



THE INDIAN LAW REPORTS

MADRAS SERIES

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

Editor]

RAO BAHADUR R. N. AINGAR (*Barrister-at-Law*)

Reporters

Privy Council ..	{ C. SIDNEY SMITH (<i>Barrister-at-Law</i>) (<i>died in February</i>) T. F. R. McDONNELL (<i>Barrister-at-Law</i>)
High Court ..	{ G. RAJAGOPALAN (<i>Advocate</i>) V. V. CHOWDARY (<i>Barrister-at-Law</i>) N. SRINIVASA AYYANGAR (<i>Advocate</i>)

1942

January—December

Published under the Authority of the Governor of Madras
BY THE SUPERINTENDENT, GOVERNMENT PRESS, MADRAS

[*All Rights Reserved*]

JUDGES OF THE HIGH COURT

1942

1ST JANUARY TO 31ST DECEMBER

CHIEF JUSTICE.

The Hon'ble Sir LIONEL LEACH, Barrister-at-Law.

PUISNE JUDGES.

The Hon'ble Mr. Justice S. BURN, Kt., I.C.S. (*retired on 19th June*).

The Hon'ble Mr. Justice V. MOCKETT, M.B.E., Barrister-at-Law.

The Hon'ble Mr. Justice A. J. KING, