment. They accepted the opinion expressed by MOOKERJEE J. in *Surjiram Marwari* v. *Barhamdeo Persad*(5) to which I shall presently refer. In *Muthu Chettiyar* v. *Muthuswami Ayyangar*(3) JACKSON J. held that an acknowledgment

(1) (1912) 24 M.L.J. 66.
(2) A.I.R. 1925 Mad. 1108.
(3) (1932) I.L.R. 55 Mad. 758.
(4) A.I.R. 1935 Mad. 899.
(5) (1905) 1 C.L.J. 337.

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of the mortgage debt made by a mortgagor after he had lost his interest in the mortgaged property affected both him and his alienee, but KRISHNAN PANDALAI J. who formed the Bench with JACKSON J. did not go to this length. In his view an acknowledgment of the mortgage debt made by a mortgagor who had sold a portion of the mortgaged property, but remained personally or in respect of the unsold portion liable on the mortgage, was effective to save limitation as against the property sold. In *Narayana* v. *Venkataramanna*(1) RAMESAM and STONE JJ. held that by reason of section 19 of the Limitation Act an acknowledgment by the mortgagor subsequent to the sale of the mortgaged property saved limitation and made the purchaser of the equity of redemption liable on the mortgage. In that case the mortgagee undertook to deliver a quantity of paddy in payment of principal and interest and the deliveries of paddy were endorsed on the deed. The deliveries of paddy were made on 3rd January 1904, 14th January 1911 and 12th January 1914 in payment of interest. The mortgagor sold the equity of redemption on 5th January 1908. The mortgagee filed a suit on the mortgage within twelve years from 12th January 1914. The purchaser of the equity of redemption contended that the suit was barred as the mortgagor could not bind his successors, but this contention was not accepted. In that case the defendant relied on the following dictum of Lord WESTBURY in *Bolding* v. *Lane*(2), where the Lord Chancellor said:

"It was not the intention nor is the effect of the section to give to the mortgagor or other person, who is 'by law compellable to pay the interest', a statutory power to deprive, by his acknowledgment given to a prior encumbrancer, the

(1) A.I.R. 1935 Mad. 899.
(2) (1863) De G.J. & S. 122; 46 E.R. 47.

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subsequent encumbrancers the benefit of the statute, which would be monstrously unjust, but to enact a plain and simple rule that no person having a charge on lands shall recover more than six years' interest on such charge against any other person having an interest in the lands without an acknowledgment in writing, signed by such person or by some former owner from whom the interest is derived."

RAMESAM and STONE JJ. rejected this argument on the ground that they did not see any injustice in making a purchaser or subsequent encumbrancer liable in such circumstances in view of the fact that in India there was a law of registration and every purchaser or encumbrancer can easily know of the existence of a prior mortgage.

I will now turn to the Calcutta decisions. In *Krishna Chandra Saha* v. *Bhairab Chandra Saha*(1) a Bench of that Court (MACLEAN C.J. and MITRA J.) held that section 19 of the Indian Limitation Act applied in these circumstances. A mortgaged several properties under a deed dated 28th April 1887. He then sold one of them to B who mortgaged it to C and in a mortgage suit by C the property was sold and purchased by D. After the sale had taken place A paid part of the principal as well as interest under the mortgage to B and made an acknowledgment of his liability under it. The question was whether the acknowledgment kept the mortgage debt alive against the property bought by D. It was held that it did. MACLEAN C.J. expressed a similar opinion sitting with HOLMWOOD J. in *Domi Lal Sahu* v. *Roshan Dobay*(2). But these decisions of the Calcutta High Court are not in accord with that of MOOKERJEE J. in *Surjiram Marwari* v. *Barhamdeo Persad*(3) on which

(1) (1905) I.L.R. 32 Cal. 1077. (2) (1906) I.L.R. 33 Cal. 1278.
(3) (1905) 1 C.L.J. 337.

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reliance was placed in *Yagnanarayana* v. *Venkata Krishna Rao*(1). MOOKERJEE J. there said:

"It is argued on behalf of the respondents that the second mortgagee derives his title or liability from the mortgagor, and, that, consequently, an acknowledgment by the mortgagor in favour of the first mortgagee, is operative against the second mortgagee, no matter whether such acknowledgment was given before or after the second mortgagee derived his title. After careful consideration of this argument, I am unable to accept it as well-founded. I think that the proper construction to be put upon the section (section 19 of the Limitation Act) is that, when it makes an acknowledgment given by one person operative as against another on the ground that the latter derives title or liability from the former, it contemplates that the derivation of title or liability (which is the essential condition for the extended operation of the acknowledgment) takes place after the acknowledgment has been given."

In certain of the cases to which I have referred the mortgagor retained an interest in part of the mortgaged properties sold, but I do not consider that this makes any difference in principle. The question is whether a mortgagor who has lost all interest in the mortgaged property, can by an acknowledgment within the meaning of section 19 or by the payment of interest or principal within the meaning of section 20, bind the person on whom his interest has devolved. If he cannot bind the purchaser of the equity of redemption when the purchase covers the whole of the mortgaged properties, obviously he cannot bind the purchaser of part of the mortgaged properties.

As I have shown, COUTTS TROTTER C.J. and RAMESAM J. in *Yagnanarayana* v. *Venkata Krishna Rao*(1) accepted the opinion of MOOKERJEE J. in *Surjiram Marwari* v. *Barhamdeo Persad*(2) that, in order to be binding on the assignee, the acknowledgment

(1) A.I.R. 1925 Mad. 1108. (2) (1905) 1 C.L.J. 337.

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must be made before the person making it has parted with his interest in the property, and I see no reason to doubt the correctness of this opinion. And if a mortgagor, whohas lost all interest in the mortgaged property, cannot bind the purchaser of the equity of redemption by an acknowledgment, he cannot bind his assignee by a part payment of interest or principal. A payment of interest to start a fresh period of limitation must be made by the person liable to pay the debt or by his agent duly authorized in that behalf. If the personal remedy against the mortgagor is barred he is no longer liable to pay the debt. If the mortgagee's remedy against the property is not barred the mortgagor or his representative in interest can avoid the sale by payment of the mortgage debt, but that does not make him liable to pay. He may pay if he chooses. If he does not choose, the mortgagee is left to his remedy against the property.

I do not share the opinion that the English authorities are not in point. There is no fundamental difference between the provisions of sections 19 and 20 of the Indian Limitation Act and the corresponding provisions of the English Act. Section 40 of the Act for the Limitation of Actions and Suits relating to Real Property, 1833 (3 & 4 Will. IV. c. 7), was in these terms:

"That after the said 31st December 1833, no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

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Section 40 of the Act of 1833 has been replaced by section 8 of the Real Property Limitation Act, 1874 (37 and 38 Vict., c. 57), but the only difference between the two sections is that a period of limitation of twelve years has been substituted for one of twenty years. It seems to me that sections 19 and 20 of the Indian Limitation Act embody all the elements of this section.

I have already quoted the observations of Lord WESTBURY in *Bolding* v. *Lane*(1) and no English authority has been quoted to us which throws doubt on the opinion there expressed. In fact, the Court of Appeal applied the same principle in *Newbould* v. *Smith*(2). In that case a solicitor lent money to a client on equitable mortgage, and on 12th February 1866 an account was settled between them as to the amount due. In July 1878, the client assigned the mortgaged property to his two nephews, and the question was whether an entry, dated 10th September 1878, in a diary kept by the solicitor, who had since died, was admissible in evidence. That entry showed the receipt of money paid by the mortgagor by way of interest. NORTH J. held that this entry was not admissible in evidence. On appeal it was held that assuming the entry to be admissible evidence, as to which the Court gave no opinion, it proved nothing but a payment on account of interest by a person who when he made it had no interest in the mortgaged property, and was not shown to be the agent of the assignees. Therefore, the payment of interest did

(1) (1863) I De G. J. & S. 122; 46 E.R. 47. (2) (1886) 33 Ch. D. 127.

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not start a new period of limitation. COTTON L.J. said :

"In my opinion, even if in fact C. E. Smith (the client) in September 1878 paid a sum in respect of interest on this mortgage, that would not be sufficient to prevent the statute running in favour of those to whom previously to this time he had transferred the property. It is said that he had assigned it subject to the mortgages and charges thereon. That is so, but that does not make him an agent to pay interest on behalf of those to whom he has transferred the property. It may be he might have a claim against them, but that is not the question which we are considering. The question is whether this payment is to be considered as their payment, that is to say, whether he is to be considered as their agent in making it. They say in their statement of defence that if this payment was made it was not made by their authority or with their knowledge. In my opinion, then, even if the entry is admissible, it does not prove anything that can help the plaintiff."

LINDLEY and LOPES LL.J. delivered judgments to the same effect. I can see no reason why the principle propounded in *Bolding* v. *Lane*(1) and *Newbould* v. *Smith*(2) should not be applied in India. The principle is one which accords in full with the spirit of equity and unless the Indian Statute of Limitation is so worded as to preclude its application—and I have said sufficient to indicate my opinion that it does not—it must be applied. It follows that in my judgment the decisions of this Court which have not applied this principle should no longer be regarded as good law.

I hold that the case has been rightly decided by the Subordinate Judge and that the appeal should be dismissed with costs.

KING J.—I agree.

KRISHNASWAMI AYYANGAR J.—I agree.

N.S.

(1) (1863) I De G. J. & S. 122; 46 E.R. 47. (2) (1886) 33 Ch. D. 127.

INCOME-TAX REFERENCE.

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

THE COMMISSIONER OF INCOME-TAX, MADRAS, PETITIONER,

1940, March 14.

v.

MADRAS AND SOUTHERN MAHRATTA RAILWAY COMPANY, LIMITED, MADRAS, RESPONDENTS.*

Indian Income-Tax Act (XI of 1922), sec. 4—Guaranteed interest paid in London to railway company by Secretary of State for India—Subsequent reimbursement by him out of the profits of the company working in British India—Assessability of the amount to income-tax in British India.

Where, in pursuance of a contract between a railway company working in British India and the Secretary of State for India, the Secretary of State for India paid guaranteed interest half-yearly in sterling in London to the company on the capital provided by it and at the end of the year reimbursed himself out of the profits of the undertaking in British India, the surplus profits being distributed between the company and the Secretary of State in proportion to their respective shares in the capital, the company contended that the payment of guaranteed interest in London cannot be regarded as profits accruing or arising in British India within the meaning of section 4 of the Indian Income-Tax Act, 1922,

held, negativing the contention, that the payment by the Secretary of State in London is merely a provisional payment which he recovers out of the profits in British India and the sum of money representing the equivalent in rupees of the amount so paid is consequently liable to assessment in the hands of the company in British India.

Madras and Southern Mahratta Railway Co., Ltd. v. *The Commissioners of Inland Revenue*(1) applied and followed.

* Original Petition No. 225 of 1939.

(1) (1926) 12 T.C. 1111.

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Bengal-Nagpur Railway Company, Ltd. v. *The Secretary of State for India*(1) not followed.

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

Nugent Grant (with him *C. Krishnaswami Ayyar*) for respondents.—The assessee is a company incorporated in England working a railway in British India. The company has contributed a portion of the capital of the undertaking and, under the terms of a contract with the Secretary of State for India, the latter has agreed to pay every half-year to the company in London interest at the rate of three and a half per cent on the capital contributed by the company. The amount of such guaranteed interest paid to the company in London is the subject-matter of dispute in the present case. The Income-tax authorities claim that this amount paid to the company in England is liable to income-tax in British India while the company contends that it is not so liable. Construing a similar contract between the Bengal-Nagpur Railway Company and the Secretary of State for India, the Calcutta High Court held in *Bengal Nagpur Railway Company, Ltd.* v. *The Secretary of State for India*(1) that such amount of guaranteed interest received by that company in England was not profit and that no income-tax could be levied on that amount in British India. This decision is, no doubt, in conflict with the decision of ROWLATT J. in *Madras and Southern Mahratta Railway Co., Ltd.* v. *The Commissioners of Inland Revenue*(2). But the Income-tax authorities have for a long time accepted the Calcutta decision as correct and even after the decision of ROWLATT J., no attempt has been made to set matters right by legislative amendments. Several amendments have been introduced in the Indian Income-Tax Act on many other points but no amendment has been sought to be made in regard to this matter. I shall, however, proceed on the basis that the view of the Calcutta High Court is erroneous and that the decision of ROWLATT J. must be accepted as correct. ROWLATT J. held that the guaranteed interest received by the company in England formed part of the profits of the company, and that it must be taken into account in assessing the company to corporation profits tax

(1) (1922) I.L.R. 49 Cal. 815 (S.B.). (2) (1926) 12 T.C. 1111.

COMMISSIONER OF INCOME-TAX, MADRAS v. M. & S. M. Ry. Co., Ltd.

in England. It may be that the amount of guaranteed interest paid in England is profit of the company; but it is not profit or income accruing or arising in British India within the meaning of section 4 of the Indian Income-Tax Act. Under the contract with the Secretary of State the amount is payable to the company in London on 1st January and 1st July every year and when it is so paid in London it is not paid out of any profits earned in British India. The fact that the amount is shown in the balance sheet of the railway undertaking in British India does not affect the question and the amount cannot be deemed to be income arising or accruing in British India on this ground. Moreover, the amount is liable to income-tax in England, see *Foulsham* v. *Pickles*(1) and *Hall (H.M. Inspector of Taxes)* v. *Marians*(2); and the profit must be deemed to arise in England.

K. V. Sesha Ayyangar for petitioner.—The decision in *Madras and Southern Mahratta Railway Co., Ltd.* v. *The Commissioners of Inland Revenue*(3) is clear. ROWLATT J. held that the total profits of the company, and not the profits of the company minus the amount of guaranteed interest, was liable for the corporation profits tax. Under the terms of the contract the profits are divided at the end of the year between the Secretary of State and the company and the share of the company is paid to it, only after the Secretary of State reimburses himself the amount which he has paid by way of guaranteed interest. This amount is paid in anticipation of profits and is traceable to the profits earned in British India. The company is paid this amount because it manages the railway in British India and carries on business there. The fact that the Secretary of State guarantees a definite percentage of interest on the capital contributed by the company and pays the same in advance in England does not alter the character of the profits when they are earned. All that the guarantee means is that the Secretary of State assures a minimum percentage of interest even if profits are not made in the undertaking. That the amount is paid in England does not make any difference. The amount is paid to the company in respect of business carried on by it in British India and consequently it is income arising to the company

(1) [1925] A.C. 458. (2) (1935) 19 T.C. 582.
(3) (1926) 12 T.C. 1111, 1123.

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in British India. Even though money is paid under agreement in a place outside British India for business done in British India, it is assessable to tax in British India; vide *Commissioner of Income-tax, Bombay Presidency* v. *Sarupchand Hukamchand*(1), which was approved by the Privy Council in *Commissioner of Income-tax, Bombay* v. *Chunilal B. Mehta*(2). In *In the matter of the Bishop of Lucknow*(3) the Allahabad High Court held that an honorarium paid in London to the Bishop of Lucknow for holding the Lucknow See was income accruing in British India. Commission paid outside British India for services rendered within British India was held to be income arising within British India; see *In the matter of V. G. Every*(4). The fact that the amount paid in England is liable to income-tax assessment in England has also no bearing on the question whether it is income arising or accruing within British India. There is provision for relief against double taxation, both in the British and the Indian Statutes.

Nugent Grant in reply.—The question that arose in *Madras and Southern Mahratta Railway Co, Ltd.* v. *The Commissioners of Inland Revenue*(5) was entirely different from the one that arises here. Distinction ought to be made between the amount of guaranteed interest and the amount of surplus profits paid to the company. The nature and scope of the two payments are different. If the amount of guaranteed interest is subject to assessment in England it cannot be deemed to be income arising in British India. Income cannot be considered to accrue in two places at the same time in regard to the same transaction.

Cur. adv. vult.

JUDGMENT.

LEACH C.J.—The assessee in this case is the Madras and Southern Mahratta Railway Company, Limited, which was incorporated in England in 1882. The main object of the incorporation of the company was the fulfilment of a contract with the Secretary of State for India in Council for the construction and

(1) (1930) I.L.R. 55 Bom. 231. (2) I.L.R. [1938] Bom. 752 (P.C.).
(3) (1931) I.L.R. 54 All. 223. (4) I.L.R. [1937] 2 Cal. 327.
(5) (1926) 12 T.C. 1111, 1123.

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carrying on of a railway in India. After the incorporation, the contract was duly entered into and in accordance therewith the company constructed, equipped and maintained the railway to which the contract related and supplied the necessary staff for its working. The Secretary of State provided the land required for the railway and also the moneys necessary for its construction and working. All the assets of the undertaking including the rails, plant, machinery and rolling stock were to be and are his property. The company manages the railway under the supervision and control of the Secretary of State, who is empowered to appoint one member of the board of directors. The Court has been informed that the director appointed by the Secretary of State possesses a power of veto.

By virtue of the contract of 1882 the company undertook to pay into the Bank of England to the credit of the Secretary of State a sum of £3,000,000, and the Secretary of State undertook during the continuance of the contract to pay half-yearly to the company out of the revenues of India interest at the rate of 3½ per cent per annum on the amount. The £3,000,000 was duly paid by the company into the Bank of England to the credit of the Secretary of State, who has paid to the company in London half-yearly the amount required to meet the interest due but the Secretary of State has reimbursed himself at the end of the year out of the profits of the undertaking. The £3,000,000 represented the company's capital and the Secretary of State guaranteed interest on it at the rate mentioned. The contract also provided for division of the surplus profits between the Secretary of State and the company according to their respective shares in the capital of the undertaking.

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The contract of 1882 continued to govern the relations between the company and the Secretary of State until 26th June 1908 when a further contract, expressed to be supplemental to the contract of 1882, was entered into. The contract of 1908 provided for the continuance of the original contract subject to certain variations and modifications. It was agreed that the capital of the undertaking should be taken to be the sum of £16,250,000 of which £12,750,000 was to be the capital of the Secretary of State, and £3,500,000 to be the capital of the company. The Secretary of State was given the right to require the company to issue new capital stock not exceeding £1,500,000 to be allotted as fully paid up to such share-holders as he might direct. This new stock was issued in the same year with the result that the amount of the company's capital became £5,000,000 the figure at which it now stands. After the issue of this new stock the capital of the Secretary of State was deemed to be £11,250,000 for the purpose of determining the proportion in which the profits should be distributed.

All moneys received by the company in the course of the working of the railway have to be paid over to the Secretary of State. The company is not entitled to use any of the receipts of the undertaking for the purposes of meeting working expenses. These expenses are met from a grant made each year by the Secretary of State. As I have indicated the net receipts of the undertaking are divided at the end of each year between the Secretary of State and the company in proportion to their respective shares in the capital. The distribution of the profits rests with the Secretary of State, who is entitled in calculating the surplus to deduct the equivalent in rupees of the amount he has paid to the company by way of

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guaranteed interest in the course of the year. The surplus has always been more than sufficient to enable the Secretary of State to reimburse himself.

The reference arises out of the assessment of the company for the year 1937–38. The company returned an income of Rs. 24,36,479 for 1936–37. In arriving at this figure the company deducted Rs. 23,33,333 which it had received from the Secretary of State as interest under his guarantee. This deduction was in accordance with the practice which had been previously allowed, a practice which received the approval of the Calcutta High Court in *Bengal-Nagpur Railway Company, Ltd.* v. *The Secretary of State for India*(1). This decision however conflicts with a later decision in England affecting the company, *Madras and Southern Mahratta Railway Co., Ltd.* v. *The Commissioners of Inland Revenue*(2), and it is this conflict which has given rise to the reference. The Income-tax authorities say that the Calcutta decision is wrong and that the company in calculating its annual profits must include the amount of guaranteed interest received in London. In order that the question may be decided, the Commissioner of Income-tax, in agreement with the company, has referred to this Court under the provisions of section 66 (1) of the Indian Income-Tax Act, 1922, the following question:

"Whether the said sum of Rs. 23,33,333 being the equivalent in rupees of the guaranteed interest paid by the Secretary of State for India under the terms of the contracts, dated 1st June 1882 and 26th June 1908 between the Secretary of State and the company which was deducted for the purpose of the company's return for the accounting year 1936–37 is liable to assessment in the hands of the company?"

(1) (1922) I.L.R. 49 Cal. 815 (S.B.).

(2) (1926) 12 T.C. 1111.

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In *Bengal-Nagpur Railway Company, Ltd.* v. *The Secretary of State for India*(1) that company was called upon to pay tax on an income of Rs. 1,72,60,595 which included a sum of Rs. 13,07,440 being the equivalent of the amount of the guaranteed interest paid in sterling by the Secretary of State on the share of the capital of the company. For the purposes of the present reference the contract of the company with the Secretary of State may be taken to be on all fours with the contract of the Bengal-Nagpur Railway Company, Limited, with the Secretary of State. The Bengal-Nagpur Railway Company, Limited, claimed that it was only taxable in respect of the amount which it received in India at the end of the year as its share of the surplus profits. A Full Bench of the Calcutta High Court held that the company was only liable in respect of its share of the surplus profits received in return for its services in the management of the railway, and not in respect of the moneys received in London. It was considered that the payment of the guaranteed interest in London was independent of the earnings of the railway and that the repayment of the amount of the guaranteed interest constituted the payment of a debt due from the company to the Secretary of State.

In *Madras and Southern Mahratta Railway Co., Ltd.* v. *The Commissioners of Inland Revenue*(2) the question was whether the company was liable to corporation profits tax in respect of the amount which it received from the Secretary of State as guaranteed interest. Admittedly there is no difference in principle between assessment in England to the corporation profits tax and assessment to Indian income-tax. It was held by ROWLATT J.

(1) (1922) I.L.R. 49 Cal. 815 (S.B.). (2) (1926) 12 T.C. 1111.

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that the guaranteed interest paid by the Secretary of State formed part of the company's profits and that the recoupment to the Secretary of State out of the surplus profits represented a distribution of profits within the prohibition of deduction from the profits in section 53 (2) of the Finance Act, 1920. ROWLATT J. put the question this way:

"Are the profits of the company for the purpose of corporation profits tax the amount of their share before the Secretary of State is recouped, or are they only the balance which is left to them after the Secretary of State is recouped? That is what the question is, or to put it in another way, are they to be taxed on that balance, or are they to be taxed on that balance plus the amount of the guaranteed interest, which is only putting the same thing in another way?"

In deciding the case against the company the learned Judge said:

"If you put it in commercial or financial language or look at it from the commercial or financial point of view, the position simply is that these share-holders have been paid out of the proceeds of the working of the railway, and the revenues of India have not paid them a penny. The money they have got is simply because the railway has been so successful, and for no other reason they have got it. If it had not been successful they would have got some of it from the Secretary of State for India, but that position has not arisen; or, if you use language framed more exactly with respect to tax law, this, in my judgment, is the position, that the railway company have earned all these profits, all their one-fifth share, or whatever it is, of the profits of the railway company and it does not matter in the least that they have had to apply those profits, being profits from the working of the railway in making good to the Secretary of State a guarantee which he had honoured provisionally in favour of the share-holders . . . The Secretary of State is recouped out of what is called the company's share of the surplus receipts and as I have pointed out, the extent of his recoupment depends upon the amount of the profits. I think that this is a distribution of profits within the prohibition in section 53, sub-section 2 (*b*) of the Finance Act, 1920. I

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think it is a distribution of profits. It is a distribution of profits in recoupment of a guarantor who guaranteed those profits—guaranteed them if you like to the share-holders, but what he guaranteed are the profits. He has guaranteed that the people who put up the capital shall have a return on the capital, and if the profits unaided give that return, the person who gives the guarantee gets them to make good his guarantee. It seems to me the very simplest case of the application of profits, after they have become profits, by way of distribution of them to make good to somebody who has taken the risk of those profits not reaching that amount."

Both the company and the Income-tax authorities accept the decision of ROWLATT J. in *Madras and Southern Mahratta Railway Co., Ltd.* v. *The Commissioners of Inland Revenue*(1), as correctly stating the law and consequently are agreed that *Bengal-Nagpur Railway Company, Ltd.* v. *The Secretary of State for India*(2) ought not to be followed. While accepting the judgment of ROWLATT J. in *Madras and Southern Mahratta Railway Co., Ltd.* v. *The Commissioners of Inland Revenue*(1), Mr. Grant has contended on behalf of the company that the payment of interest on the £5,000,000 in London cannot be regarded as profits accruing or arising in British India within the meaning of section 4 of the Indian Income-Tax Act, 1922. In fact this is the only point taken on behalf of the company. As the correctness of the decision in *Madras and Southern Mahratta Railway Co., Ltd.* v. *The Commissioners of Inland Revenue*(1) is not challenged, I fail to see any basis for the argument that the receipt of the interest in London must be taken to be income earned there. The decision of ROWLATT J. emphatically negatives the contention. The basis of his judgment is that all the profits of the undertaking are earned in India and

(1) (1926) 12 T.C. 1111. (2) (1922) I.L.R. 49 Cal. 815 (S.B.).

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the payment by the Secretary of State in London is merely a provisional payment which he recovers out of the profits in India.

There are cases arising under the Indian Income-Tax Act which also militate against Mr. Grant's contention. In *Commissioner of Income-tax, Bombay Presidency* v. *Sarupchand Hukamchand*(1) the Bombay High Court had to consider whether section 4 (1) of the Indian Income-Tax Act, 1922, applied in these circumstances. A company registered in Indore, a Native State, entered into an agreement with a firm in Bombay under which the firm was to open and maintain at the company's expense shops in Bombay and elsewhere for the sale of the company's goods, to keep the books of account in Indore in respect of all sale-proceeds and disbursements of the company, to charge a commission of $1\frac{1}{4}$ per cent on the gross sale proceeds of all cloth and yarn produced by the company, and to pay itself out of the moneys of the company all sums due to it by way of commission or otherwise. The sale-proceeds of the Bombay shop were all sent to Indore and the commission was paid there. It was contended that in these circumstances no income accrued or arose in British India, but the contention was rejected and the decision was approved of by the Privy Council in *Commissioner of Income-tax, Bombay* v. *Chunilal B. Mehta*(2). In *In the matter of the Bishop of Lucknow*(3) the Allahabad High Court held that a sum of money paid annually in London to the Bishop of Lucknow by the trustees of a certain fund as a gratuitous and unconditional personal allowance of the holder of the Lucknow See was income accruing or arising in British India and was assessable as salary

(1) (1930) I.L.R. 55 Bom. 231. (2) I.L.R. [1938] Bom. 752 (P.C.).
(3) (1931) I.L.R. 54 All. 223.

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under section 7 (1) of the Act. In *In the matter of V. G. Every*(1) the Calcutta High Court held that commission earned by an assessee in British India for services rendered there as an employee of a company which was received by him in the United Kingdom while on leave, was income which had accrued or arisen in British India within the meaning of section 4 (1).

It is not necessary to carry the discussion any further. There is ample authority in the cases which I have quoted to support the contention of the Income-tax authorities that all the profits of the company accrue or arise in British India and therefore I would answer the question referred to us in the affirmative. I would add that the Court is not called upon to consider whether the payment in London would constitute profits arising in British India in the event of the working of the undertaking not realizing sufficient to reimburse the Secretary of State at the end of the year, as this situation has not arisen.

As the reference has been made by consent in order that there should be a pronouncement by the Court on the question, there will be no order as to costs.

KING J.—I agree.

KRISHNASWAMI AYYANGAR J.—I also agree.

Solicitors for Respondents—*King & Partridge.*

N.S.

(1) I.L.R. [1937] 2 Cal. 327.

APPELLATE CIVIL.

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

T. S. PICHU AYYANGAR (SECOND PLAINTIFF), APPELLANT,

1940, March 6.

v.

SRI PERARULALA RAMANUJA JEER SWAMIGAL, DHARMAKARTHA AND MANAGER OF SRI ALAGIA NAMBIRAYAR TEMPLE (DEFENDANT), RESPONDENT.*

Madras Hindu Religious Endowments Act (II of 1927), sec. 63 (4)—Refusal of Endowments Board to frame scheme for temple—Court's jurisdiction to set aside refusal and frame scheme—Civil Procedure Code (V of 1908), ss. 105 and 115—Order under sec. 115 on preliminary issue, if open to challenge in appeal to High Court against decree.

Under section 63 (4) of the Madras Hindu Religious Endowments Act, 1926, no suit lies to set aside an order of the Hindu Religious Endowments Board refusing to frame a scheme in respect of a temple. The words "institute a suit in the Court to modify or set aside such order" in sub-section 4 refer only to an order settling a scheme or modifying or cancelling one and not to an order refusing to frame a scheme. There is nothing in sections 63, 64 and 65 of the Act which gives power to the Court to frame a scheme when the Board has refused to do so. The Court can modify or cancel a scheme framed by the Board but it cannot take initial action. The initial duty of framing a scheme rests with the Board and with the Board only.

Venkatasami v. *Stridavamma*(1) explained and distinguished.

An order by the High Court in revision under section 115 of the Code of Civil Procedure on a preliminary issue relating to the maintainability of a suit, holding that the suit does not lie, is open to question in an appeal to the High Court from

* Appeal No. 229 of 1937.

(1) (1886) I.L.R. 10 Mad. 179 (F.B.).

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the decree dismissing the suit based on such order. Such an order is an interlocutory order affecting the decision of the Court when passing the decree and it is clearly open to the High Court by virtue of section 105 of the Code of Civil Procedure to consider its correctness in the appeal from the decree.

APPEAL against the decree of the District Court of Tinnevelly in Original Suit No. 4 of 1935.

K. V. Sesha Ayyangar and *R. Desikan* for appellant.

K. E. Rajagopalachari for respondent.

JUDGMENT.

LEACH C.J.

LEACH C.J.—In 1933 an application was made by twenty worshippers of the Sri Alagianambirayar temple in the Tinnevelly district to the Madras Hindu Religious Endowments Board for an order directing an inquiry to be held into the question whether the Board should frame a scheme for the administration of the temple and its endowments. The Board held an inquiry and as the result of the investigation decided that it was not necessary to frame a scheme. The applicants then filed a suit in the Court of the District Judge of Tinnevelly with the object of obtaining the settlement of a scheme under a decree of the Court. The suit was defended by the trustee, who is the respondent in this appeal. It is unnecessary to set out all the objections to the suit. It is sufficient to say that the main objection was that the Court had no power to frame a scheme. On this question a preliminary issue was framed and was answered by the District Judge in favour of the plaintiffs. Thereupon the respondent applied to this Court to reverse the order in exercise of its revisional powers. The application was heard by VENKATARAMANA RAO J. who decided that the District Judge had erred in holding that the suit lay. In addition to allowing the petition the learned Judge dismissed the suit.

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On the order being communicated to him the District Judge passed a formal decree dismissing the suit with costs. The appeal is from that decree. Before proceeding to discuss the merits of the appeal it is necessary to dispose of a preliminary objection raised by the respondent who says that the order of VENKATARAMANA RAO J. was final and therefore the appeal does not lie.

Section 115 of the Code of Civil Procedure which confers upon the High Court its power of revision states that if the subordinate Court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit. The section only contemplates an order which is appropriate to the application, and the order of VENKATARAMANA RAO J. dismissing the suit was not appropriate. Having decided that the District Judge had erred on the preliminary issue, he should have set aside his ruling and directed the District Judge to dispose of the suit in accordance with law and not to have dismissed the suit himself. The order of VENKATARAMANA RAO J. was an interlocutory order and the preliminary objection must be decided on this footing.

In support of his contention that the decision of VENKATARAMANA RAO J. is final the learned Advocate for the respondent has quoted *Ram Kirpal* v. *Rup Kuari*(1), *Mubarak Husain* v. *Bihari*(2) and *Hook* v. *Administrator-General of Bengal*(3) but as the present case is clearly governed by section 105 of the Code

(1) (1883) I.L.R. 6 All. 269 (P.C.). (2) (1894) I.L.R. 16 All. 306. (3) (1921) I.L.R. 48 Cal. 499 (P.C.).

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of Civil Procedure they are not in point and I do not propose to pause to examine them.

That section says:

"(i) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(ii) Notwithstanding anything contained in sub-section (i), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom he shall thereafter be precluded from disputing its correctness."

Authority is given here to the Court to set aside an erroneous order affecting the decision of a case unless it be an order of remand from which an appeal lies and no appeal is filed. Sub-section (ii) appeared in the Code for the first time in 1908. Now the order of VENKATARAMANA RAO J. certainly affected the decision of the case. As the result of the order, the District Judge was left with no other course open to him but to dismiss the suit. Therefore the order is one which directly falls within sub-section (i) of section 105. If the argument of the learned Advocate for the respondent were to be accepted it would mean that this suit would be decided by an interlocutory order and there would be no appeal either to this Court or to the Privy Council. The order of VENKATARAMANA RAO J. was not appealable. The Letters Patent of this Court expressly provide that an order passed in revision shall not be subject to an appeal and section 111 of the Code of Civil Procedure says that no appeal shall lie to His Majesty in Council from the decree or order of one Judge of a High Court. Therefore the order of VENKATARAMANA RAO J. does not fall within the purview of section 109 of the Code

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which provides for appeal to His Majesty in Council from a final order or a decree of a High Court. The present appeal is from the decree, and as the order affected the decision of the Court when passing the decree it is clearly open to this Court by virtue of section 105 to consider its correctness.

I will now turn to the merits of the appeal. Section 62 of the Madras Hindu Religious Endowments Act, 1926, says that when the Board has reason to believe that the trustee of a math or excepted temple has been mismanaging the endowments or has been spending or alienating them for improper purposes, or when not less than twenty persons having interest make an application to the Board stating that in the interests of the proper administration of the endowments a scheme of administration should be settled, the Board may hold an inquiry. The Board cannot be compelled to hold an inquiry. If it decides that an inquiry is not necessary the applicants can carry the matter no further. So much is conceded by the learned Advocate for the appellant. The decision of the appeal depends upon the interpretation to be placed on sub-section 4 of section 63, but the sub-section must be read in conjunction with the first part of sub-section 1 and sub-section 3. The first part of sub-section 1 of section 63 reads as follows:

"If after making the inquiry referred to in section 62 the Board is satisfied that the trustee concerned has mismanaged the endowments of such math or temple or has spent or alienated them for improper purposes, or that, in the interests of the proper administration of such endowments, a scheme of administration should be settled, the Board may, after consulting in the prescribed manner the trustee and the persons having interest, by order settle a scheme of administration for the endowments connected with such math or temple."

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Sub-sections 3 and 4 are in these words :

"(3) The Board may at any time by order and in the manner provided in sub-section 1 modify or cancel a scheme settled under that sub-section.

(4) Every order of the Board under this sub-section shall be published in the prescribed manner.

The trustee or any person having interest may within six months of the date of such publication institute a suit in the Court to modify or set aside such order."

For the appellant it is said that inasmuch as sub-section 4 gives a person having interest in an endowment the right to institute a suit in the Court to modify or set aside an order under this section, the power must include a power to the Court to frame a scheme, if the Court sets aside an order of the Board refusing to do so. It is also said that the Court has power to frame a scheme by reason of section 65 to which I shall refer later. It is further said that apart from the provisions of the Madras Hindu Religious Endowments Act, 1926, there is power in the Court to frame a scheme.

I agree with VENKATARAMANA RAO J. that section 63 does not give authority to the Court to frame a scheme in the event of the Board refusing to do so. The only orders which the section refers to are : (i) an order settling a scheme, (ii) an order modifying a scheme, and (iii) an order cancelling a scheme. I consider that the words "institute a suit in the Court to modify or set aside such order" are intended only to refer to an order settling a scheme or modifying or cancelling one.

Mr. Sesha Ayyangar on behalf of the appellant has referred us to *Venkatasami* v. *Stridavamma*(1) and *Reasut Hossein* v. *Hadjee Abdoollah*(2). In *Venkatasami*

(1) (1886) I.L.R. 10 Mad. 179 (F.B.). (2) (1876) I.L.R. 2 Cal. 131 (P.C.).

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v. *Stridavamma*(1) a Full Bench of this Court held that an order rejecting an application for the appointment of a receiver was an order passed under section 503 of the Code of 1882 (now Order XL, rule 1) and was therefore appealable under section 588, clause 24 [now Order XLIII, rule 1, clause (*s*)]. An appeal was given from an order appointing a receiver, but nothing was said with regard to an appeal from an order refusing to appoint a receiver. The Court considered that as there was an appeal from an order appointing a receiver it followed that there must be an appeal from a negative order. This meant that on appeal the Court could appoint a receiver if an appointment had been improperly refused by the Court below. Mr. Sesha Ayyangar says that, inasmuch as the Court has the power to set aside an order of the Board to frame a scheme under section 63, it can set aside the order refusing to settle a scheme, and, if it does so, this must imply a power to frame a scheme. This does not follow. The Act may vest in the Board the power to frame a scheme and in the Court only the power to modify or cancel it, and this is my reading of the Act. The Board must in the first instance frame a scheme. The Court can modify or cancel it but it cannot take initial action. Therefore it is not a question of the Court having power to do something and refusing to do it, as in *Venkatasami* v. *Stridavamma*(1), and that makes all the difference. The decision in that case was based on *Reasut Hossein* v. *Hadjee Abdoollah*(2), the second case quoted by Mr. Sesha Ayyangar.

If sub-section 4 were to be held to apply to the order of the Board in this case, what would be the

(1) (1886) I.L.R. 10 Mad. 179 (F.B.). (2) (1876) I.L.R. 2 Cal. 131 (P.C.).

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result? The Court would have to set aside the order, but it could not pass any further order, because the power to frame a scheme is in the Board. VENKATARAMANA RAO J. put the position here very aptly in these words:

"So when the Board declines to frame a scheme there is no use in the Court setting at naught that discretion because there is no power in the Court to compel the Board to frame a scheme. Unless the Court has got that power it would be futile to set aside such an order."

In my opinion the Legislature never intended sub-section 4 to have application except to orders of the Board framing schemes or modifying or cancelling them.

This brings me to the second contention of the appellant. Section 65 says that any scheme of administration which has been settled by a Court under section 63, or which under section 75 is deemed to be a scheme settled under the Act may, at any time, for sufficient cause be modified or cancelled by the Court in a suit instituted by the Board or the trustee or any person having interest but not otherwise. Mr. Sesha Ayyangar says that the words "any scheme of administration which has been settled by the Court under section 63" must be read as meaning that the Court is given power to settle a scheme in any circumstances. I cannot read section 65 in this way. The Court has power to settle a scheme, but it must be a scheme which has first been framed by the Board. Section 65 is merely intended to give the Court power, after a scheme has been framed, to modify or cancel it at any time.

I am also unable to accept the argument that there is a residuary power in the Court to frame a scheme. The first Act relating to the Madras Hindu Religious Endowments came into force in 1925. Before then a

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scheme for the management of a temple could only be framed in accordance with the provisions of section 92 of the Code of Civil Procedure, and the suit required the sanction of the Advocate-General to its institution. It is common ground that since 1925 section 92 has ceased to apply and that the Madras Hindu Religious Endowments Board has taken the place of the Advocate-General. The scheme of the first Act was to place in the Board power of supervision of Hindu temples and maths in this Province and in proper cases the control of the management, and this is the scheme of the present Act. As section 92 of the Code of Civil Procedure has now been replaced by the Madras Hindu Religious Endowments Act, 1926, so far as Hindu religious endowments of this Province are concerned, that Act alone can be looked at for ascertaining what the powers of the Court are. There can be no residuary powers because the former powers are taken away by the present Act. The only section which has application here is section 63, and, as I have indicated, this section in my judgment gives no power at all to the Court to frame a scheme when the Board has refused to do so. I consider that VENKATARAMANA RAO J. correctly interpreted the Act in his order of revision and consequently I hold that the appeal fails and should be dismissed with costs.

KRISHNASWAMI AYYANGAR J.

KRISHNASWAMI AYYANGAR J.—I agree with my Lord the CHIEF JUSTICE on both the points dealt with in the judgment just now delivered. On the second point, which turns on the true construction of the last sentence in section 63 (4) of the Madras Hindu Religious Endowments Act, I desire to add a few words of my own. That clause runs as follows:

"The trustee or any person having interest, may within six months of the date of such publication institute a suit in the Court, to modify or set aside such order."

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The words "such publication" and "such order" in this clause have reference obviously to the kind of order mentioned just previously, in the earlier portion of the same sub-section which directs the publication of "every order of the Board under this section" in the prescribed manner. The order with which we are here concerned is no doubt an order of the Board, but is it also one *under this section* so as to give to the appellants a right to institute a suit to modify or set it aside? I was at first impressed by the argument that the point is covered by the decision of the Full Bench in *Venkatasami* v. *Stridavamma*(1) but, on further consideration, I think that that view cannot be sustained. The above decision was rendered no doubt on similar words but occurring in a different enactment, namely, the Code of Civil Procedure, 1882. By section 588 (24) of that Code, corresponding to Order XLIII, rule 1 (*s*) of the present Code, an appeal was allowed against, amongst others, orders under section 503. Section 503 contained the various provisions relating to the appointment of a receiver, his rights and duties, etc., but said nothing about the dismissal of an application made under the section, a feature which is common to both the old and the new Codes. The argument was advanced that an appeal was permitted only in respect of an affirmative order, that is to say, an order granting the application and none against an order refusing it. The contention was negatived, the Court holding that even an order rejecting the application was an order passed *under* the section, and was therefore appealable under section 588 (24). The result was that, in the view of the Full Bench, an order *under the section* comprehended both classes of orders, positive as

(1) (1886) I.L.R. 10 Mad. 179 (F.B.).

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well as negative. Here then, it is said, we have a construction of the words *orders under* a section, and the question is, are we free to adopt a different construction in respect of what is practically the same language in the Madras Hindu Religious Endowments Act?

Two reasons in particular have operated on my mind in persuading me to assent to the opinion expressed in the judgment of the learned CHIEF JUSTICE. In the first place, it is to be observed that there is nothing in common between the Code of Civil Procedure and the Hindu Religious Endowments Act; or, to say the same thing in other words, the two statutes are not *in pari materia*. Further the judgment of the Full Bench appears to have proceeded on considerations which have little or no application to an Act like the one with which we are concerned. PARKER J. felt compelled to place a reasonable construction on the Act and pointed out that the opposite construction could not have been intended by the Legislature. BRANDT J. laid stress on principles and expediency, and held that the view of the Full Bench was more consonant with the general principles of the Code and the rules of construction. But it cannot be said that there is anything in the general principles of the Hindu Religious Endowments Act which, as pointed out by my Lord, can be said to lend support to the construction accepted in the case cited. The purpose and scope of the Madras Hindu Religious Endowments Act are quite different and leave no room for doubt that it was the intention of the Legislature to vest the supervision and control of religious institutions in a Board composed of men specially qualified by their knowledge and equipment to discharge the duty entrusted to them by the Act. It is therefore right to say that, in a

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statute of this kind, we should require language more explicit than we have to give a right of suit against the decisions of a body composed presumably of persons having expert knowledge in the special field of Hindu religion and charities.

Secondly, and this in my view is a more powerful argument against the appellant, the Court should be slow to adopt a construction which is not likely to afford a real and effective remedy to the complaining party. The initial duty of framing a scheme rests with the Board and with the Board only, and all that the Court can do, assuming it has the power, is to modify or set aside its order of refusal, and not to compel it to frame a scheme. There is nothing in sections 63, 64 and 65, to warrant our holding that the Court by its decree can itself frame a scheme in the suit. To imply such a power in the Court from the opening words of section 65 namely, "any scheme of administration which has been settled by a Court under section 63" is to place an unreasonable construction on these words and cannot be permitted. Is the Court then to be placed in a position in which it is merely to set aside the order and still leave it open to the Board to refuse to frame a scheme, in other words, to stultify itself? I think not.

I therefore feel that, whatever might be the meaning of the words in question in some other enactment or in some other context, it is not correct to construe section 63 as conferring a right of suit against a refusal to frame a scheme under the section.

N.S.

APPELLATE CIVIL.

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

1940, February 28.

SREE RAJAH VASI REDDI BALACHANDRASEKHARA VARAPRASAD BAHADUR MANNE SULTAN GARU (PLAINTIFF), APPELLANT,

v.

MALLELA LAKSHMINARASIMHAM AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu law—Alienation—Rights of alienee—After-born son, if entitled to challenge alienation.

A mortgage of joint family property was made by a Hindu father on behalf of himself and his minor son. Subsequently another son was born to the father. A suit upon the mortgage was later on filed against the father and his two sons. The trial Court found that the mortgage was not binding on the sons and gave a decree in favour of the plaintiff in respect of one-half of the mortgaged property. On appeal,

held, the father was entitled at the time of the execution of the mortgage to one-half share in the property mortgaged and the plaintiff was therefore entitled to a decree for sale of that half share.

In the Presidency of Madras, an alienee from a Hindu coparcener gets the share to which the alienor is entitled at the time of the alienation undiminished by any births or deaths in the family subsequent to the date of the alienation.

Chinnu Pillai v. *Kalimuthu Chetti*(1) and *Kasi Viswesra Rao* v. *Varahanarasimham*(2) followed.

Sathapathiar v. *Sivanarayana Pillai*(3) not followed.

The question, whether a coparcener born subsequent to an alienation of joint family property is entitled to challenge it, left open.

Lal Bahadur v. *Ambika Prasad*(4) considered and explained.

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* Appeal No. 8 of 1937 and Civil Miscellaneous Petitions Nos. 484 and 500 of 1940.

(1) (1911) I.L.R. 35 Mad. 47 (F.B.). (2) A.I.R. 1937 Mad. 631.

(3) (1932) I.L.R. 56 Mad. 534. (4) (1925) I.L.R. 47 All. 795 (P.C.).

RAJAH VASI REDDI v. LAKSHMI-NARASIMHAM.

APPEAL against the decree of the District Court of Kistna, dated 31st October 1936, and passed in Original Suit No. 15 of 1936.

V. Govindarajachari and *K. Krishnamurti* for appellant.

A. Venkatachalam for first respondent.

P. Somasundaram and *P. Suryanarayana* for second and third respondents.

Cur. adv. vult.

VENKATA-RAMANA RAO J.

The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—This is an appeal from the judgment and decree of the learned District Judge of Kistna in a suit upon a mortgage, dated 19th September 1929, executed by the first defendant for himself and as guardian of his son, the second defendant, in favour of the plaintiff. The third defendant is another son of the first defendant born subsequent to the date of the mortgage. The mortgage was for a sum of Rs. 2,500 payable with compound interest at Re. 0–14–6 per cent per month. The plaint alleged that there was a payment of Rs. 600 on 9th November 1930 and that the said payment was made by one Kasibotla Suryanarayanamurthi on behalf of the defendants. The defendants denied that the said sum of Rs. 600 was paid as alleged in the plaint and the first defendant pleaded that he was not personally liable on the ground that the personal remedy was barred by limitation, the suit having been instituted on 16th March 1936 more than six years from the date of the mortgage. Defendants 2 and 3 denied the truth and validity of the mortgage. Their case was that the amount was not borrowed for any family necessity or for payment of any antecedent debt but for conducting a business newly started by the first defendant himself. Another point taken was

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VENKATA-RAMANA RAO J.

that even assuming the mortgage to be true, it was binding only on the mortgagor's share which must be deemed to be one-third and the third defendant though born subsequent to the date of the mortgage would be entitled also to a third share in the property mortgaged. The learned District Judge found the mortgage to be true but held that it was not binding on defendants 2 and 3 on the ground that the amount borrowed was for the purpose of a business started by the father and not for any antecedent debt or family necessity. He also found that Rs. 600 was paid by the said Suryanarayanamurthi but he was not an agent duly authorized within the meaning of section 20 of the Limitation Act and therefore the said payment would not save the bar of limitation in respect of the personal liability of the first defendant. He therefore held that the first defendant was not personally liable for the debt. In regard to the interest of the first defendant in the property he held that he was entitled to a half share in the suit property and that the third defendant cannot repudiate the alienation made before his birth. The plaintiff has preferred this appeal in so far as the decree is against him, that is, in so far as it negatived the personal liability of the first defendant. Defendants 2 and 3 have preferred a memorandum of objections raising the contention that the lower Court should have passed a decree only for a third share of the property and not for a half share.

Two questions therefore fall to be decided, namely, (i) whether the first defendant is personally liable for the debt, and (ii) what is the share of the first defendant in the property mortgaged which the plaintiff is entitled to sell in execution of the decree in his favour. The first question turns on the determination of the issue whether the payment of Rs. 600

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operates as an acknowledgment of debt within the meaning of section 20 of the Limitation Act. The payment of Rs. 600 was apparently made towards the principal and was so treated by the plaintiff. In order that a part payment of a principal can be relied on for saving the bar of limitation within the meaning of section 20 of the Limitation Act, it must fulfil three requisites: (i) the payment must be made by the debtor or his agent; (ii) the agent must have been empowered specifically to make the said payment; and (iii) there must be an acknowledgment of the said payment in the handwriting of or in a writing signed by the debtor or his agent, that is, if the payment was made by the debtor, in the handwriting of or in a writing signed by the debtor, or if the payment was made by the agent, in the handwriting of or in a writing signed by the agent. The question is whether the view of the learned District Judge that K. Suryanarayanamurthi (P.W. 4) in making the payment was not the duly authorized agent of the defendants within the meaning of section 20 is correct. P.W. 4 admits that he paid Rs. 600 in part-payment of the debt. He acknowledges the fact of payment in a letter Exhibit B signed by him and delivered to the plaintiff, which runs thus:

"Irusalnamah submitted by Kasibotla Ramayya Garu's son Suryanarayanamurthi, resident of Challapalli, Divi taluk:

Out of the amount due under the hypothecation deed executed on 19th September 1929 in your favour by Mallela Venkatappayya Garu's adopted son Lakshmi Narasimham, resident of Godugupeta, Bandar, a sum of Rs. 600 (in words six hundred) has been sent to me to be credited towards the said deed and so I have sent the same to you. I shall get the said amount credited towards the said deed by the said Lakshmi Narasimham.

(Signed) Kasibotla Suryanarayanamurthi,
9th November 1930."

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Mr. Somasundaram on behalf of defendants 2 and 3 does not dispute the fact of payment but contends that P.W. 4 was not an agent within the meaning of the section but only a mere messenger who made the payment and that Exhibit B therefore cannot save limitation. On the evidence on record we are clearly of the opinion that P.W. 4 in making the payment was the duly authorized agent of the defendants within the meaning of the section. P.W. 4 is a close relation of the first defendant. It was P.W. 4 that arranged for the loan. Exhibit B clearly says that the sum of Rs. 600 was sent to him for the express purpose of making the payment on his behalf and crediting the same towards the deed. No doubt P.W. 4 says in his evidence before the Court that the money was not sent by the first defendant but he had the money belonging to one Venkata Ramanamma and inasmuch as the plaintiff pressed for the payment of the debt he paid the same on behalf of the first defendant. This story cannot possibly be believed in the face of the express recital in Exhibit B. P.W. 4 says that he told the first defendant that he made the payment of a sum of Rs. 600 to the plaintiff and that first defendant told him that he would settle later. Though the first defendant as D.W. 1 denies P.W. 4 having told him that such a payment was made, we cannot accept this denial as true. Four months before the plaintiff filed the suit the plaintiff sent a registered letter Exhibit D, dated 3rd March 1936, to the first defendant wherein the fact of payment of Rs. 600 on his behalf by Suryanarayanamurthi was mentioned and no reply was sent thereto. Therefore the recital in Exhibit B that Rs. 600 was sent by the first defendant must be true and there is no reason to think that P.W. 4 was making a false recital. It

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is very likely that that sum was sent to P.W. 4 as he was the person who arranged for the loan. The decision in *Ramkumar Sewchand Roy* v. *Nanuram Poddar*(1) on which Mr. Somasundaram relies does not support him; on the other hand, as in this case, the payment was made by a friend of the debtor acting as his agent but he did not actually pay the money to the creditor but sent it through a messenger with a letter which was similar in terms to Exhibit B. It was held that that was a valid acknowledgment within the meaning of section 20 of the Limitation Act.

The next question is whether the decree of the learned District Judge directing a sale of a half share of the first defendant is right. The contention of Mr. Somasundaram is that an after-born son is entitled to question the alienation made by a father without any legal necessity when on the date of the alienation there were other sons living who could object to the said alienation and, as in this case on the date of the alienation the second defendant was born and in existence, it would follow that the third defendant would be entitled to a third share and what would pass to the alienee would only be a third share of the father and therefore the decree ought to have directed only a sale of the one-third share of the father in the property mortgaged. In support of his contention Mr. Somasundaram relies on the decisions reported as *Amirthalinga Thevan* v. *Arumuga Ambalagaran*(2), *Chandramani Prushti* v. *Jambeswara Rayagaru*(3) and *Sathapathiar* v. *Sivanarayana Pillai*(4). Though in *Chandramani Prushti* v. *Jambeswara Rayagaru*(3) it is stated as settled law

(1) (1925) I.L.R. 53 Cal. 163.
(2) (1928) 28 L.W. 634.
(3) (1930) 34 L.W. 598.
(4) (1932) I.L.R. 56 Mad. 534.

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that, if a son was born after the alienation of the family property by his father, if there were other members who had not consented to and validated the alienation, it can be questioned by an after-born son, the proposition would seem to require reconsideration in view of the decision of the Privy Council in *Lal Bahadur* v. *Ambika Prasad*(1). The learned editor of Mayne's book on Hindu Law, Tenth Edition, comments on that decision at pages 511 and 512 thus:

"An observation of the Privy Council in *Lal Bahadur* v. *Ambika Prasad*(1) would seem to confine the right to challenge alienations of family property to the coparceners alive at the date of the alienation and to deny such a right to a coparcener who though born subsequent to the alienation acquires an interest in the coparcenary property before the death of the objecting or non-alienating coparceners. The point was not considered and it may not be right to regard the observation as a decision on the question. It would be against the whole current of Indian authorities which were neither referred to nor considered and cannot therefore be deemed to be overruled. If however the observation means that coparceners born in the family subsequent to an alienation before the death of the other coparceners who could challenge it, have no right to the property and consequently no right to challenge the alienation it would conflict with what was said by the Board in *Ramkishore Kedarnath* v. *Jainarayan Ramrachhpal*(2) as well as with the cardinal principle of Hindu law."

With great respect to the learned editor we are not inclined to agree with these remarks. We are inclined to think that the decision of the Privy Council is a direct decision on the question. In that case the facts were as follows: Ram Din and his brother Pateshwari were two brothers. On 6th August 1895, as managers of the family they mortgaged certain family property. They executed two mortgages, one simple

(1) (1925) I.L.R. 47 All. 795 (P.C.).
(2) (1913) I.L.R. 40 Cal. 966 (P.C.).

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and the other usufructuary. On the date of the mortgage Ram Din had two sons Awadh Behari and Jantri Prasad, both of them minors. Long subsequent to the date of the mortgages the plaintiffs were born to Awadh Behari. On 12th September 1904 Pateshwari and Ram Din sold the property to the usufructuary mortgagee in part satisfaction of his mortgage and for cash received for payment of the other debts. The suit was brought in 1919 to set aside the sale when the plaintiff's father was alive and his right to set it aside was barred by limitation. Dealing with the right of the plaintiffs to question the mortgages their Lordships observed as follows :

"The respondents, plaintiffs in the suit, are sons of Awadh Behari. In 1895 they were still unborn. This, as will later appear, is one of the most important facts in the case. *It follows from it that these two mortgage deeds have always been binding on the respondents.* The only joint family estate to an interest in which they succeeded was an estate which to the extent of these two mortgages had already been alienated."

These observations of their Lordships seem to be clear and there seems to be no ambiguity about them. If the matter had rested there, one might have said that they were in the nature of an *obiter*. The learned Judicial Commissioner of Oudh had rested his decision on the ground that on the date of the sale the mortgages must be deemed to be antecedent debts and therefore the sale was justified. But their Lordships were not inclined to rest their decision on this ground but expressly put it on the ground that the plaintiffs were not born on the date of the mortgage. This is how they deal with the question at page 801 :

"The effect of that explanation [the explanation of *Sahu Ram's* case in the case of *Brij Narain* v. *Mangal Prasad*(1)] in their Lordships' judgment is to show that in the circumstances of this case both of the mortgages of 1895 were 'antecedent

(1) (1925) I.L.R. 46 All. 95 (P.C.).

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debts' which would justify for their liquidation a sale of family property not otherwise improper. In the present case, however, it is not in their Lordships' judgment, necessary to invoke any such doctrine in order to counter the objection to the sale now being dealt with. *Both mortgages, as their Lordships observe once more, were binding upon the respondents.* A sale of family property otherwise unobjectionable, which resulted in the removal from what remained of it of the burden *pro tanto* of these encumbrances, *cannot be successfully attacked by those so bound.*"

This decision is therefore a direct decision on the question whether an after-born son is entitled to impeach an alienation made before his birth. And the case in *Ramkishore Kedarnath* v. *Jainarayan Ramrachhpal*(1) does not enunciate any principle in conflict with this decision. In that case the facts were as follows. The plaintiffs were the four sons of one Kedarnath who in October 1898 made a disposition of a part of the family property by way of partition to Jainarayan who was alleged to be an adopted son of his undivided brother's widow. The suit was instituted on 20th December 1907 to set aside the said alienation. The first plaintiff was born on 20th December 1886. The other plaintiffs were born between 1892 and 1894. The learned Judicial Commissioner held that as the first plaintiff instituted the suit within three years of attaining the age of 21, he was entitled to the benefit of section 7 of the Limitation Act of 1877 and the suit was not barred as against him, but he held that it was barred as against his younger brothers who were born after the commencement of what he regarded as the adverse possession of the defendant Jainarayan. Their Lordships dispose of the correctness of this view thus :

"It was however conceded before this Board, and, as their Lordships think, rightly conceded, that if the first plaintiff

(1) (1913) I.L.R. 40 Cal. 966 (P.C.).

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succeeds in the suit his younger brothers born before a partition of the estate will be entitled to share in the relief."

This does not lend countenance to the view that the younger sons are entitled to impeach the alienation. What was meant by their Lordships was that if the elder son recovers the estate the younger son would be entitled to share in it being joint family property recovered for the family. Apparently in *Visweswara Rao* v. *Surya Rao*(1) their Lordships, MADHAVAN NAIR and STONE JJ., were not inclined to agree with the view expressed in *Chandramani Prushti* v. *Jambeswara Rayagaru*(2) as settled law (*vide* observations at page 687), because in that page the learned Judges after a review of the case-law remark thus :

"Whether or not an after-born son can effectively join with existing sons to attack or resist an alienation, the cause of action or the right to defend is a cause or right that was in those members of the family that were alive at the time of the alienation and were not consenting."

They express an opinion that if before the after-born son is born, the sons in existence were to die, the right is lost to the after-born son though the right to set aside an alienation may be within the time from the date when the cause of action accrued to the sons in existence. This seems to be in conflict with the view expressed in Mayne's book, at page 513, where it is stated that it is a right in every member of the coparcenary for the time being and as long as that right in the coparcenary exists it would be immaterial whether he was alive on the date of the alienation or born subsequently. Much may be said in favour of either view and it may be that the view expressed in Mayne's book is sounder. The scope and effect of the Privy Council decision in *Lal Bahadur* v. *Ambika Prasad*(3)

(1) (1935) I.L.R. 59 Mad. 667. (2) (1930) 34 L.W. 598.
(3) (1925) I.L.R. 47 All. 795 (P.C.).

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may require consideration. But we think that, in the view we are taking of the share which the father is entitled to, it is not necessary to decide the point.

The question to what share he is entitled is quite distinct from the question whether an after-born son is entitled to question the alienation or not. We will assume he can and deal with the question of the father's share on that footing. So far as our Presidency is concerned, it is accepted law that a coparcener is entitled to alienate his share for value. What the alienee gets by virtue of such an alienation is not a bare right to partition but a vested interest, the extent of which will have to be ascertained by a suit for partition. The Full Bench decision of our High Court in *Chinnu Pillai* v. *Kalimuthu Chetti*(1) has ruled that the interest which an alienee would get would be the share to which the alienor would be entitled at the time of the alienation undiminished by any births or deaths in the family subsequent to the date of the alienation. The rule is thus stated by WHITE C.J. in delivering the judgment of the Full Bench :

"As pointed out by the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad Singh*(2) an alienation by a coparcener of his joint interest in family property is inconsistent with the strict theory of a joint and undivided Hindu family. But the doctrine recognizing this right is well established in this Presidency, and it seems to me to be only the logical development of this doctrine that, for the purpose of ascertaining the quantum of interest alienated, the test to apply should be the state of the family as regards the number of coparceners at the time the alienation is made, and not the state of the family when the owner of the interest seeks to reduce his interest into possession."

(1) (1911) I.L.R. 35 Mad. 47 (F.B.). (2) (1879) I.L.R. 5 Cal. 148 (P.C.).

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The learned Judges in *Chinnu Pillai* v. *Kalimuthu Chetti*(1) expressly dissented from the decision of the Full Bench in *Rangasami* v. *Krishnayyan*(2) which took the view that the interest of the alienor would be diminished by births of subsequent members of the family. They in effect followed the view expressed by BHASHYAM AYYANGAR J. in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(3) where the learned Judge took the view that the matter was concluded by the decisions of the Privy Council. The learned Judge, at page 718, observes as follows:

"A coparcener may profess to alienate either his undivided share in the whole of the family property or his undivided share in some specified portion of the family property or the whole of a specified portion of the family property. The same thing may take place in the case of involuntary sales also. In all these cases the sale operates upon the interest and share of the transferor as the same existed at the date of the transfer and the transferee must work out the transfer by bringing a suit for ascertaining what the share and interest of the transferor was at the date of the transfer. When the transfer is of an undivided interest in the whole of the family property, the transferee will get whatever may be allotted to the transferor's share in a suit for partition. But if the transfer relates to any specified portion of the family property, there is the risk that it may turn out that in a partition of the whole property it is impracticable or inequitable to allocate either the whole or a part of such specified portion to the share of the transferor."

In giving expression to this view his Lordship was only following the decision of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad Singh*(4). In that case the mortgage was executed by the father Adit Sehai and on the date of the mortgage he was entitled to a third share. The question was what

(1) (1911) I.L.R. 35 Mad. 47 (F.B.).
(2) (1891) I.L.R. 14 Mad. 408 (F.B.).
(3) (1902) I.L.R. 25 Mad. 690 (F.B.). (4) (1879) I.L.R. 5 Cal. 148 (P.C.).

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passed to the purchaser at the execution sale. In dealing with this contention their Lordships of the Judicial Committee observed thus:

"On the other hand, if the law of the Presidency of Fort William were identical with that of Madras, the mortgage executed by Adit Sehai in his lifetime as a security for the debt, might operate after his death as a valid charge upon Mouza Bussumbhurpore to the extent of his own then share."

In the present case at the date of the alienation the father was entitled to a half share in the joint family property and that interest which was vested in him would pass to the mortgagee. The property which has been effectively carried away from the family was only a half and the other half would still be the joint family property and it is only in that half and in the equity of redemption in the other half, the alienation being a mortgage, the after-born son would be entitled to participate with the other son. This is in strict consonance with the principles of Hindu law that in a Mitakshara family a member acquires right by birth only in the property which was then in existence and not in the property which has been effectively carried away from the family. In so far as the alienation of the father's interest is concerned, it must be deemed to have been effectively carried away because he is entitled to alienate it for value. If the view indicated in *Chinnu Pillai* v. *Kalimuthu Chetti*(1), namely, that the alienee gets the interest which the father was entitled to on the date of the alienation, is to be followed, the view taken by the learned District Judge in this case, that the father was entitled to a half share and the mortgagee is entitled to sell that share in execution of his decree, is correct. There is only one reported decision which directly

(1) (1911) I.L.R. 35 Mad. 47 (F.B.).

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deals with this matter and that is a decision of our learned brother PANDRANG ROW J. reported as *Kasi Viswesra Rao* v. *Varahanarasimham*(1). In that case the father sold the property in 1919. On that date there was only one son in existence and subsequently two sons were born. The alienation was not found to be such as to be binding on the sons. On the date of suit there were the father and three sons. The question was to what share the alienee would be entitled. The learned Subordinate Judge in that case following *Sathapathiar* v. *Sivanarayana Pillai*(2) held that the father would only be entitled to a fourth and the alienee would only get a fourth share. PANDRANG ROW J. following *Chinnu Pillai* v. *Kalimuthu Chetti*(3) held that the share which the father would get would be the share which he would be entitled to on the date of the alienation which would be half and therefore he gave a decree for a half share. The learned Judge declined to follow *Sathapathiar* v. *Sivanarayana Pillai*(2) and, if we may say so with respect, rightly. The Full Bench in *Chinnu Pillai* v. *Kalimuthu Chetti*(3) was constituted for the express purpose of considering the view expressed in *Rangasami* v. *Krishnayyan*(4) that the share of the alienee should be determined not on the date of the alienation but on the date of suit and if subsequent to the date of alienation more members were born the alienee would get a reduced share. At the time when the Full Bench was constituted and the question was discussed there were five Judges, but at the time when the judgment was about to be delivered one of them ceased to be a Judge of the High Court and the Full Bench was reconstituted with four Judges and the

(1) A.I.R. 1937 Mad. 631.
(2) (1932) I.L.R. 59 Mad. 534.
(3) (1911) I.L.R. 35 Mad. 47 (F.B.).
(4) (1891) I.L.R. 14 Mad. 408 (F.B.).

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judgment was delivered dissenting from the said view in *Rangasami* v. *Krishnayyan*(1). The judgment was delivered in 1912 and so far as we know it was accepted as sound law both by the Bench and the Bar and followed till JACKSON J. struck a dissenting note in *Sathapathiar* v. *Sivanarayana Pillai*(2) and declined to follow the view expressed in *Chinnu Pillai* v. *Kalimuthu Chetti*(3). Our own view is that the view expressed in *Chinnu Pillai's* case(3) is the sounder view. In *Amirthalinga Thevan* v. *Arumuga Ambalagaran*(4); though the question was not discussed, it was the view that was taken in *Chinnu Pillai's* case(3) that was followed. This is clear from the following observations of THIRUVENKATACHARI J. in that case at page 640:

> "The only remaining point to be considered is whether the sixth defendant who was born after the alienation has any and if so what right in the plaint properties which would entitle him to contest the suit. Under the sale-deed Exhibit A the plaintiff acquired only the one-third share of the father Mari Ambalagaran in the joint family properties. The remaining interest therein appertained to the joint family of the alienor; and it so remained at the date of the sixth defendant's birth with the result that he also acquired an interest in it by his birth."

The view that the father's share was a third and it is only in the remaining interest, that is, in the two-thirds, the after-born son, the sixth defendant, could be held to have acquired an interest by birth is in strict conformity with the view expressed in *Chinnu Pillai* v. *Kalimuthu Chetti*(3). In *Chandramani Prushti* v. *Jambeswara Rayagaru*(5) the question of share was not considered at all. We are therefore of the opinion that

(1) (1891) I.L.R. 14 Mad. 408 (F.B.).
(2) (1932) I.L.R. 56 Mad. 534.
(3) (1911) I.L.R. 35 Mad. 47 (F.B.).
(4) (1928) 28 L.W. 634.
(5) (1930) 34 L.W. 598.

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the decree of the learned District Judge in directing a sale of a half-share of the father is correct.

In the result we modify the decree of the learned District Judge by declaring that the father is personally liable to pay any balance that might remain after the sale of his interest in the mortgaged property and the plaintiff will be entitled to apply for a decree for the said balance against the father personally and against the joint family properties in the hands of defendants 1 to 3. The appellant will have half the costs of the appeal but there will be no costs in the memorandum of objections.

Two applications have been put in under the Madras Agriculturists Relief Act (IV of 1938), one by Mr. A. Venkatachalam on behalf of the first respondent and the other by Mr. Somasundaram on behalf of respondents 2 and 3. The plaintiff will have leave to file a counter affidavit objecting to the reliefs sought in the said petitions. We direct these applications to be sent to the lower Court for adjudication on the merits. The decree that we pass herein will be subject to any relief which the applicants may get in those petitions.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Pandrang Row and Mr. Justice Horwill.

KUPPU GOVINDA CHETTIAR (PLAINTIFF), APPELLANT,

v.

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

1940, April 5.

Code of Civil Procedure (Act V of 1908), ss. 2 (17) and 80—"Public Officer" within the meaning of sec. 2 (17)—Liquidator appointed by Registrar of Joint Stock Companies—If "public officer"—Winding up or dissolution of a co-operative society—Suit in civil Court with respect to any matter connected therewith—Madras Co-operative Societies Act (VI of 1932), sec. 48—Sanction of Registrar under—If condition precedent to maintainability of such suit—Resignation of member of a private body like co-operative society—Absence of by-laws about same—Resignation effective even without acceptance by society—Inapplicability of principles governing resignation of public office to such cases.

Held: (i) A liquidator appointed by the Registrar of Joint Stock Companies to wind up a co-operative society is not a "public officer" within the meaning of section 2 (17) of the Code of Civil Procedure simply because he is given certain quasi judicial powers and the duties which he performs must necessarily be regarded as public duties. He is not appointed by the Government. Moreover, every person appointed by the Government to perform public duties is not necessarily a "public officer." Hence, a suit against the liquidator is not bad for want of notice contemplated by section 80 of the Code of Civil Procedure,

(ii) Under section 48 of the Co-operative Societies Act the sanction of the Registrar is a condition precedent to the maintainability of a suit in a civil Court with respect to any

* Appeals Nos. 352 and 353 of 1937.

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matter connected with the winding up or dissolution of a co-operative society,

(iii) In the absence of any provision in the Act or the by-laws of the co-operative society as regards the resignation of a member and as regards the mode in which a member ceases to be one, the law does not, in the case of an office in a private body like a co-operative society, require that the resignation of a member should be accepted by the society or any one else on its behalf before it takes effect. The principles governing the resignation of a public office cannot be applied to such cases.

APPEALS against the decrees of the District Court, Chingleput, in Original Suits Nos. 1 and 12 of 1935.

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

C. S. Venkatachariar and *D. Ramaswami Ayyangar* for respondent.

Cur. adv. vult.

PANDRANG ROW J.

The JUDGMENT of the Court was delivered by PANDRANG ROW J.—These are appeals from the decrees in two connected suits, Original Suits Nos. 1 and 12 of 1935, on the file of the District Court of Chingleput. The plaintiff was the same in both the suits and the defendant also was the same. The plaintiff is the appellant and the defendant, who is the respondent in these appeals, was described as the Uttukottai Co-operative Society by its liquidator. The suits were for a declaration that certain orders made in 1933 and 1932 by the liquidator of the co-operative credit society in question determining the contribution payable by the plaintiff in the suits at Rs. 8,000 and Rs. 2,000 respectively were illegal and void and of no effect whatever as against the plaintiff. The suits were resisted on various grounds and they were tried together and disposed of in one and the same judgment by the District Judge. It is an unfortunate feature that in this case judgment was pronounced by the

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Court below more than a year after the case had been closed.

On all the points except one, the findings of the Court below were in favour of the plaintiff. But the suits were dismissed, though without costs, on the sole ground that no notice had been given as required by section 80 of the Code of Civil Procedure. In other words, it was only on the ground of want of notice that the suits were found to be not maintainable, and in other respects the findings were in favour of the plaintiff. The only point therefore argued in these appeals in the first instance, so to say, on behalf of the appellant is that the finding of the lower Court on the question of notice is wrong. Section 80 of the Code of Civil Procedure requires that, unless notice is given at least two months before the suit, no suit can be instituted against the Crown or against any public officer in respect of any act purporting to be done by him in his official capacity. In this case no notice whatever was given, and the contention on behalf of the plaintiff-appellant is that no notice is required because the defendant in the suit is not a public officer as defined in the Civil Procedure Code; *vide* section 2 (17). It has been contended that, even assuming that the defendant in the suit is the liquidator and not the society, he cannot be regarded as a public officer within the meaning of the Code of Civil Procedure. In this connection perhaps it is desirable first to deal with two applications presented at a very late stage, namely, after the hearing of the appeal was over and just before judgment was to be delivered, one application in each appeal to amend the cause-title so as to show the defendant as "the liquidator of the society" instead of "the society by its liquidator". It is enough to say as regards the oral

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application for permission to withdraw the suits, that it is now withdrawn, and there is no need to pass any other order on it except to dismiss it as it is withdrawn. As regards the first application for amendment of the cause-title of the plaint, it would be highly undesirable from every point of view to allow applications of this kind which are made after the whole case is argued and the parties have an opportunity of knowing or at least guessing with some degree of accuracy what is going to happen to their case. It is not as if this objection to the maintainability of the suit in view of section 48 of the Co-operative Societies Act was not raised in the trial Court, and the application to amend the cause-title should have been put in much earlier. There is really no explanation forthcoming for the delay in making the present application. We are therefore not prepared to allow that application and it is accordingly dismissed. We may add, however, that the application to amend is absolutely contrary to what is alleged in the grounds of appeal, where it is contended that the defendant in the suit was the co-operative society and not the liquidator and therefore the question of notice did not arise at all. In other words, the main ground on which the finding of the Court below, which is against the appellant, was attacked was that the Court below failed to notice that the defendant in the suit was the co-operative society and not the liquidator, and of course, it was nobody's case that the co-operative society is a public officer. Apart from the fact that the suit is really directed against the society which is represented by the liquidator, because the society has been ordered to be wound up and a liquidator has been appointed by the Registrar, the question remains whether even a liquidator appointed by the Registrar can be regarded as

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a public officer within the meaning of the Civil Procedure Code. It is contended that he is a public officer because he is an officer in the service of the Crown. It is obvious, however, that *qua* liquidator he is not an officer in the service of the Crown, and it is not the case of either side that the liquidator as such receives any pay from the Crown or receives any remuneration for his duties as liquidator. The liquidator in this case is the Deputy Registrar of Co-operative Societies who, of course, in that capacity is a public officer. But that does not mean that when he is actually acting in the capacity of a liquidator of a co-operative society, he is an officer in the pay of the Crown or in the service of the Crown.

The only decision which has been relied upon by the Court below is the one reported as *Liquidator, Yedha Society, Nimar* v. *Prag*(1). Apart from the fact that in that decision it is merely stated without any discussion that a liquidator should no doubt be considered a public officer within the meaning of section 2 (17) of the Civil Procedure Code, the actual facts of the case show that it was not necessary in that case to give any notice to the liquidator because the suit was not brought against the liquidator in respect of any action of his. In other words, the observation was an *obiter dictum*. Another case which has been cited to us is the one reported as *Sangakheda Society* v. *Ayodhyaprasad*(2) in which POLLOCK J. refers to the earlier decision of the Nagpur Court as one in which it was assumed without discussion that a liquidator is a public officer as defined in section 2 (17) of the Civil Procedure Code. The reason given by POLLOCK J. for holding that the liquidator is a public officer is that

(1) A.I.R. 1934 Nag. 201. (2) A.I.R. 1939 Nag. 232.

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the liquidator was appointed by the Government and his duties are quasi judicial. In other words, the proposition as put forward in the case is that, as the liquidator is appointed by the Government and performs duties, he is an officer in the services of the Government when acting as the liquidator and therefore a public officer as defined in the Civil Procedure Code. In the present case the liquidator is not appointed by the Government but by the Registrar of Co-operative Societies. Even otherwise, we find it difficult to accept the general proposition that because the liquidator is given quasi judicial powers, the duties which he performs must necessarily be regarded as being public duties. Nor are we prepared to accept the proposition that every person who is appointed by the Government to perform public duties is a public officer. If that view were accepted it would follow that even a member or chairman of a local body appointed by Government would be a public officer. The word "service" must necessarily mean something more than being merely subject to the orders of Government or to control by Government. We are unable to accept the view that a liquidator who is appointed by the Registrar of Co-operative Societies to liquidate a private co-operative society is an officer in the service of the Government, and this is the only ground on which it has been sought on behalf of the respondent to support the finding of the Court below. We are therefore of opinion that the present suits cannot be rightly defeated on the plea that no notice was given as required by section 80, Civil Procedure Code.

The decrees, however, of the Court below dismissing the suits have been supported on the ground that the findings on other points by the Court below in favour

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of the plaintiff-appellant are wrong. The main point is whether the suit is maintainable in view of the provisions of section 48 of the Co-operative Societies Act, which runs as follows :

"Save in so far as is expressly provided in this Act, no civil Court shall take cognizance of any matter connected with the winding up or dissolution of a society under this Act, and when a liquidator has been appointed no suit or other legal proceeding shall lie or be proceeded with against the society except by leave of the Registrar and subject to such terms as he may impose."

Considerable reliance is placed on behalf of the appellant on the Bench decision in *Vaikuntà Bhat* v. *Sarvothama Rao*(1). That, however, was a case which had to consider a similar provision in the Imperial Act, namely, section 42 (6) which runs as follows :

"Save in so far as is hereinbefore expressly provided, no civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act."

In construing that provision it was held by the learned Judges that the liquidator in the case before them acted without jurisdiction and that therefore the civil Court's jurisdiction was not ousted by section 42 (6) of the Co-operative Societies Act of 1912. That was a case which is otherwise on all fours with the present case, because there also the question arose whether a person who had once been a member of a co-operative society could be rightly made to pay a contribution by an order of the liquidator when he had not admitted his liability. In the case before them the contention was that the appellants had ceased to be members five years before the liquidation and it was held that it cannot be said that they had

(1) (1936) I.L.R., 59 Mad., 895.

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no right to ask the civil Court to decide whether they were under any liability to contribute at all. That decision as well as the other decisions which have been mentioned to us were all of them with reference to the Act of 1912 and section 42 (6) thereof. As will be seen from the words of the provisions of the law with which we have to deal, namely, section 48 of the Madras Co-operative Societies Act (VI of 1932), the second clause thereof is far more precise in its language than the provisions in the earlier Imperial Act. For it says that when a liquidator has been appointed (as in this case) no suit or other legal proceeding shall lie or be proceeded with against the society except by leave of the Registrar. There was no provision of this kind in the earlier Imperial Act for a suit being filed with the leave of the Registrar against a society after a liquidator was appointed. In this case it is admitted that the Registrar refused leave when leave was asked for, and we find it impossible to find any reason for ignoring the plain words of the provisions of law which are applicable to the present case and in particular, the second clause of section 48 of the Act which is as clear as possible. It says that no suit can be instituted against a society when a liquidator has been appointed except by leave of the Registrar. This provision appears to us to stand in the way of the present suits, and though this point was not prominently placed before us in the argument and was certainly not referred to in the Court below, we are not able to find any way out of the situation created by the new law. This finding, namely, that the suits are not maintainable in view of the provisions of section 48 of Madras Co-operative Societies Act (VI of 1932) is sufficient to dispose of these appeals. Nevertheless, as the other point, namely, the question of the liability

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of the plaintiff-appellant has been argued at considerable length before us, it is perhaps desirable that we should briefly express our opinion thereon and all the more so because a special request has been made on behalf of the appellant that we should express our opinion on this point.

The point really is a simple one because the facts are practically undisputed. The plaintiff-appellant sent his resignation on 4th June 1930 to the secretary of the society and there is no doubt that that resignation was received by the society and a meeting was held in the next month to consider the resignation. A copy of the letter of resignation appears also to have been sent to the co-operative department. The society in its resolution, dated 1st July 1930 (*vide* Exhibit II), resolved that the resignation should not be accepted. A copy of the resolution was sent to the plaintiff-appellant by registered post, but he appears to have declined to receive it. There can be no doubt that he was aware of the contents or at least of the fact that his resignation had not been accepted. On 24th January 1931 at a general body meeting of the co-operative society the plaintiff was present as a member and took part in it for some time, though he later on was asked to go out by the chairman who presided at the meeting. It is argued on behalf of the respondent that these facts show that the resignation did not take effect and that the plaintiff-appellant really continued to be a member in spite of the letter of resignation sent by him on 4th June 1930. This argument assumes, first, that unless a resignation is accepted it does not take effect in a case of this kind, and secondly, that the subsequent conduct of the plaintiff-appellant amounts to a withdrawal of his letter of resignation. As regards the first assumption, it

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appears to be really without foundation. In the case of an office in a private body like a co-operative society the law does not require that resignation should be accepted by the society or anyone else before it takes effect. The by-laws of the society are altogether silent as regards the mode in which a member ceases to be a member, and there is no reference to resignation in the Act or in the by-laws. There are one or two references in the Act to the withdrawal of members from the society, and it is not contended that there can be no withdrawal or cessation of membership by means of resignation of membership. On the side of the plaintiff-appellant reliance has been placed on two English cases; *Finch* v. *Oake*(1) and *Glossop* v. *Glossop*(2). *Finch* v. *Oake*(1) was a case which related to the membership of the Bermondsey and Rotherhithe Licensed Victuallers and Beer Sellers' Trade Protection Association and though the member who had resigned wanted subsequently to withdraw his resignation, the society declared that he had ceased to be a member by reason of the resignation and it was held that he had really ceased to be a member as soon as his letter of resignation had been received by the committee of the association. In that case also the rules of the association contained nothing as to the right of members to retire, this matter being left to be governed by the ordinary principles of law. In those circumstances it was held that he could withdraw from the association at any moment of his own pleasure and without the consent of his fellow members or the association and, therefore, that immediately the letter of resignation reached the association the member who sent in his letter of resignation ceased to be a member and he could again become a member only

(1) [1896] 1 Ch. 409. (2) [1907] 2 Ch. 370.

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by following the rules regarding election of members framed by the association and not by any withdrawal. In the latter case, *Glossop* v. *Glossop*(1), it was a director of a limited company who resigned his office as managing director. On the very day on which the letter of resignation came up for consideration before the special meeting of the directors an attempt was made to withdraw the resignation. But the meeting resolved that the office of managing director had been vacated. In this case, however, the matter of resignation was provided for in two articles of the company, which provided that the office of managing director should be vacated on the happening of any of the contingencies mentioned therein whereby the office of director should be vacated. The provision regarding the latter subject was to this effect:

"The office of director shall be vacated (inter alia) if by notice in writing to the company he resigns his office, provided that the vacation of office shall not take effect unless the directors shall pass a resolution to the effect that he had vacated his office, such resolution to be passed within six months from the happening of the event whereby such director had vacated his office."

In these circumstances it was held that the managing director could not withdraw his resignation without the consent of the company and that he had vacated his office by his letter of resignation and that the resolution of the Board at the special meeting was effective and valid. On the side of the respondent reliance has been placed on two decisions, namely, *Sudarsana Rao* v. *Christian Pillai*(2) and *Kuppu Govinda Chetty* v. *Secretary, Co-operative Central Bank, Conjeevaram*(3). The latter case does not contain any discussion of the question but is important in view of the fact that it deals with the very letter of resignation

(1) [1907] 2 Ch. 370. (2) (1923) 45 M.L.J. 798.
(3) 1932 M.W.N. 18.

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with which we are concerned in this case, though the decision therein was in respect of the resignation of the office of the president of the society, the petitioner being also the president of the society and the letter of resignation being in respect of both his office as president as well as his membership. We are not concerned in the present case with the office of president but only with the question of membership and therefore the decision in *Kuppu Govinda Chetty* v. *Secretary, Co-operative Central Bank, Conjeevaram*(1) is not very helpful. The discussion of the point is contained in *Sudarsana Rao* v. *Christian Pillai*(2) where the same learned Judge, namely, RAMESAM J., relies to a great extent on certain passages from two text-books on Elections. The case with which the learned Judge had to deal was one in which the question for decision was whether a certain person had ceased to be an honorary magistrate prior to a certain date on which he was elected as a member of a local body. In that case it was held that an honorary magistrate does not cease to hold his office by his resignation but only on the acceptance of his resignation. That decision is certainly supported by the extracts from the text-books on Elections which relate to public offices or offices in local bodies in England which cannot be ordinarily given up without either the consent of some authority or the payment of a fine for non-acceptance. That case was one similar to *The Queen* v. *Corporation of Wigan*(3) which was decided in the light of the statutory provision in section 36 of the Municipal Corporations Act, 1882, which provided that a person elected to a corporate office may, at any time, by writing signed by him and delivered to the town

(1) 1932 M.W.N. 18. (2) (1923) 45 M.L.J. 798.
(3) (1885) 14 Q.B.D. 908.

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clerk, resign the office, on payment of the fine provided for non-acceptance thereof. The reasoning which would apply to resignation of a public office of this kind cannot be applied to resignation of the membership of a society with which we have to deal in the present case. We are therefore inclined to the view that the membership of the plaintiff-appellant ceased immediately his letter of resignation reached the society, that is to say, early in June 1930. There was thus an immediate cessation of his membership, and there being no provision for withdrawal of any resignation in the Act or in the by-laws, he could become a member again only by complying with the provisions relating to membership. The mere fact that he refused to receive the copy of the resolution sent to him in July 1930 and that he attended a meeting of the society some six or seven months later has no legal effect so far as this question is concerned in the sense that these subsequent circumstances could not possibly restore him to his membership or make him a member after he had ceased to be one. It follows from this that the plaintiff-appellant ceased to be a member more than two years prior to the orders complained of in the present suits and to the liquidation.

The only other point which perhaps deserves some reference is the question whether the liquidator acted within his jurisdiction in these circumstances. So far as this point is concerned the decision of the Bench in *Vaikunta Bhat* v. *Sarvothama Rao*(1) appears to us to hold the field and, being a case clearly in point, has to be followed unless it is declared not to lay down the law correctly. Reliance has also been placed on two decisions of the Lahore High Court which are to the

(1) (1936) I.L.R. 59 Mad. 895.

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same effect, namely, *Mukand Lal* v. *Liquidator, Malhotra Bank, Hafizabad*(1) and *Anjuman-i-Imdad Qarza Bahami* v. *Mehr Din*(2). In view of the fact that these decisions relate exactly to the present point, whereas the other cases, and in particular *Secretary of State for India* v. *Meyyappa Chettiar*(3) and cases of that description, deal with other enactments, it does not seem necessary for us to consider in detail the question whether the cases dealing with other enactments really affect the present question having regard to the decisions which deal with the exact point which arises in these cases. On these points we are inclined to decide in favour of the plaintiff-appellant. Nevertheless his appeals must fail and the suits must stand dismissed because of the absence of leave from the Registrar for the institution of the suits which, in our opinion, is required by the provisions of section 48 of the Madras Co-operative Societies Act (VI of 1932). Having regard to the circumstances of these cases, we think the just course to follow with regard to costs is to direct the parties to bear their own costs in this Court, the appeals being dismissed and the memorandum of cross-objections also.

G.R.

(1) (1933) I.L.R. 14 Lah. 703. (2) (1937) I.L.R. 18 Lah. 649.
(3) I.L.R. [1937] Mad. 211.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth and Mr. Justice Patanjali Sastri.

NIMMAGADDA RAMASESHAYYA (PETITIONER), PETITIONER,

1940, April 9.

v.

ADUSUMILLI KUTUMBA RAO AND ANOTHER, MINORS BY GUARDIAN ADUSUMILLI PITCHAMMA (RESPONDENT), RESPONDENT.*

Madras Agriculturists Relief Act (IV of 1938), *ss.* 8 *and* 9—*Debts incurred before* 1*st October* 1932—*Decree thereon, passed subsequent to that date—Sec.* 8 *applicable.*

The scaling down of a debt which was incurred before 1st October 1932 and which has ripened into a decree subsequent to that date is governed by section 8 and not by section 9 of the Madras Agriculturists Relief Act. The starting point for scaling down is the original debt itself and not the decree.

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 Masulipatam, dated 9th August 1939 and made in Interlocutory Application No. 737 of 1938 in Original Suit No. 77 of 1935.

A. Lakshmayya for petitioner.

D. Narasaraju amicus curiae.

Respondent was not represented.

The JUDGMENT of the Court was delivered by

WADSWORTH J.

WADSWORTH J.—This revision petition raises the question of the meaning of the words "debts incurred before the 1st October 1932" in section 8 of the Madras Act IV of 1938. The transaction with which we are concerned is a decree, dated 21st August 1936, which itself is passed on the basis of a promissory note of

* Civil Revision Petition No. 2543 of 1939.

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1928 which promissory note was in renewal of an earlier promissory note of 1925. The learned Subordinate Judge has held that the debt to be scaled down is the decree itself and not the antecedent debt which formed the basis for the decree. He bases his decision on the definition of the word "debt" in section 3 of the Act which contains the words

"'debt' means any liability in cash or kind . . . due from an agriculturist, whether payable under a decree or order of a civil or revenue Court or otherwise."

He holds that, since the definition of the word "debt" covers one payable under a decree, we must regard the decree as the starting point and since the decree was passed in 1936, it must be scaled down under section 9 of the Act and not under section 8. The learned Subordinate Judge has not, however, considered two provisions in the Act, which, in our opinion, render it impossible to hold the view which he expresses.

Firstly, we have the second part of section 7 which says:

"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 any manner 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 this Chapter."

This provision seems to contemplate the scaling down of the original debt notwithstanding a decree and it is difficult to give any meaning or purpose to this clause if the process of scaling down is to start with the decree. Secondly, we have the first clause of section 8 which, in dealing with the way in which debts incurred before 1st October 1932 shall be scaled down, speaks of interest outstanding on 1st October 1937 "whether the same be payable under law, custom or contract or under a decree of Court

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and whether the debt or other obligation has ripened into a decree or not". It seems to us impossible to give any effect to the words "whether the debt or other obligation has ripened into a decree or not" if the debt contemplated in the initial words of the section is the decree itself. On the other hand, this first clause of section 8 seems quite clearly to contemplate the debt incurred before 1st October 1932 as the original debt which ultimately ripened into a decree, and consequently it must be the date of the original debt which is the governing factor and not the date of the decree. The inclusion of a decree in the definition of "debt" in section 3 (iii) of the Act is quite consistent with this view. For, obviously, there are many debts which start with the decree, as for instance, when there is a decree for damages, which of itself creates a debt bearing interest and liable in certain circumstances to be scaled down. Clearly the idea underlying these provisions is that when the decree merely enforces the payment of a pre-existing debt bearing interest, that pre-existing debt shall be regarded as the liability, the date of which shall govern the section to be applied.

This subject has come already before this Court, though there is apparently no considered decision of a Bench hitherto. In *Kanakaraju* v. *Achutaramanaraju*(1) there is a very brief judgment of one of us, adopting the view which we have just adumbrated though it deals with another point which does not arise here. In *Narayanaswami Naidu* v. *Rajamanickam Pillai*(2) HORWILL J. has taken the same view even with reference to a compromise decree. We are not now concerned with compromise decrees which may possibly be affected by different considerations. But it is to be noted that the learned Judge definitely regards

(1) 1940 M.W.N. 338. (2) (1940) 1 M.L.J. 225.

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the debt incurred before 1st October 1932 as the original liability which has ripened into the decree and does not treat the decree itself as the starting point. Other cases have been quoted before us in which this view has been tacitly assumed to be correct without any argument or consideration of the point involved; vide *Anandam* v. *Muthukumaraswami Mudali*(1) and the decision of the Bench in *Perianna* v. *Sellappa*(2).

Unfortunately the respondent in the present case is not represented. But we have to express our gratitude to Mr. D. Narasaraju who has given us the benefit of his argument for the respondent as *amicus curiæ*, he having gone into the subject with reference to another case posted for hearing by us in which a similar question arises. The only authority which he has been able to cite on behalf of the respondent is contained in a mere observation of VENKATARAMANA RAO J. in *Sreenivasachariar* v. *Krishniah Chetty*(3) where the learned Judge merely remarks that there is a good deal of force in the contention that when the decree has been passed after 1st October 1932 it is governed by section 9 of the Act. He gives, however, no decision to this effect and the matter does not appear to have been argued at length before the learned Judge. We are clearly of opinion that when there is a debt incurred before 1st October 1932 which has ripened into a decree after 1st October 1932, the scaling down must be governed by section 8 and not by section 9.

We therefore allow the petition and remit the matter to the lower Court with a direction to scale down the debt in accordance with this decision. The petitioner is entitled to costs.

N.S.

(1) (1939) 2 M.L.J. 658. (2) I.L.R. [1939] Mad. 218, 222.
(3) 1940 M.W.N. 329.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth and Mr. Justice Patanjali Sastri.

BUDIREDLA RAMAMURTI (PETITIONER), PETITIONER,

1940, April 11.

v.

MATTE SITARAMAYYA (RESPONDENT), RESPONDENT.*

Madras Agriculturists Relief Act (IV of 1938) *ss.* 8 *and* 19—*Compromise decree—When and how to scale it down under sec.* 8 *of the Act—Uncertified payments towards decree—How far they can be proved under sec.* 19 *of the Act in scaling down debt—Civil Procedure Code (Act V of* 1908), *O. XXI, r.* 2 (3).

Where there was a decree passed before 1st October 1932 in terms of a compromise, which itself was a renewal of an anterior debt,

held, the Court has to scale down the debt under section 8 of the Madras Agriculturists Relief Act (IV of 1938), treating as the principal the amount originally advanced together with the amount of any sums subsequently advanced.

Whether a compromise forming the subject of a decree is or is not a renewal of a pre-existing liability must, to a large extent, be a question of fact in every case.

Notwithstanding Order XXI, rule 2 (3) of the Code of Civil Procedure, when a judgment-debtor applies under section 19 of the Act to scale down a decree, he can prove payments which have not been certified, for the purpose of satisfying the decree regarding costs. For any other purpose there is no express provision allowing the petitioner to prove payments made after the decree and not recorded by the Court, and he would have to establish those payments in the ordinary way by getting them certified in Court if he wants them to be taken into consideration as payments towards the decree.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the

* Civil Revision Petition No. 2010 of 1939.

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Subordinate Judge of Cocanada, dated 6th September 1939 and made in Interlocutory Application No. 1321 of 1938 in Original Suit No. 44 of 1931.

V. Viyanna for petitioner.

D. Narasaraju for respondent.

JUDGMENT.

WADSWORTH J.

The JUDGMENT of the Court was delivered by WADSWORTH J.—This civil revision petition raises the question of the power of a Court to scale down a compromise decree under section 8 of the Madras Agriculturists Relief Act IV of 1938.

The relevant facts may be briefly stated. The petitioner is the judgment-debtor. He and the respondent had dealings on account starting in 1922. On 26th March 1928 the petitioner executed a promissory note in settlement of that account. On 3rd April 1928 he executed a second promissory note for a fresh advance. On 20th July 1929 he executed a promissory note for Rs. 4,600 comprising the amounts due on the two previous notes and a small amount in cash advanced at that time. It was alleged that on 27th September 1930 there was an arrangement whereby the petitioner undertook to pay the amount due on this promissory note within a given time or to execute a mortgage over certain properties. No payment having been made and no mortgage having been executed, the respondent filed a suit, Original Suit No. 44 of 1931, on the promissory note of 1929, claiming a charge over the properties covered by the alleged agreement to mortgage. He also obtained an attachment before judgment of the properties in respect of which the charge was claimed. On 8th August 1932 a decree was passed in terms of a compromise. The compromise recited that the transactions

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between the parties had been examined by mediators who had decided that the whole of the debt claimed should be recovered from the family properties of the defendants, and that the defendants had agreed that the suit debt, costs and subsequent interest calculated at Rs. 7,150 in all should be a charge on the properties mentioned in the plaint and it was agreed that the defendants were to be given time till 1st October 1932 to pay the amount so settled. It is to be noted that this compromise does not appear to have dealt with matters extraneous to the suit and that it provided for the payment of the full amount claimed by the plaintiff with interest. The lower Court following the decision of PANDRANG ROW J. in Civil Revision Petition No. 86 of 1939 held that, in scaling down the decree, the starting point must be the decree itself and that it was not open to the Court to go behind the compromise and treat the original debt as the debt which is to be scaled down.

Now, we have held in a very recent decision, *Ramaseshayya* v. *Kutumba Rao*(1), that in the simple case of a decree on a debt the Court must with reference to the terms of section 8 (1) of Act IV of 1938 look to the debt upon which the decree is passed and not regard the decree itself as the debt which has to be scaled down. A decree embodying a compromise is in one respect different from a decree merely directing payment of the debt which forms the subject matter of the suit. The effect of the compromise is the substitution of a new contract for the contract sued on, which new contract itself forms the basis of the decree. When we come to apply sections 8 and 9 to such a decree, we must

(1) I.L.R. [1940] Mad. 943.

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have regard to the provisions of section 7 which lays down that,

"notwithstanding any 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 Chapter 11 of the Act."

The decree in terms of the compromise is in fact a decree on a contract superseding the original debt upon which the suit is laid. To the extent to which that contract can be proved to be in whole or in part a renewal of the debt upon which the suit was laid, clearly sections 8 and 9 of the Act provide that the principal of the debt liable to be scaled down must be the principal sum originally advanced together with any sums subsequently advanced. On the facts of the present case, it is clear that we are concerned with a very simple compromise dealing only with the suit debt and agreeing that the said debt with interest at the contract rate and costs shall be payable by the defendants and shall be charged in a particular way. There can therefore be no doubt that the compromise agreement upon which the decree was based is substantially a renewal of the suit debt together with an agreement to pay the costs and to submit to the charge. It seems to us that clearly this debt is liable to be scaled down under section 8 having regard to the principal originally advanced by the creditor together with such sums as have been subsequently advanced as principal.

It is not necessary for the purpose of this case to decide what would be the position in a more complicated case when the compromise is the result of mutual concessions and advantages which together make up an agreement from which it would be extremely difficult to disentangle that part which is a renewal of the original debt. We may, however,

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observe that the question whether the compromise forming the subject of the decree is or is not a renewal of a pre-existing liability must, to a large extent, be a question of fact in every case.

We have been referred to the decision of HORWILL J. in *Narayanaswami Naidu* v. *Rajamanickam Pillai*(1) which on the facts of the particular case decided that when there was a decree on a compromise, the date on which the debt was incurred must with reference to section 8 or section 9 of the Act be the date of the original debt and not the date of the compromise decree. It is not necessary for the purpose of this case to consider the correctness of our learned brother's decision on the facts before him. We confine ourselves to holding that when, as in the present case, there is a decree passed before 1st October 1932 in terms of a compromise, which itself is demonstrably a renewal of an anterior debt, the Court must scale down the debt under section 8 of Madras Act IV of 1938, treating as the principal the amount originally advanced together with the amount of any sums subsequently advanced.

A further question has been raised with reference to the terms of section 19 of Act IV of 1938, whether the petitioner in applying for the scaling down of the decree can prove uncertified payments made towards that decree having regard to the terms of Order XXI, rule 2, Civil Procedure Code. Section 19 lays down that, on the application of the judgment-debtor or the decree-holder, the Court which passed the decree shall apply the provisions of the Act to that decree and notwithstanding anything contained in the Code of Civil Procedure shall amend the decree accordingly or enter satisfaction as the case may be. Then

(1) (1940) 1 M.L.J. 225.

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follows a proviso with which we will deal separately. So far the section is concerned merely with the amendment of the decree in accordance with the terms of Act IV of 1938 and with the addition of a power to the Court to enter satisfaction, presumably when the scaling down process under the Act itself results in the extinction of the decree. So far, the section is not concerned with execution, nor is it concerned with payments made in execution or payments made subsequent to the decree. Then follows the proviso that all payments made or amounts recovered, whether before or after the commencement of the Act, in respect of any such decree shall first be applied in payment of all costs as originally decreed. This proviso expressly contemplates the appropriation of payments made after the decree by the Court which passed the decree. We find it difficult to hold that in making these appropriations, the trial Court is acting as an executing Court. If the Court is not a Court executing the decree, then the provisions of Order XXI, rule 2 (iii), would not bar the petitioner from proving payments which have not been certified in the manner necessary for establishing them in an executing Court. If this view is correct, it follows that when a judgment-debtor applies under section 19 to scale down a decree, he can prove payments which have not been certified, for the purpose of satisfying the decree regarding costs. For any other purpose, there is no express provision allowing the petitioner to prove payments made after the decree and not recorded by the Court and it seems to follow that he would have to establish those payments in the ordinary way by getting them certified in Court, if he wants them to be taken into consideration as payments towards the decree.

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In the result, therefore, we hold that this decree is liable to be scaled down under section 8 treating as the principal of the debt the amount originally advanced and any subsequent sums lent to the extent to which the original debt can be said to have been renewed by the agreement of compromise embodied in the decree and that the petitioner is entitled under the proviso to section 19 to prove uncertified payments for the purpose of appropriating those payments if established towards costs of the decree. The petition is therefore remitted to the trial Court for disposal in the light of this judgment and the petitioner is entitled to his costs in this Court.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

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

1940, April 23.

THE OFFICIAL RECEIVER OF EAST GODAVARI AT RAJAHMUNDRY (NIL), APPELLANT,

v.

CHAVA GOVINDA RAJU AND ANOTHER (DEFENDANT 1 AND PLAINTIFF), RESPONDENTS.*

Indian Limitation Act (IX of 1908), sec. 2 (8), Arts. 142 and 144—Suit for ejectment—Onus on plaintiff to prove possession within twelve years of suit—Same principle applicable to suit for possession by court-auction-purchaser in suit on mortgage executed subsequent to trespass on mortgaged property.

In suits for ejectment where the plaintiff sues for possession of immovable property in the occupation of another, the plaintiff cannot rest his case on title alone. Article 142 of the

* Second Appeal No. 255 of 1937.

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Limitation Act applies to such suits and the plaintiff must show that he has exercised rights of ownership by being in possession within twelve years of suit. The fact that the plaintiff is a purchaser at a court-auction held in execution of a mortgage decree does not make any difference in the applicability of Article 142 where the decree is on a mortgage executed subsequent to the trespass by the defendant. When property is sold at such a court-auction the purchaser has vested in him the full title of the mortgagor as it existed before the mortgage and the law which applies to the mortgagor applies to him.

Observations in *Sundaram Aiyar* v. *Thiyagaraja Pillai*(1) not approved.

Periya Jeeyangarswami v. *Esoof Sahib*(2) and *Ramanujachariar* v. *Sundarachari*(3) overruled.

Vyapuri v. *Sonamma Boi Ammani*(4) distinguished.

APPEAL against the decree of the Court of the Subordinate Judge of Rajahmundry in Appeal Suit No. 9 of 1933 preferred against the decree of the Court of the District Munsif of Rajahmundry in Original Suit No. 382 of 1931.

The appeal first came on for hearing before HORWILL J. In view of the conflict between the decisions of two Benches of this Court, viz., *Ramanujachariar* v. *Sundarachari*(3) and *Alam Khan Sahib* v. *Karuppannaswami Nadan*(5) his Lordship directed that the papers in the case be put before the CHIEF JUSTICE, for referring to a Full Bench, if his Lordship so pleased, the question whether, in a case where a plaintiff sets up a case of permissive possession and fails to prove it, the burden lies upon the plaintiff to prove that he was in possession within twelve years of suit, or the onus is upon the defendant to prove adverse possession for a period of twelve years.

(1) (1922) 50 M.L.J. 183, 189. (2) (1924) 21 L.W. 398.
(3) (1926) 25 L.W. 127. (4) (1915) I.L.R. 39 Mad. 811 (F.B.).
(5) (1938) 1 M.L.J. 113.

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The appeal then came on for hearing before the Full Bench constituted as above.

ON THE REFERENCE:

K. R. Vepa for appellant.—The lower Court applying Article 142 of the Limitation Act has held that the plaintiff's claim is barred. The Article that is applicable is Article 144 and under it the burden of establishing adverse possession is on the person setting up the same, that is, by the first defendant in this case. By applying Article 142 the onus has been wrongly thrown on the plaintiff of establishing possession within twelve years of the suit. Article 142 must be confined to cases where possession of the plaintiff and subsequent dispossession by the defendant are alleged. Where the plaint is based on the allegation that the defendant is in permissive occupation of property the proper Article applicable is Article 144, even though that allegation is not found to be true on the evidence. MADHAVAN NAIR J. takes this view in *Periya Jeeyangarswami* v. *Esoof Sahib*(1). This decision is not followed by PHILLIPS J. in *Kuppuswami Mudaliar* v. *Chockalinga Mudaliar*(2). PHILLIPS J. considers the decisions of the Privy Council in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi*(3), *Mahammud Amanullah Khan* v. *Badan Singh*(4) and *Dharani Kanta Lahiri* v. *Garbar Ali Khan*(5) and holds that Article 142 is applicable to suits for possession based on title. But DEVADOSS and WALLACE JJ. in *Ramanujachariar* v. *Sundarachari*(6) hold that Article 142 is applicable only to cases where the plaintiff alleges possession and dispossession in his plaint. Where he sets up a tenancy or licence as the basis of the defendant's possession the proper Article is Article 144. This is not approved in the recent decision of VENKATASUBBA RAO and ABDUR RAHMAN JJ. in *Alam Khan Sahib* v. *Karuppannaswami Nadan*(7). There is thus conflict of authority on the point. I submit, however, that Article 142 is not applicable for the further reason that the plaintiff is an auction-purchaser in a sale held in execution of a mortgage decree. He is a

(1) (1924) 21 L.W. 398. (2) (1925) 49 M.L.J. 788.
(3) (1888) I.L.R. 16 Cal. 473 (P.C). (4) (1889) I.L.R. 17 Cal. 137 (P.C.).
(5) (1912) 25 M.L.J. 95 (P.C.).
(6) (1926) 25 L.W. 127. (7) (1938) 1 M.L.J. 113.

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representative of the mortgagee also. It has been held in *Vyapuri* v. *Sonamma Boi Ammani*(1) that adverse possession against the mortgagor does not amount to adverse possession against the simple mortgagee. Following that principle it has been held in *Sundaram Aiyar* v. *Thiyagaraja Pillai*(2) that Article 142 did not apply to the case of a court-auction-purchaser in execution of a mortgage decree. Article 137 has been held to be inapplicable to purchasers in execution of mortgage decrees and for the same reasons Article 142 also will not apply to suits for recovery of property by such purchasers. Such a purchaser is not only the representative of the mortgagor but also of the mortgagee; see *Kunhiamma* v. *Kunhunni*(3) and *Maganlal* v. *Shakra Girdhar*(4).

A. Lakshmayya for respondent.—Where there is a trespass and adverse possession starts before a mortgage is created the principle of the decision in *Vyapuri* v. *Sonamma Boi Ammani*(1) does not apply. The mortgagee in such a case has no higher rights than the mortgagor; nor the auction-purchaser in execution of a mortgage decree. In the present case the first defendant was in possession of the property even before the mortgage, in pursuance of which the plaintiff made his purchase, was created. The plaintiff derives his title from the mortgagors and Article 142 is consequently applicable. Even when a tenancy is alleged in the plaint but is disproved Article 142 has been applied; see *Gopaul Chunder Chuckerbutty* v. *Nilmoney Mitter*(5) and *Venkatarayudu* v. *Sankarayya*(6). The applicability of an Article cannot be made to depend merely on the allegations in the plaint. Otherwise the law of limitation would be evaded by the device of false averments in the plaint.

Cur. adv. vult.

JUDGMENT.

LEACH C.J.

LEACH C.J.—The appellant is the Official Receiver of East Godavari and he has filed this appeal as

(1) (1915) I.L.R. 39 Mad. 811 (F.B.).
(2) (1922) 50 M.L.J. 183.
(3) (1892) I.L.R. 16 Mad. 140.
(4) (1897) I.L.R. 22 Bom. 945.
(5) (1884) I.L.R. 10 Cal. 374.
(6) (1910) 20 M.L.J. 306.

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the representative of the estate of one Adusumilli Venkatasubbarayudu who was adjudicated an insolvent during the pendency of the suit out of which this appeal arises. The insolvent was the plaintiff in the suit. On 29th November 1911 the second defendant and his sons mortgaged certain land belonging to them and in 1922 the mortgagees filed a suit in the Court of the District Judge of Rajahmundry to enforce the mortgage. They obtained a decree which they assigned to the plaintiff, who caused the land to be put up for sale in execution proceedings. The plaintiff bought the land at the court-auction and in due course obtained a sale certificate. When he went to take possession of the property he was obstructed by the first respondent, who claimed it as his ancestral property. Thereupon the plaintiff applied to the Court for an order under Order XXI, rule 98, of the Code of Civil Procedure. His application was dismissed and consequently he filed in the Court of the District Munsif, Rajahmundry, a suit for a decree declaring his title to the property and for the ejectment of the first respondent therefrom. In his plaint he averred that in 1909 the second defendant, on being appointed a village munsif, entrusted the property to the first respondent, his nephew, who was to manage it for him. With the dishonest idea of defeating the mortgage the second defendant had, it was said, instigated the first respondent to claim the property as his own. In addition to claiming the land as his ancestral property the first respondent averred that he had title to it by adverse possession. The District Munsif found for the plaintiff on all the issues and consequently decreed the suit. The first respondent then appealed to the Court of the Subordinate Judge of Rajahmundry. The Subordinate Judge held that the land was not the ancestral property of the first

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respondent, but belonged to the second defendant and his family. He disagreed with the District Munsif, however, on the question whether the land had been entrusted to the first respondent. In his opinion this had not been proved, but without considering the question whether the first respondent had been in adverse possession for twelve years he allowed the appeal on the ground that possession had been with the first respondent since that date. The question which the Court is called upon to decide is whether Article 142 or Article 144 of the Limitation Act applies to this case. The appellant contends that Article 144 applies. The first respondent would have it that the proper Article is Article 142. That the first respondent has been in possession since 1909 is admitted and it is conceded by both sides that if Article 142 applies the appeal must fail. It is also conceded that if Article 144 applies the suit must be remanded to the Subordinate Judge to consider whether the evidence justifies the first respondent's contention that he has obtained a title by adverse possession.

Article 142 prescribes a period of limitation of twelve years for a suit for possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession. The period of twelve years runs from the date of dispossession or discontinuance. Article 144 prescribes the same period of limitation for a suit "for possession of immovable property or any interest therein not hereby otherwise specially provided for". The period commences when the possession of the defendant becomes adverse to the plaintiff. Articles 134, 134-B, 135, 136, 137, 138, 139, 140, 141 and 143 also deal with suits for possession of immovable property. Article 144 is a residuary Article and therefore can only be applied if a suit does not fall

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within any of the earlier articles. There has been much discussion in the Courts of India with regard to the application of Articles 142 and 144. If a suit falls within Article 142 the plaintiff must show that he has been in possession within twelve years of the suit. When Article 144 applies the burden of proving adverse possession for this period is upon the defendant.

A discussion of the reported cases relating to Articles 142 and 144 would be a most formidable task and in my opinion it is not necessary to undertake it. I consider that the Privy Council has indicated the application of these Articles in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi*(1), *Mahammud Amanullah Khan* v. *Badan Singh*(2) and *Dharani Kanta Lahiri* v. *Garbar Ali Khan*(3). In *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi*(1) the plaintiffs had proved that formerly they were the proprietors of the land to which they alleged title, and from which they claimed to oust the defendants. They had, however, been dispossessed, or their possession had been discontinued, some years before the suit was brought by them and the land was occupied by the defendants, who denied their title. The Judicial Committee held that in these circumstances the burden was on the claimants to prove their possession at some time within the twelve years next preceding the suit. It was not sufficient for them to show an anterior title without proof of their possession within twelve years to shift the burden on the defendants of showing that they were entitled to remain in possession. In the judgment under appeal the Subordinate Judge who tried the case observed :

"When I showed above that the plaintiffs are the rightful owners of the disputed land, it is for the ryot defendants

(1) (1888) I.L.R. 16 Cal. 473 (P.C.). (2) (1889) I.L.R. 17 Cal. 137 (P.C.).
(3) (1912) 25 M.L.J. 95 (P.C.).

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to show that they are entitled to retain possession of these lands."

Their Lordships' comment on this observation was this :

"That, as a proposition of law, is one which hardly meets with the approval of their Lordships."

Their Lordships went on to say :

"This is in reality what in England would be called an action for ejectment, and in all actions for ejectment where the defendants are admittedly in possession, and *a fortiori* where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that, in this case, the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within twelve years before the commencement of the suit, namely, for the two or three years prior to the year 1875, or 1874, and that it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed."

In *Mahammud Amanullah Khan* v. *Badan Singh*(1) the Privy Council pointed out that Article 144 only gives the rule of limitation where there is no other Article in the schedule specially providing for the case. Although the proprietary right would continue to exist until, by the operation of the law of limitation, it has become extinguished, where a claim comes within the terms of Article 142, adverse possession is not required to be proved in order to maintain a defence. The plaintiffs' ancestors at the settlement in the Delhi District in 1843, declined to pay revenue in respect of a plot of land which had been held under rent-free tenure and had been resumed in 1838. The land was nevertheless assessed and the Government made an engagement with the villagers (the defendants in the suit) under which the villagers were to

(1) (1889) I.L.R. 17 Cal. 137 (P.C.).

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be put into possession. A revision of the settlement took place some thirty years later and the plaintiffs claimed possession on the strength of their title. According to the judgment under appeal to the Privy Council the plaintiffs were undoubtedly the proprietors before 1838, but the land had been since 1842 in the possession of the defendants, who had exercised all the rights of proprietors. There was no possession of any description in the plaintiffs or their ancestors since the period of the engagement and, under those circumstances, the Judicial Committee held that whether any proprietary right existed did not matter. The question was whether there was a dispossession or discontinuance, and clearly there was. The proprietary right would undoubtedly continue to exist until by the operation of the law of limitation it had been extinguished; but upon the question whether the law of limitation applied, it appeared to be clear that the case came within the terms of Article 142. Therefore it was unnecessary to embark upon an inquiry whether there had been adverse possession.

The decision in *Dharani Kanta Lahiri* v. *Garbar Ali Khan*(1) was to the same effect. The suit was one for ejectment of persons who admittedly were at the date of suit in possession of the land. Their Lordships said :

"It lay upon the plaintiffs to prove not only a title as against the defendants to the possession, but to prove that the plaintiffs had been dispossessed or had discontinued to be in possession of the lands within twelve years immediately preceding the commencement of the suit. Their Lordships find that the plaintiffs failed to prove a title against the defendants to the possession of the lands in dispute or any part of them ; they failed to prove that the lands, the possession of which they claimed, were not the lands covered by

(1) (1912) 25 M.L.J. 95 (P.C.).

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the sanad; and they failed to prove that they had been dispossessed or that their possession had been discontinued within twelve years before suit".

In view of these decisions of the Privy Council it cannot in my judgment be maintained that a person who proves title in a suit for ejectment has the right to the decree sought unless the defendant proves adverse possession for twelve years. The plaintiff is not entitled to succeed unless he shows in addition to title, that he has been in possession of the property within twelve years of the suit. The Privy Council has declared that to be the effect of the Article 142 and that suits for ejectment come within that Article. It may be a hardship that a person who proves a title to property should lose it to a trespasser unless he can also show that he has been in possession within twelve years of suit, but that is what the Limitation Act says and the Court must administer the law. And drafting his plaint in a manner which disguises the real nature of the suit will not help a plaintiff. In *Gopaul Chunder Chuckerbutty* v. *Nilmoney Mitter*(1) GARTH C.J. pointed out a mere allegation of a tenancy will not relieve a plaintiff from the burden of proving that he or those under whom he claims had been in possession within twelve years. If it did that device might always be resorted to for the purpose of evading the law of limitation.

I will now proceed to examine the decisions of this Court to which reference has been made in the course of the arguments. The first decision is that of AYLING and VENKATASUBBA RAO JJ. in *Sundaram Aiyar* v. *Thiyagaraja Pillai*(2). A mortgagee filed a suit to enforce a mortgage created in 1897 and obtained a decree for sale. At the auction sale held on 5th September 1906 the mortgagee purchased

(1) (1884) I.L.R. 10 Cal. 374. (2) (1922) 50 M.L.J. 183.

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the property and obtained symbolical possession. A third party was in possession and the mortgagee did not institute a suit to recover possession until 4th September 1918. The defendant who had been in possession from 22nd May 1905 then claimed he had been in adverse possession for more than twelve years. The Court held that the possession of the defendant though adverse to the mortgagor did not affect the rights of the mortgagee or of the auction-purchaser and consequently the suit was not time-barred. This principle had been settled by a Full Bench of this Court (WALLIS C.J. and SADASIVA AYYAR and SRINIVASA AYYANGAR JJ.) in *Vyapuri* v. *Sonamma Boi Ammani*(1) where it was held that the possession of a trespasser who has dispossessed a mortgagor, the mortgage being a simple one within the meaning of the Transfer of Property Act, is not adverse to the mortgagee. In the present case dispossession took place before the mortgage was created and therefore it differs materially from that decided by AYLING and VENKATASUBBA RAO JJ. The learned Judges went on to express the opinion that Article 142 does not apply

> "when upon the facts proved or admitted, dispossession cannot possibly have occurred before twelve years of the institution of the suit",

and to observe that

> "the plaintiff is entitled to say that the allegation relating to his possession may be treated as superfluous and that he may be allowed to rest his case upon the footing that his suit is within twelve years of the accrual of his right".

MADHAVAN NAIR J. discussed the applicability of Articles 142 and 144 in *Periya Jeeyangarswami* v. *Esoof Sahib*(2). In that case a suit was brought

(1) (1915) I.L.R. 39 Mad. 811 (F.B.). (2) (1924) 21 L.W. 398.

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by a dharmakarta of a devasthanam for possession of land which the devasthanam alleged had been leased to the defendants. The District Munsif who tried the suit found for the plaintiff, but his decision was reversed on appeal by the Subordinate Judge, who held that the alleged lease had not been proved and that Article 142 applied. As the plaintiffs had failed to prove possession within twelve years of suit the Subordinate Judge allowed the appeal. On second appeal MADHAVAN NAIR J. held that the proper Article to apply was Article 144 and based his opinion on the judgments of the Privy Council in *Secretary of State for India* v. *Chellikani Rama Rao*(1) and in *Kuthali Moothavar* v. *Kunharankutty*(2) and of that of the Allahabad High Court in *Jai Chand Bahadur* v. *Girwar Singh*(3).

In *Secretary of State for India* v. *Chellikani Rama Rao*(1) the question was whether the Secretary of State in Council was entitled to incorporate into a reserved forest under the Madras Forest Act (V of 1882) certain islands which had been formed on the bed of the sea near the mouth of the river Godavari within three miles of the main land. It was held that the islands belonged to the Crown and that the claimants had not proved adverse possession for a period sufficient to establish a right against the Crown. In the course of their Judgment their Lordships said:

"Nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say, 'I am here; be your

(1) (1916) I.L.R. 39 Mad. 617 (P.C.). (2) (1921) I.L.R. 44 Mad. 883 (P.C.).
(3) (1919) I.L.R. 41 All. 669.

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title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions'. Such a singular doctrine can be well illustrated by the case of India, in which the right of the Crown to vast tracts of territory, including not only islands arising from the sea, but great space of jungle lands, necessarily not under the close supervision of Government officers, would disappear because there would be no evidence available to establish the state of possession for sixty years past. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession."

In *Kuthali Moothavar* v. *Kunharankutty*(1) the Judicial Committee observed:

"Standing a title in 'A', the alleged adverse possession of 'B' must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor. Accordingly when the holder of title proves, as in their Lordship's view he does with some fullness prove in the present case, that he too has been exercising during the currency of his title various acts of possession then the quality of these acts, even although they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds."

I do not regard these pronouncements of the Privy Council as deciding the question of the effect of Article 142. I regard them as laying down principles which have to be applied when the issue is confined merely to a plea of adverse possession in particular circumstances. As I have already pointed out the Privy Council has dealt with the application of Article 142 in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi*(2), *Mahammud*

(1) (1921) I.L.R. 44 Mad. 883 (P.C.). (2) (1888) I.L.R. 16 Cal. 473 (P.C.).

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Amanullah Khan v. *Badan Singh*(1) and *Dharani Kanta Lahiri* v. *Garbar Ali Khan*(2) which MADHAVAN NAIR J. did not consider.

The Allahabad High Court in *Jai Chand Bahadur* v. *Girwar Singh*(3) expressed the opinion that it was sufficient for the plaintiff in an ejectment suit to rest his case on title. There the plaintiff, who was a zamindar, sued to eject the defendant from certain land which he alleged the defendant was in possession of as his licensee. The defendant denied the licence and set up a claim of adverse possession. The claim of adverse possession failed and the Court held that the plaintiff was entitled to succeed on the title which he had proved as zamindar. The question whether the licence was ever granted or revoked was immaterial. This decision appears to be in direct conflict with the pronouncements of the Privy Council to which I referred at the outset.

The next decision of this Court is that of PHILLIPS J. in *Kuppuswami Mudaliar* v. *Chockalinga Mudaliar*(4). It was argued there that Article 142 had no application to a suit for possession based on title but, having considered the decisions in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi*(5), *Mahammud Amanullah Khan* v. *Badan Singh*(1) and *Dharani Kanta Lahiri* v. *Garbar Ali Khan*(2), PHILLIPS J. rejected this argument.

In *Ramanujachariar* v. *Sundarachari*(6) DEVADOSS and WALLACE JJ. held that Article 142 is applicable only to cases where the plaintiff alleges possession and dispossession in his plaint. They considered that notwithstanding that the plaintiff sets up a

(1) (1889) I.L.R. 17 Cal. 137 (P.C.).
(2) (1912) 25 M.L.J. 95 (P.C.).
(3) (1919) I.L.R. 41 All. 669.
(4) (1925) 49 M.L.J. 788.
(5) (1888) I.L.R. 16 Cal. 473 (P.C.).
(6) (1926) 25 L.W. 127.

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tenancy or licence as the basis of the defendant's possession the Article applicable is still Article 144. The learned Judges did not, however, consider any of the authorities.

The latest decision of this Court is that of VENKATASUBBA RAO and ABDUR RAHMAN JJ. in *Alam Khan Sahib* v. *Karuppannaswami Nadan*(1). In that case the plaintiff was a mutawalli of a Mohomedan trust. He sued for possession of immovable property and alleged that the defendants had been his tenants. It was held that the tenancy was not proved. The defendants did not appear at the trial, but the plaintiff's witnesses themselves stated that the property had never to their knowledge been in the possession of the plaintiff. It was held that the suit was governed by Article 142 and not by Article 144 and that it should be dismissed as the plaintiff had not proved his possession within the statutory period. The learned Judges, however, considered that on the facts of the case it was unnecessary to deal with the broad question whether, in a suit in ejectment where the plaintiff's title is proved, there rests any duty upon him of shifting the burden on the defendants to prove adverse possession under Article 144.

I have said sufficient to indicate that in my opinion a plaintiff who is suing for possession of property in the occupation of another cannot rest his case on title alone. He must show that he has exercised rights of ownership by being in possession within twelve years of suit. It follows that in my opinion the observations which I have quoted from the judgment in *Sundaram Aiyar* v. *Thiyagaraja Pillai*(2) cannot be accepted and that *Periya Jeeyangarswami*

(1) (1938) 1 M.L.J. 113.
(2) (1922) 50 M.L.J. 183.

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LEACH C.J.

v. *Esoof Sahib*(1) and *Ramanujachariar* v. *Sundarachari*(2) were wrongly decided.

In the present case the appellant and his predecessors in title have admittedly been out of possession since 1909 and this disposes of the appeal, but before I conclude it is necessary to deal with another argument advanced on behalf of the appellant. It is said that, where the plaintiff is the purchaser at a court-auction held in execution of a mortgage decree, his case does not fall within Article 142. It is contended that that Article only applies when the plaintiff is suing on his own title or on the title of the previous owner of the property and does not apply when he is the representative of both the mortgagor and the mortgagee. In *Kunhiamma* v. *Kunhunni*(3) and *Maganlal* v. *Shakra Girdhar*(4) it was held that the purchaser at a court-auction in execution of a mortgage decree is the representative of the mortgagor and the mortgagee, having acquired both their interests in the property sold. But this cannot mean that he is outside Article 142. When the owner mortgages his property part of his interest passes to the mortgagee, but when the property is sold at a court-auction the purchaser has vested in him the full title of the mortgagor as it existed before the mortgage and the law which applies to the mortgagor applies to him. Section 2 (8) of the Limitation Act defines the word "plaintiff" as including any person from or through whom a plaintiff derives his right to sue. The appellant here derived his right to sue from the mortgagor. It is true that part of his interest in the property came to him from the mortgagor through the mortgagee but that does not warrant the assertion

(1) (1924) 21 L.W. 398.
(2) (1926) 25 L.W. 127.
(3) (1892) I.L.R. 16 Mad. 140.
(4) (1897) I.L.R. 22 Bom. 945.

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that different considerations apply when he is suing for the ejectment of a person in possession of the property which he has bought. In my judgment there is no substance in the last contention advanced on behalf of the appellant.

For these reasons I would dismiss the appeal with costs.

MOCKETT J.—I agree.

KRISHNASWAMI AYYANGAR J.—I also agree.

N.S.

APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice King and Mr. Justice Somayya.

1940, April 26.

KATIKINENI VENKATA GOPALA NARASIMHA RAMA RAO (DEFENDANT), APPELLANT,

v.

CHITLURI VENKATARAMAYYA (PLAINTIFF), RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 22—Profit and loss statement and statement showing details of net income filed by assessee under, in support of his return of income—If public documents within sec. 74 of Indian Evidence Act (I of 1872)—Certified copies of same—If admissible under sec. 65 (e) of Indian Evidence Act.

A profit and loss statement and a statement showing the details of net income, filed by an assessee in support of his return of income furnished under section 22 of the Indian Income-tax Act, are public documents with reference to section 74 of the Indian Evidence Act, of which certified

* Appeals Nos. 234 and 235 of 1937.

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copies would be admissible under section 65 (*e*) of the Indian Evidence Act.

Mythili v. *Janaki*(1) overruled.

APPEALS respectively against the decrees of the Court of the Subordinate Judge of Ellore, dated 29th March 1937, in Original Suits Nos. 14 of 1935 and 28 of 1936.

These appeals came on for hearing and WADSWORTH J. on behalf of the Court (WADSWORTH and PATANJALI SASTRI JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:

These two appeals raise the question of the liability of the appellant on two missing promissory notes, one for Rs. 9,704, dated 16th February 1932 and the other for Rs. 24,400, dated 13th February 1933. The former promissory note formed the subject-matter of Original Suit No. 14 of 1935 against which Appeal Suit No. 234 is preferred. The execution of this promissory note was admitted but the defendant (appellant) pleaded that it was discharged except for a small amount. The second promissory note formed the subject-matter of Original Suit No. 28 of 1936 (against which Appeal Suit No. 235 is filed) and its execution is totally denied by the appellant. The promisee (plaintiff) was a well-to-do Vaisya money-lender and it is common ground that, up to 28th March 1934, he and the defendant, an important mokhasadar, were on very friendly terms and had considerable dealings. On 1st February 1934, the defendant made over the income from some of his lands to his wife for a term of years and it is said that this transaction made the respondent uneasy about his advances to the appellant.

[His Lordship discussed the evidence and proceeded:]

The main question in this case therefore becomes the question whether the existence of this promissory note for Rs. 24,000 before 30th March 1934 has been *satisfactorily* demonstrated.

Now, the evidence of the earlier existence of this debt, apart from the statements of the plaintiff and witnesses interested in him, on which much reliance cannot be placed,

(1) I.L.R. [1940] Mad. 329.

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consists of (i) the respondent's own accounts, (ii) the evidence of the Vakil (P.W. 3) regarding what he saw on 17th February 1934 and (iii) Exhibits H and E certified copies of the profit and loss statement attached to the respondent's income-tax return and the statement on which it was based, which were apparently filed on or before 17th May 1933 before the Income-tax Officer. The accounts show entries corroborating the story of the execution of the promissory note for Rs. 24,400 on 13th February 1933, with corresponding credits in favour of the plaintiff's brother and wife relating to liabilities originally due from the appellant to them which the respondent had taken over in return for the execution of this note.

[His Lordship discussed the evidence and proceeded:]

The most conclusive piece of evidence on this question of the previous existence of the promissory note for Rs. 24,400 is provided by Exhibits E and H which are certified copies of the income statement and profit and loss statement, the latter purporting to have been signed by the plaintiff on 17th May 1933, the former of which sets forth this debt of Rs. 24,400 as due to the respondent. There is, however, a serious difficulty with reference to the admissibility of this evidence. Objection was taken to it at the time when it was tendered and we deem it necessary to refer to a Full Bench the question of its admissibility in view of the decision of our learned brothers, BURN and STODART JJ., in the case of *Mythili* v. *Janaki*(1). In our opinion the evidential value of these income-tax documents is such that, if they are admitted, the correctness of the lower Court's conclusion is clear. If they are to be rejected, we shall have to decide hereafter whether the remaining evidence is sufficient to establish the pre-existence of this note for Rs. 24,400 which, if established, seem to us, in view of the defendant's denials and suppressions, to warrant the decree which has been given.

The legal difficulty may be briefly stated. Exhibits E and H are both certified copies. If the original is a public document within the meaning of section 74 of the Evidence Act, then the certified copies are good secondary evidence of that original under section 65 (*e*). If these statements are

(1) I.L.R. [1940] Mad. 329, 332.

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not public documents, we are unable to see how the certified copies can be admitted in evidence under any other clause of section 65 of the Evidence Act. Section 74 defines public documents as documents forming the acts or records of the acts (i) of the sovereign authority, (ii) of official bodies and tribunals and (iii) of public officers, legislative, judicial and executive, and the term includes also public records kept in British India of private documents. The question is whether an income-tax return and the statements accompanying it form part of the record of the act of the Income-tax Officer who makes the assessment. In the case just referred to, the learned Judges decided, without quoting any authority other than the statutory provisions, that it was the policy of the law that statements made in income-tax returns should not be used in evidence against the person making them or against any one else, that income-tax returns could not be proved by secondary evidence and that the income-tax return was not part of the record of the act of assessment and not a public document as defined in section 74 of the Evidence Act. In coming to this conclusion, the learned Judges appear to have been greatly influenced by the provisions of section 54 of the Indian Income-tax Act which prohibits the disclosure by any public servant of particulars contained in an income-tax return or statement. Now quite clearly this section applies only to disclosures and does not prohibit the Income-tax Officer from giving to the person who made the return a copy of that return. In fact, we are informed that the departmental orders expressly provide for the giving of such a copy to the assessee on application. It seems to us that there is no ground of public policy which would prevent such an assessee from using in evidence such a copy when it has been granted to him. Nor are we convinced that the ground of public policy is a sufficient reason for excluding from evidence any document which is legally admissible under the Evidence Act and is not excluded by any statutory prohibition. This view has been adopted in the case of *Venkataramana* v. *Varahalu*(1), a decision of VARADACHARIAR and PANDRANG ROW JJ. anterior to the decision of BURN and STODART JJ., but apparently not brought to their notice. VARADACHARIAR and PANDRANG ROW JJ. were actually dealing with a copy of a

(1) (1938) 50 L.W. 681, 687, 680.

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statement recorded by the Income-tax Officer which clearly was a public document and they held that certified copies of such a statement were admissible notwithstanding the provisions of section 54 of the Indian Income-tax Act. The learned Judges refer to a decision, *Anwar Ali* v. *Tafozal Ahmed*(1), wherein a single Judge held that income-tax returns being made confidential by section 54 of the Income-tax Act, certified copies of such a return could not lawfully be given and if given could not be used in evidence. In *Devidatt* v. *Shriram Narayandas*(2) a Bench of the Bombay High Court held that certified copies of an income-tax return could not be given in evidence because the return is not a public document within the meaning of section 74 of the Evidence Act and that the prohibition in section 54 of the Indian Income-tax Act was sufficient to warrant the view that a certified copy could not be lawfully obtained and would not be admissible in evidence if obtained. It seems to us that these decisions raise a question of far reaching importance. With all respect to the learned Judges who have held otherwise we do not consider that the prohibition against the disclosure of the contents of an income-tax return can have any bearing on the admissibility of the contents of that return filed at the instance of the person who made it. If the income-tax return is a part of the record of the act of the Income-tax Officer making the assessment, a certified copy of that document can lawfully be given, subject to the prohibition against disclosure in section 54 of the Indian Income-tax Act. If it has been so given, then by the terms of section 65 of the Evidence Act it is, no matter who produces it, good evidence of the original, provided that the original is a public document; and we do not think that considerations of public policy can warrant its exclusion from evidence. If an income-tax return is not a public document, as being part of the record of the act of the assessing officer, it is difficult to see how a plaint or written statement in a civil suit or a complaint in a criminal case can be deemed to be public documents such as can be proved by the production of certified copies. It is almost the universal practice of the Courts to grant certified copies of such documents and to admit them in evidence, though the admissibility of a certified copy of a plaint appears

(1) (1924) I.L.R. 2 Rang. 391.
(2) (1931) I.L.R. 56 Bom. 324, 329.

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to have been successfully challenged in one or two cases, not of this High Court. We are inclined to the view that an income-tax return, being the basis of the Income-tax Officer's assessment, must be treated as part of the record of the act of assessment and must therefore be regarded as a public document of which a certified copy can be given in evidence. The matter, however, being the subject of somewhat conflicting rulings of Benches of this High Court, we refer to a Full Bench the following question:

"Whether a profit and loss statement and a statement showing the details of net income, filed by an assessee in support of his return of income furnished under section 22 of the Indian Income-tax Act, are public documents with reference to section 74 of the Evidence Act, of which certified copies would be admissible under section 65 (*e*) of the Evidence Act."

The appeal came on for hearing before the Full Bench constituted as above.

ON THE REFERENCE:

P. V. Rajamannar, K. Subba Rao and *D. Suryaprakasa Rao* for appellant.—Exhibits E and H are certified copies of the income statement and profit and loss statement which were filed in the income-tax office in connexion with the income-tax return. Exhibit E contains a statement that the disputed amount was due to the respondent. The question for decision is whether the income-tax return and its annexures are public documents within the meaning of section 74 of the Indian Evidence Act, such that their certified copies are good secondary evidence of their originals under section 65 (*e*) of the Indian Evidence Act. Income-tax returns have been uniformly held not to be public documents.

[Counsel read sections 64 and 74 to 78 of the Indian Evidence Act and section 54 of the Income-tax Act and proceeded:]

Under section 74 (2) the acts and record of acts of an Income-tax Officer will be public records but not the whole record. The materials on which he bases his conclusions are not public records. Income-tax Manual, paragraph 85, clause (2), deals with the practice of giving certified copies to assessees, partners and managers of joint Hindu families. No section gives any person a right to get copies.

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[KING J.—No section prevents copies being given to them.]

Section 76 of the Evidence Act prohibits certified copies being given of only income-tax returns. In *Venkataramana* v. *Varahalu*(1) VARADACHARIAR and PANDRANG ROW JJ. held that certified copy of a statement on oath of a partner recorded by the Income-tax Officer to be admissible in evidence but they pointed out that the income-tax return would not be a public document. To this extent they follow *Devidatt* v. *Shriram Narayandas*(2). In *Mythili* v. *Janaki*(3) BURN and STODART JJ. held that an income-tax return would not be a public document. To the same effect is the decision in *Anwar Ali* v. *Tafozal Ahmed*(4). The income-tax return is only an act of the assessee. It will only be a private record kept in a public office along with public documents and it cannot become a public record of a private document. In *Ali Khan Bahadur* v. *Indar Parshad*(5) the Privy Council adopted without any discussion the decision of the Judicial Commissioner who held that income-tax returns were not public documents. The acts contemplated in section 74 of the Evidence Act were final and completed acts and not acts of a preparatory character.

[Counsel also referred to *Sturla* v. *Freccia*(6).]

Advocate-General (*Sir A. Krishnaswami Ayyar*), *Nugent Grant* and *V. Suryanarayana* for respondent.—Section 74 of the Evidence Act uses the following words, namely, "forming the acts" and "records of the acts". The proceedings commence with notice under section 22 of the Income-tax Act. If the Income-tax Officer is satisfied, then the assessment proceeds on the basis of the return under section 23. All these steps are proceedings before the Income-tax Officer. The proceedings before him cannot be split up into various stages for holding that a document filed in a particular stage is a private document and that filed in another stage is a public document. Such a truncated scrutiny is not warranted by the provisions of the Income-tax Act. In *Bhagain Megh Ranee Koer* v. *Gooroo Pershad Singh*(7) a compromise petition which was followed by a decree of Court

(1) (1938) 50 L.W. 681, 687, 689. (2) (1931) I.L.R. 56 Bom. 324.
(3) I.L.R. [1940] Mad. 329, 332. (4) (1924) I.L.R. 2 Rang. 391.
(5) (1896) I.L.R. 23 Cal. 950 (P.C.).
(6) (1880) 5 App. Cas. 623, 642. (7) (1876) 25 W.R 68.

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was held to be parts of records of Court. In *Mangal Sen* v. *Hira Singh*(1) a copy of an application for compromise on which the order of Court was made was held to be a record of Court and as such held admissible in evidence under sections 61, 62 and 77 of the Evidence Act. The mixing up of the provisions of the Evidence Act and Income-tax Act has been responsible for the confusion.

P. V. Rajamannar in reply.—In the two cases referred to by the Counsel for the respondent the compromise petitions were held to be records of Court since orders of Court were made on them.

Cur. adv. vult.

OPINION.

LEACH C.J.

LEACH C.J.—Before proceeding to examine the provisions of the sections of the Indian Evidence Act mentioned in the question under reference it is desirable to state the effect of section 54 of the Indian Income-tax Act, 1922, as in some cases where certified copies of income-tax documents have been tendered in evidence its provisions have been misunderstood and misapplied. Sub-section (1) of section 54 of the Indian Income-tax Act states that all particulars contained in a statement made, return furnished or accounts or documents produced under the provisions of the Act, or in evidence given in the Court of proceedings under the Act other than proceedings under Chapter VIII (which relates to offences and penalties), or in a record of an assessment proceeding, or a proceeding relating to the recovery of a demand shall be treated as confidential, and, notwithstanding anything contained in the Indian Evidence Act, 1872, no Court shall be entitled to require a public servant to produce a document referred to in the section or to give evidence thereon. Sub-section (2) provides for

(1) (1904) 1 A.L.J.R. 369.

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the punishment of a public servant who unlawfully discloses particulars of an income-tax matter. Sub-section (3) sets out the occasions on which disclosure can lawfully be made. It is not necessary to set them out as the provisions of sub-section (3) have no application here and have no bearing on the reported decisions which have relation to the application of section 54.

While section 54 prohibits the disclosure, except on specified occasions of matters connected with an assessment to income-tax and prohibits a Court from requiring a public servant to produce the documents mentioned in the section or to give evidence in respect of them, it does not follow that the Court may not admit in evidence a document which falls within section 54 (1). This will depend on whether the document is admissible under the provisions of the Indian Evidence Act. Paragraph 85 of the notes and instructions compiled by the Income-tax department for the guidance of its officers states that the following persons shall, in practice, be allowed to inspect or to receive copies: (i) In any case the person who actually made the return; (ii) any partner (known to be such) in a firm registered or unregistered to whose income the return relates; and (iii) the manager of a Hindu undivided family to whose income the return relates, or any other adult member of the family who has been treated as representing it. There is nothing in section 54 to prohibit this practice and it is only right that a person who is concerned with an assessment should be allowed to obtain copies of the documents relating to his assessment to income-tax should he so desire, and if copies are supplied he may put them in evidence in a suit if the Evidence Act allows it.

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I will now turn to the relevant provisions of the Indian Evidence Act. Section 74 says that the following documents are public documents :

(1) documents forming the acts or records of the acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, whether of British India, or of any other part of His Majesty's dominions, or of a foreign country ;

(2) public records kept in British India of private documents.

Section 75 states that all other documents are private. Section 76 provides that every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of the copy that it is a true copy. Section 77 says that certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies. Therefore, if a document is a public document it may be proved by means of the production of a certified copy. Private documents must be proved by primary evidence, except in such cases where secondary evidence is permitted under the provisions of section 65. Clause (*e*) of that section allows secondary evidence to be given when the original is a public document within the meaning of section 74. If an income-tax return or a statement filed in support of it is a public document within the meaning of section 74, certified copies will be admissible under section 65 (*e*). The answer to the question whether a document of this nature is a public document depends on whether it is a document forming an act or the record of an act or acts of an Income-tax Officer. Before stating my

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opinion on the question I will first refer to certain of the cases which have been quoted in argument.

In *Anwar Ali* v. *Tafozal Ahmed*(1) a single Judge of the Rangoon High Court held that income-tax returns being made confidential by reason of section 54 of the Income-tax Act, and the disclosure of their contents being a punishable offence, certified copies cannot be admitted in evidence. The Court did not consider the effect of section 74 of the Indian Evidence Act and decided against the admissiblity of the certified copies submitted on the ground that section 54 of the Indian Income-tax Act made the issue of copies unlawful and made the disclosure of the particular contents in the return an offence punishable with imprisonment. In my opinion there is here a misconception. Section 54 does not make the issue of a certified copy of an income-tax return to an assessee unlawful. The return is a confidential document and cannot be disclosed to a third party, but there can be no objection to the maker of the return having a copy for his own purposes if he so desires. So far as the assessee is concerned he is not bound to treat the document as confidential.

A Bench of the Bombay High Court considered the question of the admission of certified copies of income-tax returns in *Devidatt* v. *Shriram Narayandas*(2) and held that they were not admissible, but the decision was based on a different ground from that given by the Rangoon High Court in *Anwar Ali* v. *Tafozal Ahmed*(1). The reason given here was that the assessee had no right to inspect the original documents in the custody of the Income-tax Officer and the latter was not bound to give certified copies to the assessee

(1) (1924) I.L.R. 2 Rang. 391. (2) (1931) I.L.R. 56 Bom. 324.

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on demand. It was considered that the words "right to inspect" in section 76 of the Evidence Act exclude all such documents as a government officer has a right to refuse to show "on the ground of state policy or privilege, etc." But an Income-tax Officer would not be fulfilling his duty if he refused to allow an assessee to inspect his own return. If he did so, he might be placing an assessee at a disadvantage when the assessee was objecting to an improper assessment. The Bombay High Court, however, considered that there was nothing in the terms of section 54 of the Income-tax Act and the intention of the Legislature underlying it, prohibiting an assessee from giving secondary evidence of the contents of the return made by him or on his behalf or of the assessment order made upon him or his firm on that return, where such secondary evidence would be admissible under the Indian Evidence Act. Where the original cannot be produced the best secondary evidence must be a true copy.

A Bench of this Court (VARADACHARIAR and PANDRANG ROW JJ.) held in *Venkataramana* v. *Varahalu*(1) that a certified copy granted to an assessee of a statement made by him on oath before an Income-tax Officer is admissible in evidence and there is nothing in section 54 of the Income-tax Act or any of the provisions of the Evidence Act which precludes its admissibility. The statement was regarded as being a public document because it was a statement recorded by the Income-tax Officer and therefore a document forming a record of his act. Though they did not accept the Bombay interpretation of section 76 of the Evidence Act the learned Judges concurred in the opinion expressed by the Bombay High Court in

(1) (1938) 50 L.W. 681.

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Devidatt v. *Shriram Narayandas*(1) that an income-tax return is not a public document. They did not say so, but it is to be gathered from their judgment that they did not regard an income-tax return as a public document because it is prepared by the assessee.

The question whether an income-tax return is a public document was discussed at some length by a Bench of this Court (BURN and STODART JJ.) in *Mythili* v. *Janaki*(2) and the conclusion arrived at was that it is not a public document within the meaning of section 74 of the Indian Evidence Act. The learned Judges considered that it was impossible to infer from the wording of the Act that a return made by an assessee is either part of the act of the Income-tax Officer or part of the record of the act of that Officer. In their opinion to allow a person who comes into possession of a certified copy of a return to produce it in Court and so prove the contents of the return would be defeating the express provisions of section 54. I have said sufficient to indicate that in my opinion there is nothing in section 54 which prohibits a party from putting in evidence a certified copy of an income-tax return if that return is a public document and that the learned Judges misunderstood the effect of that section. It only remains to be considered whether the opinion that an income-tax return is outside section 74 of the Evidence Act is correct.

The judgments in *Venkataramana* v. *Varahalu*(3) and *Mythili* v. *Janaki*(2) indicate that in the opinion of the learned Judges who decided those cases a document on the record of an assessment proceeding cannot be deemed to be a public document within the

(1) (1931) I.L.R. 56 Bom. 324.
(2) I.L.R. [1940] Mad. 329.
(3) (1938) 50 L.W. 681.

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meaning of section 74 of the Evidence Act, unless it be a statement recorded by the Income-tax Officer himself or an order passed by him, and therefore does not include a document drawn up by the assessee or under the assessee's directions. In my opinion this interpretation of section 74 of the Evidence Act is too limited. Section 22 of the Income-tax Act empowers the Income-tax Officer to call upon a person to submit a return of his income. Section 23 states that if the Income-tax Officer is satisfied that a return made under section 22 is correct and complete he shall assess the total income of the assessee and shall determine the sum payable by him on the basis of the return. The submission of the return constitutes the fulfilment of a requirement of the Income-tax Officer; in other words, it is a document which he has caused to be prepared. Can it then be dissociated from his action in calling for the return? If the Income-tax Officer is not satisfied with the return he can call upon the assessee to produce evidence in support of it. If the assessee produces evidence the Income-tax Officer must consider it in determining the sum to be paid by the assessee. A profit and loss statement filed by the assessee is evidence in the matter and the Income-tax Officer may draw it up himself, if he thinks it expedient to do so. It is common ground that an order of assessment is a public document within the meaning of section 74 and the decision in *Venkataramana* v. *Varahalu*(1) that a statement recorded by an Income-tax Officer falls in the same category has not been questioned. Now, if a statement recorded by an Income-tax Officer in the course of his examination of the assessee is a public document

(1) (1938) 50 L.W. 681.

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it is difficult to see why a statement handed in by the assessee disclosing the basis of the return called for should not be similarly regarded. Surely, the test cannot be whether the profit and loss statement is actually drawn up by the Income-tax Officer.

As the learned Judges who have made this reference have pointed out, a plaint or a written statement has always been regarded by this Court as forming part of the record of a case and a public document of which an interested party may obtain a certified copy. If the argument, that an income-tax return is not a public document but that the order passed thereon is, were carried to its logical conclusion, it would mean that no part of the record of a civil suit could be regarded as constituting a public document, except evidence recorded by the Court or summonses or notices or interlocutory orders or the judgment in the case. In *Bhagain Megh Ranee Koer* v. *Gooroo Pershad Singh*(1) GARTH C.J. and BIRCH J. expressly held that a petition which was the subject-matter of an order passed was part of the record in the suit, and I do not think that this can reasonably be doubted. In my judgment it would be putting an unwarranted restriction on the words "documents forming the acts or records of the acts" to say that they should be confined to those parts of an income-tax record which the Income-tax Officer has himself prepared and to exclude documents which he has himself called for or which have been admitted to the record for the purposes of the assessment. I consider that the record of an income-tax case must be regarded as the record of the acts of the Income-tax Officer in making his assessment and therefore that any document properly

(1) (1876) 25 W.R. 68.

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on the record is just as much a public document as the final order of assessment. For these reasons I would answer the question propounded in the affirmative.

I would make the costs of this reference costs in the cause.

KING J.—I agree.

SOMAYYA J.—I agree.

These appeals came on for final hearing on 30th April 1940, after the expression of the opinion by the Full Bench on the question referred to them, and WADSWORTH J., on behalf of the Court (WADSWORTH and PATANJALI SASTRI JJ.), delivered the following Judgment :—

The Full Bench have decided that the certified copies, Exhibits E and H, are admissible in evidence of the contents of the original statements. These statements are relevant both as corroborating the evidence of the plaintiff himself and as rebutting the contention that the promissory note was fabricated at a date subsequent to that on which the statements were made. They are not being used to impose a liability on the defendant but to rebut a contention of fabrication which is inconsistent with the existence of these statements. The appeals are therefore dismissed with costs, including costs of the reference to the Full Bench—Advocate's fee for the reference Rs. 150. The petitions under Madras Agriculturists Relief Act (IV of 1938) are remitted to the trial Court for disposal.

G.R.

INCOME-TAX REFERENCE.

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

1940, March 4.

COMMISSIONER OF INCOME-TAX, MADRAS, PETITIONER,

v.

MESSRS. HARVEYS, LTD., TUTICORIN, RESPONDENT.*

Indian Income-Tax Act (XI of 1922), sec. 10—Allowance for depreciation of property under sec. 10 (2) (vi)—Ascertainment of original cost of property—Authorities, if entitled to go behind price in contract of sale—Issue of debentures towards portion of sale price—Transaction colourable—Interest on debentures, if deductible from assessable income—Exchange of shares between assessee company and another company with undertaking to gin cotton at concession rate—Difference in value of shares exchanged, if capital or income—Anticipated profits of a number of years received in lump in advance—Such profits, if assessable in the year of receipt.

The assessee, a private company incorporated in British India, purchased, in pursuance of an arrangement made shortly before its incorporation, a cotton ginning business consisting of lands, buildings, plant and machinery for a sum of rupees fifteen lakhs. Out of this sum, five lakhs were paid by issue of shares and the balance of seven lakhs by issue of debentures. In pursuance of negotiations made before its incorporation, the assessee entered into a contract, shortly after its incorporation, with another company that in consideration of an allotment of twenty thousand shares of the latter company in favour of the assessee, the assessee should allot one thousand of its shares to the other company and that it should gin cotton for that company at a flat rate of Rs. 8 per candy, which was lower than the market rate, for a period of ten years. The allotment of shares was duly made subsequently. For the year 1934–35, the assessee was assessed to tax on a total income of Rs. 82,643 after certain deductions. This assessment was re-opened and the total income which had

* Original Petition No. 160 of 1939.

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escaped assessment in that year was computed to be a sum of Rs. 7,11,316 which included the following items: (i) Rs. 48,149 depreciation allowed in excess in the original assessment, (ii) Rs. 61,130, interest on debentures, allowed in the original assessment and (iii) Rs. 6,00,000 advance received on account of ginning charges. The assessee objected to these items and on a reference being made to the High Court at its instance,

held: (i) For ascertaining the amount of allowance for depreciation of property under section 10 (2) (vi) of the Income-tax Act, 1922, the Income-tax authorities are not bound to accept as its original cost the price fixed by parties in a contract of sale of the property. When the circumstances show that an assessee has arranged to put an entirely fictitious price on his assets it is open to the Income-tax authorities to refuse to accept that price and to ascertain their true value.

Salomon v. *Salomon & Co.*(1) explained and held inapplicable.

(ii) In the absence of other evidence the Income-tax authorities are entitled to rely on the books of account of the vendors and accept the value mentioned therein for calculating the depreciation allowance.

(iii) The issue of debentures for the sum of ten lakhs towards the price of the cotton ginning business was colourable and illusory and the interest paid on the debentures is not allowable as a deduction.

(iv) The exchange of shares between the assessee company and the other company in respect of the ginning contract is not a transaction of a capital nature and the benefit received by the assessee represents profits received in the year of exchange. On the facts of the case the difference between the values of the exchanged shares must be allocated to the ginning contract and as such is profit in the hands of the assessee assessable to tax. If a payment represents a lump-sum payment of profits which would otherwise be received over a series of years it may be regarded as income received in the year of payment.

Observations of Lord MACMILLAN in *Van den Berghs, Ld.* v. *Clark*(2) and *The Commissioners of Inland Revenue* v. *The Northfleet Coal and Ballast Co., Ltd.*(3) applied and followed.

(1) [1897] A.C. 22. (2) [1935] A.C. 431.
(3) (1927) 12 T.C. 1102.

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

Advocate-General (*Sir A. Krishnaswami Ayyar*), with him *M. Subbaroya Ayyar*, for respondent.—The assessee is a private company incorporated in British India. In pursuance of an arrangement made a short time before its incorporation the company purchased from persons who had a controlling interest in it, plant, machinery and buildings for a sum of rupees fifteen lakhs. Part of the sale price, to the extent of five lakhs, was met by the issue of shares and the balance of ten lakhs by the issue of debentures. The Income-tax authorities have held that the aforesaid sale price was excessive and that it could not be taken as the original cost of the plant, machinery and buildings for the purpose of determining the depreciation allowance under section 10 (2) (vi) of the Income-Tax Act. They have fixed the original cost at a sum of rupees five lakhs, basing it on the amounts mentioned in the account books of the vendors. They have held further that the debenture transaction was colourable and that no deduction could be made of interest paid on the debentures, in ascertaining the assessable income of the assessee. The first three questions in the reference to the High Court made by the Commissioner relate to the above matter and may be considered together. I submit that the Income-tax authorities are not entitled to go behind the contract of sale which fixes the price at rupees fifteen lakhs. Property has been transferred to the assessee company and the valuation of the parties must be taken to be conclusive. The question of the conclusiveness of the valuation put by the vendors of a company in the contract of sale has arisen for consideration in applications by creditors in winding up proceedings. It has been held in *Salomon* v. *Salomon & Co.*(1) that a creditor cannot question the adequacy of consideration paid for purchasing a business at the time of the incorporation of a company. A similar view was taken in *In re Wragg, Limited*(2).

[LEACH C.J.—The scope of the Companies Act is different from that of the Income-Tax Act.]

There has been a sale of property in favour of the assessee company and until the sale is rescinded the consideration mentioned in the contract of sale stands good and is binding.

(1) [1897] A.C. 22. (2) [1897] 1 Ch. 796.

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In any event the sum of five lakhs fixed by the authorities is too low, particularly having regard to the income derived from the properties at the time of their sale.

Questions four to seven in the Commissioner's reference go together and deal with the assessability of a sum of rupees six lakhs. Just prior to the incorporation of the assessee company negotiations were made between it and the Madura Mills Company, and in pursuance thereof a contract was entered into after the incorporation providing for an exchange of shares between the assessee company and the Madura Mills Company and for ginning cotton for the latter company at a concession rate for a period of ten years. The difference in the values of the shares so exchanged between the two companies has been assessed at six lakhs and the Income-tax authorities have treated this sum as profits of the assessee for the year in respect of its ginning business. This is not justified. The exchange of shares is an exchange of capital assets. Both the companies have treated it in that manner and to the extent of the value of the shares of the assessee company allotted to the Madura Mills Company, even the Income-tax authorities accept that it is capital and not income. The arrangement to gin cotton at a concession rate is not like any other ginning contract entered into in the usual course of business. It is made prior to the commencement of the business and preparatory to its starting. It is a collateral transaction and any difference in the values of the exchanged shares attributable to the contract of ginning at a concession rate must be treated merely as consideration for the purpose of securing business relationship with the Madura Mills Company. The amount of the difference cannot be considered to be profits earned in the actual working of the business. Nor can it be deemed to be anticipatory profits. The rates for ginning may vary from time to time and the business when actually worked may not yield profit. The arrangement for exchange of shares and for ginning cotton at a concession rate may have been entered into for the purpose of providing against loss. The transaction is therefore one of capital as distinguished from revenue; see *Commissioner of Income-tax, Bengal* v. *Shaw, Wallace and Company*(1) and *The Commissioner of Income-tax, Central and United Provinces* v. *Messrs.*

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

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Motiram Nandram(1). The decisions in *Van den Berghs, Ld.* v. *Clark*(2) and in *Inland Revenue Commissioners* v. *British Salmson Aero Engines, Ld.*(3) also support that view. Assuming that the transaction is of a revenue nature the entire amount of the difference in the values of the shares cannot be treated as profits of that one year in which the transaction is entered into. It relates to a contract for ginning for a period of ten years and the alleged profits must be distributed over that period; see Halsbury's Laws of England, Hailsham Edition, Volume 17, paragraph 541, *Hawley* v. *The Commissioners of Inland Revenue*(4), *Short Bros., Ltd.* v. *The Commissioners of Inland Revenue*(5) and *Commissioner of Taxes* v. *Melbourne Trust, Limited*(6).

K. V. Sesha Ayyangar for petitioner.—The questions relating to depreciation allowance and interest on debentures are mainly questions of fact, and the Income-tax authorities have given a finding upon the evidence placed before them. The authorities are not bound by any fictitious value put by parties in a contract of sale and in computing the income of the assessee they are entitled to ascertain the real value of the properties. Regarding the shares exchanged, I submit that the transaction has resulted in a receipt of income by the assessee. By reason of the concession rate for ginning there will be a reduction in the profits of the company during the period of the concession. The difference in the values of the shares represents the profits which might have been earned but for the concession. The theory that the exchange of shares and the ginning contract amount to a collateral transaction made preparatory to the starting of business is not justified on facts. The ginning business has been going on for years. The transaction is a profit-earning one and the difference in the values of the shares must be considered to be a lump payment of the anticipatory profits; see *Greyhound Racing Association (Liverpool), Ltd.* v. *Cooper (H. M. Inspector of Taxes)*(7). The decisions cited on behalf of the assessee are all distinguishable and proceed upon the special facts of those cases. If the transaction has resulted in profits, these profits in their entirety

(1) I.L.R. [1940] Nag. 341 (P.C.).
(2) [1935] A.C. 431.
(3) [1938] 2 K.B. 482.
(4) (1925) 9 T.C. 331.
(5) (1927) 12 T.C. 955.
(6) [1914] A.C. 1001.
(7) (1936) 20 T.C. 373.

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are assessable in the year in which they are received. The year of receipt of income determines the year of assessment; see *The Commissioners of Inland Revenue* v. *Northfleet Coal and Ballast Co., Ltd.*(1).

Cur. adv. vult.

JUDGMENT.

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LEACH C.J.—The assessee company is a private company having been incorporated in British India in May 1933. The capital is Rs. 5,00,000 divided into 5,000 shares of Rs. 100 each and all the shares have been issued. The share-holders and their holdings are as follows:—(i) The firm of A. & F. Harvey, 3,998 shares; (ii) The Madura Mills Company, Limited, 1,000 shares and the Comorin Investment and Trading Company, Limited, two shares. For the sake of brevity I will refer to the assessee company as "the company", to the firm of A. & F. Harvey as "the firm" and to the Madura Mills Company, Limited, as the "Madura Mills." The firm consists of three partners, namely, Mr. A. Harvey, Mr. J. C. Harvey and the Tuticorin Company Limited, the share-holders of which are mostly certain employees of the firm. Mr. A. Harvey and Mr. J. C. Harvey are brothers. The profits of the firm are divisible between the partners in the following proportions: Mr. A. Harvey, 63/128, Mr. J. C. Harvey, 63/128 and the Tuticorin Company, Limited, 2/128. The capital of the Comorin Investment and Trading Company Limited is divided into 10,000 shares of which Mr. A. Harvey and Mr. J. C. Harvey hold between them 9,999 shares.

In April 1933 it was arranged that on incorporation the company should purchase for Rs. 15,00,000 the assets of a cotton ginning business owned by Messrs. A. and J. C. Harvey as individuals and not as members of the firm. The assets consisted of lands, buildings,

(1) (1927 12 T.C. 1102.

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plant and machinery. Of the purchase consideration Rs. 4,71,383 was allocated to the lands and buildings and Rs. 10,28,617 to the plant and machinery. For several years Messrs. A. and J. C. Harvey had ginned cotton for the Madura Mills. The rates charged for the years 1930, 1931 and 1932 averaged Rs. 12–8–0 per candy. Before the incorporation of the company negotiations took place between Messrs. A. and J. C. Harvey and the Madura Mills for the conclusion of an arrangement under which the Madura Mills should allot 20,000 shares to the company and as consideration the company should allot to the Madura Mills 1,000 shares and enter into a contract under which the company should agree to gin cotton for the Madura Mills at a flat rate of Rs. 8 per candy for a period of ten years from 1st April 1933. An agreement was arrived at on this basis after the incorporation of the company and 1,000 of its shares were allotted to the Madura Mills on 24th July 1933. The formal contract with the Madura Mills was executed on 26th August 1933 and the allotment to the company of the 20,000 shares of the Madura Mills duly followed.

The company paid no cash for the assets which it had acquired from Messrs. A. & J. C. Harvey. Of the Rs. 15,00,000 stated to be the consideration, Rs. 5,00,000 was satisfied by the issue of shares and the balance of Rs. 10,00,000 by the issue of debentures. On 2nd June 1933 the company passed the following resolution:

"Resolved unanimously that the sum of Rs. 10,00,000 be raised by the issue of two debentures for Rs. 5,00,000 each bearing interest at 7 per cent per annum charged upon its undertaking and all its property whatsoever and wheresoever both present and future including its uncalled capital if any and goodwill in the form now submitted to the meeting and that in consideration of the Finchley Investments, Limited,

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and the Kochadai Investments, Limited, having each paid to the company the sum of Rs. 5,00,000 that the abovementioned two debentures be sealed and issued to the above companies."

The Finchley Investments, Limited, and Kochadai Investments, Limited, are two private companies registered in Canada and controlled by Messrs. A. & J. C. Harvey through their wives. The Finchley Investments, Limited, has an authorized capital of $50,250 divided into 50 class A Cumulative Preferred shares of $5 each, and 10,000 class B shares of $5 each, of which all the class A shares and $5,990 of the class B shares have been issued. All the class B shares are held by Mrs. A. Harvey. This company has taken authority to issue debentures to the value of $1,000,000 and has in fact issued $599,000, all of which are also held by Mrs. A. Harvey. The Kochadai Investments, Limited, has an authorized capital of $25,250 made up of 50 class A Cumulative Preferred shares of $5 each and 5,000 class B shares of $5 each, of which all the class A shares and 1,990 of class B shares have been issued. Mrs. J. C. Harvey is the holder of the 1,990 class B shares. This company has authority to issue debentures to the amount of $500,000. Of these debentures $199,000 have been issued and $6,000 of them have been redeemed. The outstanding debentures are all held by Mrs. J. C. Harvey. Of the debentures issued by the Finchley Investments, Limited, the amount of $169,000 was issued on 17th October 1933, and of those issued by the Kochadai Investments, Limited, a similar amount was issued on 12th October 1933.

On the passing of the resolution which I have just quoted, two cheques for Rs. 5,00,000 each were drawn by the firm in favour of the company, but it was not intended that they should be presented for payment. In the course of explanations given on behalf of the company in answer to questions put by the Income-tax

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authorities it was stated that the two cheques were issued by the firm on behalf of the Canadian companies in pursuance of an oral arrangement between Messrs. A. & J. C. Harvey on the one side and the agents of the Canadian companies on the other with a view to avoiding costly cross remittances. It was also stated that Mrs. J. C. Harvey had received Rs. 5,00,000 from the Kochadai Investments, Limited, and that Mrs. A. Harvey had received an equal sum from the Finchley Investments, Limited. It turned out that the payments to these ladies did not represent cash, but merely the issue to them of debentures by the Canadian companies. Therefore the position was that instead of the vendors receiving Rs. 10,00,000 in cash the Canadian companies which they controlled received debentures for this amount and the Canadian companies in turn issued their own debentures to the wives of the vendors. The fact that the vendors received by this roundabout way debentures in lieu of cash will not affect the legal position if the transaction is a genuine one, but the Income-tax authorities say that it is not. They contend that the issue of debentures represents an artificial transaction undertaken to give an appearance of reality to the inflation in the value of the assets acquired by the company and a scheme to defeat the payment of income-tax.

It is made abundantly clear by the Commissioner of Income-tax in the statement of the case that the Rs. 15,00,000 representing the purchase consideration is in fact a highly inflated figure. All the assets of the business had been purchased by Messrs. A & J. C. Harvey between the years 1897 and 1931 for about Rs. 10,50,000. The following statement shows the dates of construction or purchase of the various assets, their original cost, their written down value according

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to the accounts of the firm, and the values placed upon them at the time of the sale to the assessee :

Date of purchase or construction. (1)	Block total. (2) RS. A. P.	Written down cost in the books of A. & F. Harvey. (3) RS. A. P.	Value as adopted by the assessee. (4) RS. A. P.
	Buildings.		
Virudhupatti, 1st July 1918 and 5th April 1930.	37,693 7 11	30,369 12 3	46,358 0 0
Sattur Press, 1897, 1914 and 1922.	63,845 13 1	11,185 10 8	68,750 0 0
Sattur Gins, 1905 to 1915 and 1931.	49,150 7 2	15,353 14 1	68,750 0 0
Tuticorin Press, Gins, 1905 to 1915.	59,489 7 10	14,809 2 0	26,925 0 0
Dindigul Press, 1928	26,500 0 0	28,178 6 10	68,750 0 0
" Land, 1928	5,000 0 0	....	....
" Gins, 1928	1,01,500 0 0	93,777 11 10	68,750 0 0
" Land, 1928	5,000 0 0	....	....
(a) Total ..	3,48,179 4 0	1,93,674 9 8	3,48,283 0 0
	Machinery.		
Virudupatti, 1897	40,000 0 0	....	61,342 0 0
Sattur Press, 1914	1,01,411 13 2	15,019 10 11	2,06,250 0 0
Sattur Gins, 1905 to 1915 ..	1,05,683 14 2	6,572 1 8	2,06,250 0 0
Tuticorin Press and Gins, 1905 to 1915.	1,13,904 10 6	5,723 6 2	80,775 0 0
Dindigul Press, 1928 and 1929 ..	84,944 13 10	67,955 14 2	2,06,250 0 0
Dindigul Gins, 1928 and 1929 ..	60,892 10 11	46,101 15 11	2,06,250 0 0
(b) Total ..	5,06,837 14 7	1,41,373 0 10	9,67,117 0 0
Total of (a) and (b) ..	8,55,017 2 7	3,35,047 10 6	13,15,400 0 0
Sprinklayer and Hydrant Installations.	66,565 5 0	58,147 12 9	61,500 0 0
(c) Total ..	9,21,582 7 7	3,93,105 7 3	13,76,900 0 0
Add value of other buildings and lands as under :—			
Land	71,373 6 1	61,382 7 4	71,400 0 0
Kodaikanal bungalow	3,703 5 10	1 0 0	3,700 0 0
South Manora bungalow ..	37,758 2 11	31,373 8 10	33,000 0 0
Southern godown	16,906 4 1	14,047 8 7	15,000 0 0
Total ..	1,29,741 2 11	1,06,804 8 9	1,23,100 0 0
Grand total ..	10,51,323 10 6	5,00,000 0 0	15,00,000 0 0

It is not necessary to examine these figures in detail to show that Rs. 15,00,000 was out of all proportion to the real value of the assets. It will be sufficient if attention is drawn to the machinery statement. The press at Sattur was purchased in 1914 for Rupees 1,01,411–13–2 and nineteen years later was sold for Rupees 2,06,250. The gins at Sattur were purchased between 1905 and 1915 for Rs. 1,05,683–14–2 and were sold for Rs. 2,06,250. The press at Dindigul was acquired during the years 1928 and 1929 for Rs. 84,944–13–10

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and was also sold for Rs. 2,06,250. The gins at the same place were purchased during these years for Rs. 60,892–10–11 and they were sold for Rs. 2,06,250. The total assets stood in the books of the firm at Rs. 5,00,000 and notwithstanding that there must have been considerable depreciation they were passed on to the company at the figure of Rs. 15,00,000. It has not been suggested by the company that the value of the assets had increased owing to special circumstances. On the contrary it had to be admitted to the Income-tax authorities that the value of ginning factories had been seriously affected by the depression prevailing in the textile trade. Indication of the extent of the depression may be gathered from the fact that a factory built by another company at Sattur at a cost of over Rs. 2,00,000 was acquired by the company in 1934 for Rs. 40,000.

The company was assessed by the Income-tax Officer, Tuticorin, for the year 1934–35 on a total income of Rs. 82,643. The previous year was the year ended 31st March 1934 and the assessment was completed on 31st August of that year. In arriving at the figure of Rs. 82,643 the Income-tax Officer allowed a deduction of Rs. 61,130 as interest on the debentures which were issued to the Canadian companies. The true nature of the transaction with those companies had not then been realized, but further investigations carried out by the Income-tax Officer led to the disclosure of the position which I have stated. It was also discovered that the company had not declared any dividend out of the profits of the year ended 31st March 1934 and that out of the total book profits amounting to Rs. 85,225 during the two years ended 31st March 1935, only Rs. 25,000 had been distributed by July 1935. The explanation

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given on behalf of the company was that the year 1933–34 was the first year of its working and that having regard to the world depression, the directors had decided on the ground of prudence not to pay a dividend in respect of that year. Not being satisfied with this explanation and being of the opinion that the real object of not distributing profits was to enable Messrs. A. & J. C. Harvey to avoid a large amount of super-tax, the Income-tax Officer asked the Assistant Commissioner to give his approval under section 23A (2) of the Indian Income-Tax Act, 1922, to an order being passed that the sum payable as income-tax by the company should not be determined and that the proportionable share of each member in the profits and gains should be included in the total income of the member for the purpose of assessment to tax. After giving the company an opportunity of being heard the Assistant Commissioner passed the order asked for by the Income-tax Officer. The Income-tax Officer then computed the income of the company for the year 1933–34 which had escaped assessment in 1934–35 at Rs. 7,11,316. This figure included the following major items :—

(*a*) Rs. 48,149 depreciation allowed in excess in the original assessment,

(*b*) Rs. 61,130 interest on debentures allowed in the original assessment,

(*c*) Rs. 6,00,000 advance received on account of ginning charges.

The Income-tax Officer regarded the transaction between the company and the Madura Mills as involving a payment on account of ginning charges of Rs. 6,00,000. This figure was arrived at after allowing the company to treat the allotment of 1,000 of its shares to the Madura Mills as a capital transaction. The market value of the

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20,000 shares of the Madura Mills which the company acquired was Rs. 7,00,000. The 1,000 shares of the assessee which the Madura Mills received in exchange in consequence of the arrangement had no market value, but the Income-tax Officer took the nominal value of Rs. 1,00,000 to be their true value. The difference between the Rs. 7,00,000 and the Rs. 1,00,000 represented the payment by the Madura Mills to the company on account of ginning charges for the period of ten years.

The company appealed to the Assistant Commissioner against this new computation of income and objected to the inclusion of the three items (*a*), (*b*) and (*c*) in the total income. The Assistant Commissioner accepted the Income-tax Officer's computation and dismissed the appeal. The company then applied to the Commissioner of Income-tax for revision of the Assistant Commissioner's order under section 33 and asked in the alternative that certain questions of law be referred to this Court under section 66 (2). Messrs. A. & F. Harvey also appealed against the order passed under section 23-A. That appeal is pending but the question of the validity of the order does not arise in the present proceedings. The Commissioner acceded to the request of the company for a reference and has asked the Court to decide the following questions :—

"(i) Whether the Income-tax authorities were justified in law in going behind the contract for the sale of the assets of the Harvey Brothers to the petitioner company for Rs. 15,00,000 ?

(ii) If the answer to the above is in the affirmative (*a*) whether there was any material before the Income-tax authorities to justify their finding that the original cost of those assets to the petitioner company was not Rs. 15,00,000 and (*b*) if there was such material was there any material for their finding that the cost of the assets was Rs. 5,00,000 ?

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(iii) Whether there was any material before the Income-tax authorities to justify their conclusion that the debenture loan of Rs. 10,00,000 was illusory and colourable and that the interest paid thereon is not therefore allowable as a deduction ?

(iv) Whether the transaction of exchange of the Madura Mills shares with the shares of the petitioner company is an isolated transaction and of a capital nature ?

(v) Whether on the facts of the case the difference if any between the values of exchanged shares could be said to be profit in the hands of the petitioner assessable to tax ?

(vi) Whether the Income-tax authorities were correct in adopting the market value in respect of the 20,000 Madura Mills shares allotted to the petitioners ?

(vii) Whether there was any material before the Income-tax authorities to justify their finding that the difference in value between the 20,000 shares of the Madura Mills, Limited, received by the petitioners and the 1,000 shares of their own company allotted by the petitioners to the Madura Mills amounted to Rs. 6,00,000 ? "

Question No. (i).

By virtue of section 10 (2) (vi) of the Indian Income-Tax Act, 1922, an assessee is entitled to an allowance on account of depreciation in respect of buildings, machinery or furniture which belong to him and are used for the purposes of his business. The Commissioner rightly observes that the original cost of any particular asset is entirely a question of fact, and like any other question of fact, depends upon the evidence produced to prove it. The mere production of documentary evidence showing that a contract has been made for purchasing assets at a certain price does not conclusively establish the correctness of a claim made by an assessee that for the purpose of section 10 (2) (vi) the original cost is the amount shown in the document. I also agree with the statement of the Commissioner that where the circumstances show that an assessee has arranged to put an entirely fictitious price on his assets it is open to the Income-tax authorities to refuse

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to accept that price and to ascertain what the true value is.

On behalf of the company the learned Advocate-General has contended that the Court cannot go behind the contract and in support of this argument has quoted the decision of the House of Lords in *Salomon* v. *Salomon & Co.*(1), but I fail to see what bearing that case has here. A leather merchant and boot manufacturer sold his business to a limited company which had a nominal capital of 40,000 shares of £1 each. Before the incorporation of the company the vendor entered into a contract with the trustee of the future company settling the terms upon which the transfer was to be made. One of the conditions was that part payment might be made to the vendor in debentures of the company. The memorandum of association was signed by the vendor, his wife, a daughter and four sons all of whom subscribed for one share each. In part payment of the purchase consideration debentures were issued to the vendor to whom was allotted 20,000 shares which were paid for out of the purchase money. The total number of shares issued was 20,007 and with his 20,000 shares the vendor had complete control of the company. At the time of the sale the business was solvent, but bad times came and the company was forced to go into liquidation. The question was whether the vendor as the holder of the debentures was entitled to preference over the other creditors of the company. Overruling the Court of Appeal, the House of Lords held that it was not contrary to the true intent and meaning of the Companies Act, 1862, for a trader to sell his business to a limited liability company consisting of himself and the members of his family, the

(1) [1897] A.C. 22.

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business then being solvent, all the terms of sale being known to and approved by the shareholders, and all the requirements of the Act being complied with. There had been no fraud upon the creditors or shareholders and the liquidator was not entitled to rescission of the contract of purchase.

In the present case the Court is not considering a situation analogous to the situation in *Salomon* v. *Salomon & Co.*(1), and it is not considering the provisions of the Indian Companies Act, but the provisions of the Indian Income-Tax Act. To accept the argument of the learned Advocate-General would mean that where an assessee had placed a fictitious value on his assets he would be entitled to the statutory allowance for depreciation on the fictitious figure and consequently would escape payment of income-tax. Therefore, to accept the argument would be to go against the true intent and meaning of the Indian Income-Tax Act. As I hold that the Income-tax authorities have the right to look behind the contract of sale it follows that my answer to the first question is in the affirmative.

Question No. (ii).

I have shown the basis on which the company says that the figure of Rs. 15,00,000 is arrived at and I am of the opinion that there was material to justify the finding of the Income-tax authorities that the original cost of the assets acquired was not Rs. 15,00,000. The purchase consideration was the allotment of shares of the face value of Rs. 5,00,000 and debentures of the nominal value of Rs. 10,00,000 but the shares and the debentures had no value beyond the value of the assets acquired. The company adduced no evidence of the value of the assets. It relied entirely on the figure

(1) [1897] A.C. 22.

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stated in the contract of sale. In these circumstances the Income-tax authorities took the true value to be the figure at which the assets stood in the books and as this was the only evidence before them I consider that they were justified in their conclusion, especially in view of the age of most of the assets. If the company had placed before the Income-tax authorities evidence to show that the assets stood in the books of the firm at a lower figure than their true value the position would have been different. But it did not do so and the inference is that it was not in a position to show that the assets were of higher value.

I would answer both parts of the second question in the affirmative.

Question No. (iii).

I have already stated the facts relating to the debenture issue and I consider that these facts provide material amply sufficient to justify the conclusion that the debenture loan of Rs. 10,00,000 was illusory and colourable. It follows that in my opinion the interest paid on the debentures is not allowable as a deduction.

Questions Nos. (iv), (v), (vi) *and* (vii).

These questions may be dealt with conveniently together. The learned Advocate-General has contended that the exchange of the shares of the Madura Mills for the shares of the company and the benefit of the ginning contract must be regarded as one transaction and entirely of a capital nature. He has also said as the Madura Mills has been allowed to treat it as being a transaction of a capital nature the company must be allowed to treat it in the same way. I am unable to accept either of these propositions. The main part of the consideration which the Madura Mills received for its 20,000 shares was the benefit to be derived from the ginning contract. For ten years

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the company has to gin cotton for the Madura Mills at a price far below the market price. I consider that the Income-tax authorities were justified in regarding the transaction as of a capital nature only to the extent of Rs. 1,00,000 represented by the shares of the company allotted to the Madura Mills. The company in return for an immediate gain of Rs. 6,00,000 agreed to reduce its probable annual gains over a period of ten years. In other words instead of getting a probable income of Rs. 6,00,000 spread over ten years it obtained a lump sum payment in one year. Nor do I regard the fact that this gain was not in money but in money's worth, namely, shares, makes any difference.

In my opinion the Income-tax authorities were also justified in taking the value of the 20,000 shares which the company received from the Madura Mills to be the market value at the date of the transaction. It has been argued by the learned Advocate-General that to place on the market at once a block of 20,000 shares would mean a depression in the price. As the Commissioner has remarked the shares were not put on the market and were not intended to be put on the market.

In support of his argument that the answers to these four questions should be in favour of the company the learned Advocate-General has quoted to us *Hawley* v. *The Commissioners of Inland Revenue*(1) *Van den Berghs, Ld.* v. *Clark*(2), *Short Bros., Ltd.* v. *The Commissioners of Inland Revenue*(3) and *Commissioner of Income-Tax, Bengal* v. *Shaw, Wallace and Company*(4), but I can find no support for him in these judgments.

In *Hawley* v. *The Commissioners of Inland Revenue*(1) the facts were these. In consideration of an advance

(1) (1925) 9 T.C. 331.
(2) [1935] A.C. 431.
(3) (1927) 12 T.C. 955.
(4) (1932) I.L.R. 59 Cal. 1343 (P.C.).

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of £7,000 made by the assessee to a company in 1905 he received debentures of the nominal value of £7,000 repayable after December 1914, by half-yearly instalments of £500, and from a director 5,600 £1 ordinary shares of which he was to transfer 400 shares on receiving each payment of £500 in respect of the debentures. He was also to receive one-fifth of the profits each year up to December 1914, and thereafter a share of the profits corresponding, in effect, to the proportion of the debentures remaining unpaid from time to time. The assessee received no share of the profits for the years 1915, 1916 and 1917 until 1920 when he received a sum of £6,000 in settlement of what was due to him by way of profits for those years. In May 1921 he was paid £10,000 in full settlement of the liability under the agreement up to December 1921, the prospective date of its termination. The sums of £6,000 and £10,000 were assessed to super-tax for the years 1920-21 and 1921-22 respectively as forming part of his total income for the years 1919-20 and 1920-21. It was held that he was entitled under the original contract to have his share of the profits paid to him each year and that for the purpose of computing his income for super-tax the £6,000 and £10,000 must be spread over the years in respect of the profits of which they were paid, subject to the entire exclusion from liability to super-tax of such part of the sum of £10,000 as represented a composition of his right to receive a share of the profits of the year 1921. In the case now before us there was no arrangement by which the payment was to be spread over a period of years. The contract was one under which the company got an immediate gain in consideration of its reducing its charges. It must be regarded as a contract entered into in the ordinary course of its ginning business and nothing else.

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Van den Berghs, Ld. v. *Clark*(1) was a decision of the House of Lords. The facts are even further away from the facts in the present case, but an observation of Lord MACMILLAN has application here, not in favour of, but against the argument of the learned Advocate-General. An English company carried on a large business in the manufacture of margarine and other substitutes for butter. In 1908 the company entered into an agreement with a Dutch company of rival manufacture under which the two companies undertook to share profits and losses in the proportion which, on an average of five years, the profits of the rival tradings in margarine bore to each other. In 1913 there was an extension of the agreement which was to be prolonged till the end of 1940. The two companies carried on their businesses separately until the end of 1913. During the last war the agreement could not be observed, but in 1920 a third agreement was entered into by which the former agreements were amended. One of the terms of the amended agreement was that the results of trading in the year 1914 and later years should be ascertained by accountants on each side and that any dispute arising under the agreements should be settled by arbitration. Disputes did arise and there was a submission to arbitration. The arbitration proceedings were, however, settled on terms by which the agreements were rescinded and the Dutch company paid the English company a sum of £450,000 as damages. The question was whether the £450,000 was in the nature of a capital asset or a receipt of income to be included in the profits of the English company. It was held that the payment was in the nature of a capital asset. The passage

(1) [1935] A.C. 431.

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in the judgment of Lord MACMILLAN which has bearing in the present case is this :

"Now what were the appellants (the English company) giving up ? They gave up their whole rights under the agreements for thirteen years ahead. These agreements are called in the stated case 'pooling agreements', but that is a very inadequate description of them, for they did much more than merely embody a system of pooling and sharing profits. If the appellants were merely receiving in one sum down the aggregate of profits which they would otherwise have received over a series of years the lump sum might be regarded as of the same nature as the ingredients of which it was composed."

Lord MACMILLAN'S judgment was accepted by all the members of the House of Lords who heard the appeal and therefore we have here authoritative indication that if a payment represents a lump sum payment of profits which would otherwise be received over a series of years it may be regarded as representing income.

The decision in *Short Bros., Ltd.* v. *The Commissioners of Inland Revenue*(1) was that the compensation paid in cancellation of certain contracts was chargeable to excess profits duty as a receipt of profits in the course of the company's ordinary trade, and must be included in the profits for the accounting period in which it became payable and was in fact paid. This case certainly does not help the company. The *Commissioner of Income-tax, Bengal* v. *Shaw, Wallace and Company*(2) was quoted because the Privy Council there said that the word "income" connotes a periodical monetary return coming in with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding

(1) (1927) 12 T.C. 955. (2) (1932) I.L.R. 59 Cal. 1343 (P.C.).

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anything in the nature of a mere windfall. It cannot be suggested that the allocation of the 20,000 shares of the Madura Mills was in the nature of a windfall. The contract fell within the scope of the memorandum of association of the company and it seems to me that the resulting benefit to the company must be classed as income.

A decision which is far more in point is that of ROWLATT J. in *The Commissioners of Inland Revenue* v. *The Northfleet Coal and Ballast Co., Ltd*(1). A company owned a chalk quarry and contracted to supply a purchaser with a specified quantity of chalk yearly for ten years. The contract also included in its terms that the quarry company should build a wharf at which the purchaser's ships could load the chalk. As the result of the war of 1914 the agreement was suspended and after the war the purchaser did not wish to take further deliveries. It was then agreed between the quarry company and the purchaser that in consideration of a payment of £900 a year for the remaining four years of the term the purchaser should be relieved of his liability under the contract. Subsequently, the quarry company accepted a lump sum payment of £3,000 in lieu of the four annual payments of £900 and the £3,000 was applied by the quarry company in writing down the cost of the wharf. It was held that the £3,000 was chargeable to excess profits duty as a trading profit of the quarry company and therefore must be included in the profits of the year in which it was agreed to be paid. ROWLATT J. refused to graft a distinction upon the decision of the Court of Appeal in *Short's* case(2). He considered that if a sum represented profits in a new form then

(1) (1927) 12 T.C. 1102. (2) (1927) 12 T.C. 955.

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that was income and income in the year in which it was received.

The answers which I would give to the four questions are these:

No. (iv) The arrangement by which a proportion of the shares of the Madura Mills was issued to the company in respect of the ginning contract is not a transaction of a capital nature and the benefit received by the company represents profits received in the year of payment.

No. (v) On the facts of the case the difference between the values of the exchanged shares must be allocated to the ginning contract and as such is profit in the hands of the company assessable to tax.

No. (vi) The Income-tax authorities were right in adopting the market value in respect of the 20,000 shares of the Madura Mills allotted to the company.

No. (vii) There was material before the Income-tax authorities to justify their finding that the difference between the 20,000 shares of the Madura Mills received by the company and the 1,000 shares of the company allotted to the Madura Mills amounted to Rs. 6,00,000.

The result is that the Income-tax authorities have succeeded on all the questions raised and therefore are entitled to their costs, which we fix at Rs. 250.

KING J.—I agree.

KRISHNASWAMI AYYANGAR J.—I agree.

N.S.

APPELLATE CIVIL.

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

1939, December 11.

MADHAVI AMMA AND TWO OTHERS (APPELLANTS—DEFENDANTS 1 TO 3), APPELLANTS,

v.

NAGAPPAN NAYAR AND THREE OTHERS (RESPONDENTS—PLAINTIFF AND DEFENDANTS 4 TO 6), RESPONDENTS *

Madras Marumakkattayam Act (XXII of 1933), *ss.* 38 *and* 43 *—Suit for partition under sec.* 38 *pending application under sec.* 43*—Application ordered subsequent to filing of suit—Order null and void—Suit not affected—*Lis pendens *not applicable—Hindu law—Partition—Severance of joint status from date of suit for partition.*

A tavazhi is not precluded from filing a suit for partition under section 38 of the Madras Marumakkattayam Act (XXII of 1933) because there happens to be pending an application for registration of the tarwad to which it belonged, as impartible under section 43 of the Act. The ordinary rule of Hindu law that the filing of a partition suit involves the automatic severance of the joint status of the family applies and the Collector would have no power under section 43 to register a tarwad as impartible once a suit for partition has been filed. The doctrine of *lis pendens* does not apply to such a case.

Where, therefore, a suit for partition was filed by a tavazhi during the pendency of an application for registration under section 43 and the Collector ordered registration subsequent to the institution of the suit,

held: The order of the Collector was null and void and did not have the effect of defeating the suit for partition.

Kunchi Amma v. *Minakshi Amma* (1) applied and followed.

* Letters Patent Appeal No. 94 of 1938.

(1) (1935) I.L.R. 59 Mad. 693.

APPEAL under Clause 15 of the Letters Patent against the judgment of the High Court, dated 7th October 1938 in Appeal Against Order No. 435 of 1936, preferred to the High Court against the order of the District Court of South Malabar, dated 8th July 1936, and made in Appeal Suit No. 55 of 1935 (Original Suit No. 409 of 1933, District Munsif's Court, Alattur).

B. Sitarama Rao for appellants.

Ch. Raghava Rao and *M. Chinnappan Nayar* for first respondent.

Other respondents were not represented.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The parties are members of a Marumakkattayam tavazhi. On 15th August 1933 certain members of the tarwad, representing a two-thirds majority, applied to the Collector for the registration of the tarwad as impartible under section 43 of the Marumakkattayam Act (XXII of 1933). As required by the statute, notice of the application was served upon the first respondent, who on 23rd October 1933 filed a suit in the Court of the District Munsif of Alattur for partition of the tarwad under the provisions of section 38 of the Act. Notwithstanding the suit, the registration application was proceeded with and resulted in the Collector passing an order on 15th January 1934 for the registration of the tarwad as impartible. The District Munsif held that the registration of the tarwad had the effect of defeating the suit and accordingly he dismissed it. The respondent then appealed to the District Court of South Malabar. The District Judge held that the registration of the tarwad did not affect the respondent's right to bring the suit and he remanded it to the trial Court to be dealt with on the merits. The defendants then

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appealed to this Court. This appeal was heard by KING J. who concurred in the decision of the District Judge. The present appeal is from the judgment of KING J.

Section 38 of the Act states that any tavazhi represented by the majority of its major members may claim to take its share of all the properties of the tarwad over which it has power of disposal and separate from the tarwad, provided that no tavazhi shall claim to be divided from the tarwad during the lifetime of an ancestress common to the tavazhi and to any other tavazhi or tavazhis of the tarwad, except with the consent of the ancestress, if she is a member of the tarwad. There is an explanation to the section which says that for the purpose of Chapter VI (which deals with the right of partition) a male member of a tarwad or a female member without any living child or descendant in the female line, shall be deemed to be a tavazhi if he or she has no living female ascendant who is a member of the tarwad. The respondent has no living female ascendant and he himself constitutes a tavazhi. Therefore he had the right to institute the suit for the partition of the tarwad.

Sub-section 1 of section 43 allows two-thirds of the major members of a tarwad to present a petition to the Collector for the registration of the tarwad as impartible. Sub-section 4 states that if after giving notice to all the major members of the tarwad and making such enquiry as he deems fit, the Collector is satisfied that not less than two-thirds of the major members of the tarwad have signed the petition with their free consent and desire the registration of the tarwad as impartible, he shall register the tarwad as impartible. Section 43 is embodied in Chapter VII which deals exclusively with impartible tarwads.

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Chapters VI and VII stand apart and there is nothing in any of the sections of these two chapters which suggests that a tavazhi is precluded from filing a suit for partition because there happens to be pending an application for registration under Chapter VII.

If the ordinary rule of Hindu law that the filing of a partition suit involves the automatic severance of the joint status applies, it is clear that there would be no power in the Collector to register a tarwad as impartible once a suit for partition has been filed. It is not contested that the ordinary rule of Hindu law does apply. In fact it was so held in *Kunchi Amma* v. *Minakshi Amma*(1). This being the position, the filing of the suit on 23rd October 1933 put an end to the right of the other members of the tarwad to apply for registration under section 43, and the Collector had no power to order registration. His order of 15th January 1934 must be regarded as being null and void.

Mr. Sitarama Rao has suggested that the doctrine of *lis pendens* applies and that, inasmuch as the application under section 43 was filed first, the suit was incompetent. The doctrine of *lis pendens* obviously can have no application here. There is a right to partition given in Chapter VI and there is nothing in Chapter VII which prevents that right being exercised while the tarwad remains unregistered.

We consider that the decision under appeal is correct. The appeal will be dismissed with costs in favour of the first respondent.

N.S.

(1) (1935) I.L.R. 59 Mad. 693.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth and Mr. Justice Patanjali Sastri.

1940, January 15.

RM.L.M.L.V. ALAGAMMAL ACHI AND ANOTHER (PLAINTIFFS 1 AND 2), APPELLANTS,

v.

VR. PL. M. PALANIAPPA CHETTIAR AND ANOTHER (DEFENDANTS 2 AND 3), RESPONDENTS.*

Hindu law—Joint family—Coparcener taking part in the conduct of family business—If and when personally liable—Underlying principle—Implied partnership, estoppel by holding out, or ratification.

Whether a coparcener who takes part in the conduct of his family business could be made personally liable on the ground of implied partnership or estoppel by holding out or ratification is essentially a question depending for its decision upon the nature and extent of his participation. If what the junior member is shown to have done in relation to the business is nothing more than what can reasonably be attributed to his interest in the business as a member of the family, there will be no legitimate inference that he intended to undertake a greater liability as a partner in the business. On the other hand, if the part taken by such member in the management of the business goes beyond what can be sufficiently explained by his interest in it as an asset of the family, as, for instance, when he joins in borrowing for the purposes of the business, it may afford ground for the conclusion that he has become a partner so as to be personally answerable for all the debts incurred in the course of the business, including those which he did not join in borrowing. Without such definite and unequivocal consensual acts no partnership relation between the members of a joint family can be implied from participation, however active, in the conduct of the family business. If the part taken by the junior member, while it is not sufficient to justify an inference of partnership, is such as leads others

* Appeal No. 17 of 1937.

to act on the belief that he is a partner, the member will be precluded by the principle of estoppel from showing as against the person misled that he (the member) is not a partner. The principle of liability on the ground of ratification presupposes, on the part of the member sought to be made liable, ability to adopt or repudiate the transaction in question and cannot properly be applied to dealings or transactions which under the Hindu law the coparceners are powerless to disown, so long as they continue to remain in the joint family. It would be wholly subversive of established principles of Hindu law to hold that a coparcener is personally liable on the ground of ratification by acquiescence for the dealings of the manager in the ordinary course of family businesses. In any view the liability cannot extend to antecedent transactions.

Case-law reviewed and discussed.

APPEAL against the decree of the Court of the Subordinate Judge of Sivaganga, dated 1st August 1936, in Original Suit No. 49 of 1934.

K. S. Sankara Ayyar for appellants.

N. G. Krishna Ayyangar for respondents.

Cur. adv. vult.

PATANJALI SASTRI J.

The JUDGMENT of the Court was delivered by PATANJALI SASTRI J.—This appeal arises out of a suit brought by the appellants for recovery of Rs. 5,982–14–9 from defendants 1 to 3 personally and from the family properties of all the defendants. The first defendant is the father of defendants 2 to 4 and the fifth defendant is the son of the first defendant's deceased brother. The defendants constitute a joint Hindu family of which the first defendant is the manager. The defendants are Nattukottai Chetties and were carrying on money-lending and banking business under their family vilasam V. R. Pl. M. at Rangoon and other places in Burma. The amount claimed is said to be the stridhana money of the first plaintiff deposited by her father,

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the second plaintiff, with the first defendant. The Court below decreed the claim against the first defendant personally and against the family properties of all the defendants as it was a debt contracted by the first defendant in the course of the family business. Not satisfied with this decree, the plaintiffs have appealed claiming a personal decree also against defendants 2 and 3, the respondents herein, and the only question for decision relates to their personal liability.

Such liability is said to arise on the ground that, as sons of the first defendant, they were managing the family business jointly with him and must, by virtue of such participation in management, be deemed to have become partners. A special ground of liability was also urged so far as the first respondent was concerned, namely, that he had expressly undertaken to pay the debt personally in certain letters written by him to the second appellant. The learned Subordinate Judge found that all that was established by the appellants was that the first respondent was managing the business under a power of attorney dated July 13, 1931 executed in his favour by his father for a period of three years thereafter, and that the second respondent was writing the accounts of the firm for some time and held, on these findings, that the respondents could not be said to have become partners or to have held themselves out as such, so as to be personally liable for the debts incurred in the course of the business. The learned Judge said nothing about the special ground urged as regards the first respondent, as the point was apparently not raised before him.

Some criticism was directed against the finding that the first respondent was managing the firm under

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a power of attorney executed by the first defendant, and it was pointed out that the power of attorney was not produced by the respondents. We are not prepared to attach any importance to the non-production of the power as the appellant's own witness (P.W. 2) who was the agent of another Chettiar firm in Rangoon which had dealings with the respondents' firm admitted that the first respondent was acting under a power executed by his father when he was managing the family business in Burma. But this is not in our view a material circumstance for, we are clearly of opinion that, even if he managed the firm in his capacity as a junior member of the family interested in the business, no personal liability could arise by virtue of such management in the circumstances of this case. For the deposits to which the suit relates were all made prior to December 1924 and duly stamped vouchers evidencing the terms of the deposits including the final deposit letter (Exhibit A, dated 11th December 1930) on which the suit was brought, were all executed from time to time only by the first defendant, before the respondents began to participate in the conduct of the business in 1931. Assuming, therefore, that the respondents must be deemed to have become partners or to have held themselves out as such in relation to the family business in Burma by reason of such participation, they could not, in our opinion be held to be personally liable in respect of the *pre-existing* debts of the firm.

On the question of personal liability of junior members of a joint Hindu family for debts incurred in the course of family business on the ground of their participation in the conduct or management of it, the decisions of this Court, to go no further, have been neither clear nor uniform. In *The Official Assignee*

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of Madras v. *Palaniappa Chetty*(1) it was held by WALLIS C.J. and SPENCER J. that the fact that the son had been assisting the father in the conduct of the business during his minority and had taken an active part in its management after attaining majority, did not make the son personally liable for obligations contracted during his minority, but that in respect of debts incurred since he attained majority such liability arose by reason of his conduct in taking an active part in the business. Both the learned Judges were of opinion that sections 247 and 248 of the Indian Contract Act did not apply to the case and based their conclusion apparently on the principles of Hindu law. SADASIVA AYYAR J. held that, both by virtue of those sections and the rules of Hindu law, the son was personally liable for all the debts of the business including those contracted during his minority. This extreme view has never been followed in this Court and may be left out of consideration. The other two learned Judges, however, have not clearly indicated on what legal basis personal liability in such a case rests—whether it is based on implied partnership or estoppel by holding out or ratification. In *Ramaswami Chettiar* v. *Srinivasa Iyer*(2) the view is expressed that personal liability, where it arises in such cases, rests on the doctrine of holding out and that

> " a partnership from the point of view of the general public comes into existence ".

It is, however, somewhat difficult to see how the rule of estoppel, which can only preclude proof of facts as against individuals actually misled, can give rise to a partnership *quoad* the " general public ".

(1) (1918) I.L.R. 41 Mad. 824. (2) (1935) 70 M.L.J. 214.

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On the other hand, in *Sitarama Chettiar* v. *Sivagurunatha Chetty*(1) it was thought that, according to the majority view in *The Official Assignee of Madras* v. *Palaniappa Chetty*(2),

> " unless they (i.e., the junior members of the family) were partners, they cannot be made personally liable for the debts of the business ",

and the case was sent down to the lower Court for a finding on that point. That Court having found that the junior members had taken an active part in the management of the family business, the case came up again before COUTTS TROTTER C.J. and RAMESAM J. who, however, would seem to repudiate the doctrine of personal liability of a coparcener arising out of an active participation in the family business, and refused to hold the junior members personally liable in the absence of

> " any other evidence of a consensual act whereby a definite new relation other than that of members of a joint Hindu family trading together was created "; *Sitharama Chettiar* v. *Sivagurunatha Chettiar*(3).

It seems to us, however, that this divergence of opinion is more apparent than real; for, we venture to think that the whole question whether a coparcener who takes part in the conduct of the family business is personally liable, and if so, on what legal basis, is essentially one depending for its decision upon the nature and extent of participation as disclosed by the evidence in the particular case. If what the junior member is shown to have done in relation to the business is nothing more than what can reasonably be attributed to his interest in the business as a member of the family, there will be no legitimate inference that he intended to undertake a greater

(1) 1930 M.W.N. 371. (2) (1918) I.L.R. 41 Mad. 824. (3) 1930 M.W.N. 437.

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liability as a partner in the business. This is all, as it seems to us, that the learned Judges meant to affirm in the last mentioned case; on the other hand, if the part taken by such member in the management of the business goes beyond what can be sufficiently explained by his interest in it as an asset of the family, as for instance, when he joins in borrowing for the purposes of the business, it may afford ground for the conclusion that he has become a partner so as to be personally answerable for all the debts incurred in the course of the business including those which he did not join in borrowing. Without such definite and unequivocal consensual acts, no partnership relation between the members of a joint family can, in our opinion, be implied from participation, however active, in the conduct of the family business, a position which has received additional emphasis from the provisions of section 5 of the Indian Partnership Act which postulates the possibility of members of a joint family *carrying on* the family business without becoming partners therein in the legal sense of the term. Again, the part taken by a junior member, while it may not be sufficient to justify an inference of partnership, may be such as to lead others to act on the belief that he is a partner, in which case the member will be precluded by the principle of estoppel from showing as against the person misled that he (the member) is not in fact a partner. Thus, in each case, the question is, as it seems to us, what is the proper inference to be drawn from the facts proved; and as pointed out by VARADACHARIAR J. in *Alagappa Chettiar* v. *Bank of Chettinad, Ltd., Kanadukathan*(1), the extent of the personal liability incurred by the member will vary

(1) (1938) 2 M.L.J. 944, 954.

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according as it is found to arise on the one ground or the other. But what is important for the purpose of this appeal is that such liability does not extend, in either case, to antecedent transactions. As observed by the same learned Judge in the case referred to above:

> "If the liability is to be based on the doctrine of 'holding out', it is obvious that such liability can arise only in respect of transactions subsequently entered into and on the faith of his conduct. Even if it should be held that by such participation the coparcener becomes a partner in the business, it seems to us unreasonable to hold that he thereby incurs a personal liability in respect of the pre-existing debts of the business."

See also *Russa Engineering Works* v. *Kanara Transport Co.*(1).

The appellants next relied on the following observations in *Chalamayya* v. *Varadayya*(2):

> "No doubt, where it is shown that the contract relied on, though purporting to have been entered into by the manager only, is in reality one to which the other coparceners are actual contracting parties either because they had agreed, before the contract was entered into, to be personally bound thereby, or because they, being in existence at the date of the contract and competent to enter into it, have subsequently duly ratified and adopted it, in that case unquestionably every such coparcener is absolutely responsible. Equally he would be responsible though he did not assent to the particular contract if there had been such acquiescence on his part in the course of dealings, in which the particular contract was entered into, as to warrant his being treated in the matter as a contracting party."

Appellants accordingly urged that the respondents must be taken by reason of their participation in the business to have "ratified and adopted" even the antecedent transactions in the business including the suit deposit and that, in any case, there has been

(1) (1926) I.L.R. 49 Mad. 930. (2) (1898) I.L.R. 22 Mad. 166, 167.

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such "acquiescence" on the part of the respondents in the course of the dealings had by the father as to warrant the respondents being regarded as contracting parties themselves in respect of the suit deposit. Our attention was also drawn to the approval by VARADACHARIAR J., at pages 955 and 956 in *Alagappa Chettiar* v. *Bank of Chettinad, Ltd., Kanadukathan*(1) already referred to, of the observations in *Chalamayya* v. *Varadayya*(2) quoted above. There is nothing in those observations which need arouse any dissent, for, they do no more than envisage the possible application of the general principle of ratification by adoption or acquiescence to this class of cases. The principle itself is simple and well known, but the difficulty arises, as with so many other principles, in the application. In holding a junior member of a family personally liable for a contract purporting to have been entered into by the manager on the ground of *ratification*, it is important to bear in mind that the doctrine presupposes ability to adopt or repudiate the transaction in question and cannot properly be applied for this reason to dealings or transactions which under the Hindu law the coparceners are powerless to disown, so long as they continue to remain in the joint family. As pointed out at page 168 in the very case in which those observations occur:

> "When....the contract is of a character such as, under the (Hindu) law, to entitle the manager to enter into, *independently of the consent of the other members of the family, so as to bind them thereby, then* it is clear that the scope of the manager's power is restricted to, and does not extend beyond, the family property." (Italics are ours.)

It would be wholly subversive of this well-established rule of Hindu law to hold that a co-parcener

(1) (1938) 2 M.L.J. 944, 955, 956. (2) (1898) I.L.R. 22 Mad. 166, 168.

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is personally liable on the ground of ratification by acquiescence for the dealings of the manager in the ordinary course of family business. If it had been shown in this case that the first defendant pledged the individual credit of the respondents at the time when he received the deposits in question and that the respondents having come to know of the transaction accepted or acquiesced in it, it might be possible to hold them personally bound on the principle of ratification; but nothing of the kind has been proved or even suggested in this case. We have therefore no hesitation in rejecting this contention.

It remains to consider the special ground of liability urged with reference to the first respondent, namely, a personal undertaking to pay in consideration of the appellants' forbearance to sue. Reliance was placed upon Exhibits J, J-1 and D to show that when the second appellant demanded the money and threatened to sue, the first respondent wanted time for payment promising to pay the debt personally and that in consequence the filing of the suit was delayed for over a year. We are unable, however, to read these letters as containing any undertaking by the first respondent to pay the debt due to the appellants personally. The letters merely explained why there was delay in the payment of the debt and gave an assurance that as soon as conditions of trade improved, arrangement would be made to pay up the debt.

Though written by the first respondent, the letters bore only the family vilasam (V.R.Pl.M.) and were signed with an invocation of the family deity, the mode usually adopted for signing family letters in accordance with the practice prevailing among Nattukottai Chetties. The letters are thus consistent with

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the first respondent having merely affirmed the pre-existing liability of the family such as it was, and contain no indication of his having undertaken any additional or extended liability for the debt. Nor is there any definite request in any of them for grant of time for payment. The suit was, no doubt, brought more than a year after the latest of them, namely Exhibit D, but it does not appear that this delay was due to the appellants' having granted any time for payment. The second appellant who was examined as P.W. 1 does not say that time was granted in compliance with the request of the first respondent; nor was such a thing suggested in the cross-examination of the first respondent. On the other hand, the allegations in paragraph 7 of the plaint that "on several dates after the said date (i.e., after Exhibit D) both personally and through agents demands were made on the defendants and a demand was made lastly on 30th June 1934, all to no purpose" are plainly destructive of any such suggestion.

The appeal fails and is dismissed with costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth and Mr. Justice Patanjali Sastri.

1940, April 26.

MOTAM KOTAYYA, *alias* PRAKASAM (PETITIONER), PETITIONER,

v.

SINGAMPALLI VENKATA PUNNAYYA (RESPONDENT), RESPONDENT.*

Madras Agriculturists Relief Act (IV of 1938), ss. 7, 8 and 9—Decree, meaning of—Act, if applicable to decrees passed subsequent to its coming into force.

The benefit of scaling down under the provisions of the Madras Agriculturists Relief Act is not available to debts in respect of which decrees have been passed after the Act came into force. The word "decree" in sections 7, 8 and 9 of the Act refers to decrees passed before the commencement of the Act.

Kanakaraju v. *Achutaramanaraju*(1) dissented from.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif of Tenali, dated 9th July 1938 and made in Civil Miscellaneous Petition No. 785 of 1938 in Small Cause Suit No. 4 of 1938.

A. Lakshmayya for petitioner.

M. Subramanya Sarma for respondent.

Cur. adv. vult.

JUDGMENT.

WADSWORTH J.—I agree with the conclusion and reasoning of the judgment which my learned brother is about to deliver. I only wish to add that, after hearing a fuller argument and having the benefit of discussion with my learned brother, I am of opinion

WADSWORTH J.

* Civil Revision Petition No. 1317 of 1938.

(1) 1940 M.W.N. 338.

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that my decision in *Kanakaraju* v. *Achutaramanaraju*(1) was erroneous.

PATANJALI SASTRI J.—The question that falls to be decided in this revision petition is whether a debt for the repayment of which a decree has been passed *after* the commencement of the Madras Agriculturists Relief Act, 1938, is liable to be scaled down in accordance with section 8 of the Act when the debt is one incurred before 1st October 1932. The facts are simple and not in dispute. The respondent sued the petitioner in Small Cause Suit No. 4 of 1938 on the file of the Court below for recovery of the principal and interest due on a promissory note executed on 29th October 1929. The suit was brought on 3rd January 1938 and the petitioner filed his written statement on 30th January 1938. Though the Act came into force when the suit was pending, the petitioner failed to put forward a claim to have the debt scaled down in accordance with the Act, and a decree was passed on 18th April 1938 for the full amount claimed by the respondent. Soon after the passing of the decree, however, the petitioner applied to the Court on 29th April 1938 to scale down the debt and the application was dismissed on the ground that there is no provision in the Act for scaling down a debt in respect of which a decree has been passed after the Act came into force. The petitioner has preferred this revision petition and contests the correctness of that view.

It is argued that the *non obstante* clause in section 7 and the words "whether the debt or other obligation has ripened into a decree or not" in section 8 indicate that all debts incurred before the commencement of the Act should be scaled down irrespective of any

(1) 1940 M.W.N. 338.

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decrees passed in respect of them, whether such decrees were passed before or after the commencement of the Act. These provisions are not free from ambiguity and may, at first blush, appear to lend some countenance to the contention of the petitioner. But on a closer examination of these sections in the light of other provisions of the Act and the scheme revealed thereby, it is fairly clear that the reference to decrees is intended only to extend the benefit of scaling down to debts which had ripened into decrees before the Act came into force. The provisions appear to envisage the state of things on 1st October 1937 and the reference to contracts obviously relates to contracts made prior to that date. It is therefore reasonable to assume that the word "decree" which occurs in the same context is also used subject to the same qualification. It is significant that the machinery provided in sections 19 and 20 for "amendment" of decrees by scaling them down in accordance with the Act, and for stay of execution pending proceedings for such amendment, are made applicable only to decrees passed *before* the commencement of the Act and there are no similar provisions in respect of decrees passed after the Act came into force. Similarly, section 18 provides for "amendment" of decrees passed before the Act in suits instituted after 1st October 1937 by a proportionate reduction of costs also. These provisions, which in the case of decrees passed before the Act expressly supersede the finality which attaches to decrees under the general law, seem to indicate that, in the contemplation of the Legislature, the relief which the Act provides for agriculturists should be claimed and obtained *before* decree, where such decree happens to be passed *after* the commencement of the Act, and that the principle of finality should operate unimpaired in such cases. Indeed, if the Legislature

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intended to exclude the operation of this principle in the case of all decrees against agriculturists whether passed before or after the commencement of the Act, the provisions of section 19 and the latter part of section 18 sub-section 1 relating to "amendment" of decrees passed *before* the commencement of the Act would be meaningless and otiose.

Nor is there any apparent reason to suppose that the Legislature intended to introduce into the Act such a startling departure from the basic principle of all judicial proceedings, namely, that all available pleas in answer to a claim should be made the subject of enquiry before the Court passes the decree. It is one thing to provide relief to agriculturists by way of scaling down their debts even when such debts had already ripened into decrees before such relief was thought of, but it is a different thing to declare that even if they failed to claim, when they could have claimed, such relief before a decree was passed, they should nevertheless be entitled to claim it at any time afterwards. It may be laudable to rehabilitate agriculturists by a compulsory scaling down of their debts but it could be no part of this object to condone, and thereby encourage, their laches in the conduct of legal proceedings. On the other hand, having regard to the expropriatory nature of the provisions, Courts should watch with a jealous eye attempts to have the scope of the Act extended, under colour of interpretation, beyond what its terms expressly warrant. I am therefore of opinion, reading the Act as a whole, that the word "decree," in sections 7, 8 and 9 must be taken to refer to decrees passed before the commencement of the Act.

The petitioner's learned Counsel placed reliance upon the decision of my learned brother WADSWORTH J.

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in *Kanakaraju* v. *Achutaramanaraju*(1) as supporting his contention. The judgment is very brief and the question does not appear to have been fully argued and considered and my learned brother is now inclined, in the light of the fuller argument before us, to agree with the view expressed above. In *Somasundaram Chettiar* v. *Peria Karuppan Chettiar*(2) the suit was dismissed by the trial Court as barred by limitation but was decreed by this Court on appeal. An application for scaling down the debt was made to this Court before the decree was drafted and issued, along with another application to stop the drafting of the decree pending the disposal of the former application. This Court held that in those circumstances the judgment-debtor was entitled to have the debt scaled down. The broader question arising for decision in the present case was raised but the learned Judges observed that it was not necessary to deal with it on the facts before them. This decision therefore does not assist the petitioner. A decision of the Allahabad High Court in *Abdul Noor* v. *Brijmohan Saran*(3) was also brought to our notice but it relates to the construction of differently worded provisions in the United Provinces Agriculturists' Relief Act and has no bearing on the interpretation of the provisions of Madras Act IV of 1938. This revision petition fails and is dismissed with costs.

N.S.

(1) 1940 M.W.N. 338. (2) 1940 M.W.N. 412.
(3) I.L.R. [1938] All. 305.

APPELLATE CRIMINAL.

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

1940, April 1.

IN RE ABDUL BASHA SAHIB (FIRST ACCUSED), PRISONER.*

Indian Evidence Act (I of 1872), ss. 27 and 30—Confession to Police Officer—Information leading to discovery of deceased's jewels and involving a co-accused in the murder —Admissibility of.

Where, in a case of murder, the first accused made a confession to the Circle Inspector which led to the discovery of certain jewels of the murdered woman, and also a blood-stained brick which, the first accused stated, the second accused had used to beat her with and in consequence of which she died,

held, (i) that the statement of the first accused so far as it related to the discovery of the jewels was admissible under section 27 of the Indian Evidence Act; but

(ii) that it could not be taken into consideration as against the second accused under section 30 of th Indian Evidence Act.

Under section 27 of the Evidence Act the only portions of the information given by the first accused which are admissible are those which relate distinctly to the facts discovered thereby. It cannot be said that the statements made by the first accused involving the second accused relate in any way to such facts.

TRIAL referred by the Court of Session of the Chingleput Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 33 of the Calendar for 1939, on 27th January 1940 and APPEAL by the said prisoner and another against the sentence of death passed upon the first appellant (first accused) and the sentence of rigorous imprisonment for three years passed upon the second appellant

* Referred Trial No. 25 of 1940 and Criminal Appeal No. 121 of 1940.

(second accused) in the said Sessions Case No. 33 of 1939, on 27th January 1940.

R. Narasimham for *Muhammad Asker Ali* for first accused.

Public Prosecutor (*V. L. Ethiraj*) for the Crown.

Second accused was not represented.

Cur. adv. vult.

JUDGMENT.

BURN J.

The JUDGMENT of the Court was delivered by BURN J.—On the morning of 13th October 1939 an Adi-Dravida named Mandan (P.W. 9) who lives in Poonamallee found a corpse floating in a well called Mangadu Mudaliar's well. He saw a crowd of people searching in a neighbouring well and he told them what he had seen. Amongst that crowd was Mahadeva Chettiar, P.W. 8. He and the other people with him were looking for his mother Kanniammal who had left home the previous evening at about 6-30 to deliver some oil at the house of one Abdul Wahab Sahib and had not returned. P.W. 8 had reported the disappearance of his mother at the police station in Poonamallee at 1-10 a.m. on the 13th (*Vide* Exhibit F) and had requested the police to make enquiries about her disappearance. He mentioned there that his mother was in the habit of wearing valuable jewels consisting of a gold chain made out of twenty sovereigns, gold bangles and kammals set with red stones. P.W. 8 on hearing what P.W. 9 had discovered went to the well of Mangadu Mudaliar and saw that the corpse in the well was the corpse of his mother. He therefore went again to the police station at 7 a.m. and reported this fact. The police had the body lifted out of the well and held an inquest which showed that the woman had been brutally

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murdered. No jewels were found upon the body except a nose screw. After the inquest the body was sent to the doctor in charge of the Poonamallee hospital and on the afternoon of the 13th October he made a post-mortem examination. He found that the woman's lower jaw had been fractured, that there was a contused wound on her face, abrasions on her face and neck, that the lobes of both ears had been torn through and that seven ribs on either side of the chest had been fractured. All these injuries had been inflicted before death and were the cause of death. There were no signs of drowning.

The two appellants were tried by the learned Sessions Judge of Chingleput for the murder of Kanniammal. The unanimous opinion of the Assessors was that the first accused was guilty of murder and that the second accused was guilty of an offence under section 201, Indian Penal Code. The learned Sessions Judge agreed with the Assessors and convicted the first accused of murder and sentenced him to death. He convicted the second accused under section 201, Indian Penal Code, and sentenced him to three years' rigorous imprisonment.

The first accused is the brother-in-law of Abdul Wahab Sahib, and the evidence of P.Ws. 4 and 5, the granddaughter and grandson of the deceased, was that on the evening of the 12th October the first accused came to their house to tell their grandmother Kanniammal that oil was required at the house of Abdul Wahab. Both these witnesses say that their grandmother picked up the vessel containing oil and the other implements of her trade and went off to deliver oil as requested. The police in their investigation found that she had actually delivered oil at the house of Abdul Wahab that evening. A dhobi (P.W. 6) said

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that he had seen the deceased going in the direction of Abdul Wahab's house followed by both the accused. Narasammal (P.W. 7) who lives on the way between the house of the deceased and the house of Abdul Wahab also said that she had seen the deceased going in the direction of Abdul Wahab's house followed by the two accused.

The most important evidence is connected with the discovery of Kanniammal's gold chain, gold bangles and ear-ornaments. The first accused was arrested after the inquest and on the morning of the 14th October he made a confession to the Circle Inspector (P.W. 14). The portions of this confession admissible under section 27 of the Evidence Act relate to M.Os. 1, 6, 7 and 8. He alleged that Kanniammal had been beaten with a brick by the second accused and offered to show the place where the murder had taken place. He showed in the backyard of Abdul Wahab's house a piece of brick (M.O. 1) upon which stains of blood were found. These stains were afterwards proved to be stains of human blood. The first accused further said that after Kanniammal had been murdered he and the second accused had robbed her of her bangles, kammals and chain and had concealed them in a place which he offered to show. He took the Police Inspector and Sub-Inspector and three other witnesses (P.Ws. 10, 11 and 12) to a piece of waste ground in front of the Dharmaraja Kovil and there dug up a spot which he had marked. He produced a piece of rag (M.O. 19) which when untied was found to contain a gold chain necklace, a pair of gold bangles and a pair of kammals (M.Os. 6, 8 and 7). These have been identified as the jewels of Kanniammal which she was in the habit of wearing and which she was wearing on the evening of the 12th October when she went out.

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Moreover on the kammals the chemical examiner found blood though the stains were so far disintegrated by the time the kammals reached the Imperial Serologist that it was not possible to say for certain that the blood was human blood.

The second accused was arrested on the 15th October after the confession made by the first accused in which he was involved. He is then said to have made a statement which led to the discovery of the oil vessel, the funnel, the ollock measure and the ladle that Kanniammal was in the habit of using. These are M.Os. 2, 3, 4 and 5 and they were found in consequence of information given by the second accused in two ruined wells about half-a-mile away from the well in which Kanniammal's corpse was found. Some evidence also was let in about some articles of clothing which it was said had been left by the first accused in the house of his brother Ismail. Blood was found on one of these garments but this item of evidence cannot be taken into consideration against the first accused because no one has been examined as a witness to prove that they were left in the house of Ismail by the first accused.

Both the accused denied that they had anything to do with the murder. [After considering the evidence, his Lordship held that the alibi pleaded by the first accused was not clearly established and that the alibi pleaded by the second accused need not be discussed as he must be acquitted on the evidence adduced for the prosecution.]

Learned Counsel for the first appellant has contended that the evidence of the witnesses who say they saw the first accused come to fetch Kanniammal on the evening of the 12th October is unreliable and that the confession said to have been made by the first accused to the police is inadmissible in evidence.

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We can find no reason whatever for rejecting the evidence of P.Ws. 4, 5, 6 and 7. No facts were elicited from them in cross-examination from which it could be inferred that they had any reason to give false evidence against either of the accused. Narasammal (P.W. 7) was mentioned by P.W. 8 in his first complaint to the police (Exhibit F) which was made at 1-10 a.m. several hours before the corpse of Kanniammal was found. With regard to the statement made by the first accused to the police, learned Counsel's argument is based upon an assumption that before the first accused made any statement to the Inspector on the morning of the 14th October he had already disclosed to the police what he knew. This argument is an attempt to apply the principle of decisions recently given to the effect that if the police got incriminating information from an accused person and then called upon him to repeat that information in the presence of witnesses, the statements made in the presence of witnesses would not be admissible under section 27 of the Evidence Act. In the present case, however, there is no foundation for that argument because the Inspector has said quite clearly that the information given by the first accused which led to the discovery of the jewels was disclosed to him only on the morning of the 14th in the presence of the village munsif (P.W. 10) and two other witnesses (P.Ws. 11 and 12). We cannot find any reason to suspect the Inspector of telling falsehood in this matter. The jewels undoubtedly belonged to the deceased woman; she was wearing them when she went out to her death; the ear-rings had blood on them; they were found in consequence of what the first accused said. The first accused's statement so far as it relates to the discovery of these jewels is

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therefore admissible under section 27 of the Evidence Act. There can be no doubt that the first accused is guilty and has been properly convicted of the murder of Kanniammal. We confirm his conviction for murder and the sentence of death passed upon him by the learned Sessions Judge.

The case of the second accused is very different. He did not make any confession involving him in the murder. All that he said was that he had met the first accused at about 7-30 on the night of the 12th October and that the first accused had given him M.Os. 2, 3, 4 and 5 and had asked him to throw them away in any well that might be on his path. The learned Sessions Judge considers that the second accused must have known that Kanniammal had been murdered and must have disposed of those articles in order to screen the first accused from punishment. It cannot be said that this conclusion follows from the mere fact of the second accused complying with the request made by the first accused. The second accused can only be convicted if the statement of the first accused is taken into consideration as against him. The learned Public Prosecutor suggested that this could be done under section 30 of the Evidence Act. One great difficulty in accepting this contention is that if the statement of the first accused is taken into consideration as against the second accused and if it is believed, the second accused also should be convicted for the murder of Kanniammal. In fact if the first accused was telling the truth to the police, it was the second accused who inflicted on Kanniammal the injuries that caused her death. The first accused says that it was the second accused who sat upon the old woman's chest and beat her on her face and neck with a brick. We are of opinion that it is not possible

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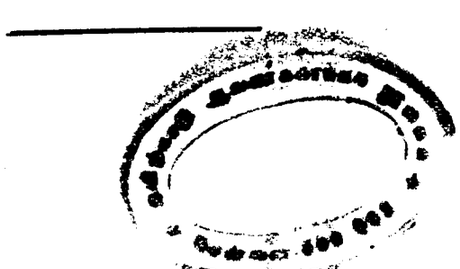
to take the statement of the first accused into consideration as against the second. It is necessary to observe strictly the provisions of section 27 by which the only portions of the information given by the first accused which are admissible are those which relate distinctly to the facts discovered thereby. The facts discovered thereby, as we have already said, are the jewels of the murdered woman and the blood-stained brick (M.O. 1) which was used to beat her about the face. It cannot be said that the statements made by the first accused involving the second accused relate in any way to these facts. All that is established as against the second accused, therefore, is that he met the first accused on the evening of the 12th October and that he knew where M.Os. 2, 3, 4 and 5 were to be found. These facts lead to grave suspicion against the second accused but they are not sufficient to warrant his conviction either for murder or for intentional concealment of evidence. The second accused must therefore be acquitted. We set aside his conviction under section 201, Indian Penal Code, and the sentence of three years' rigorous imprisonment and direct that he be set at liberty forthwith.

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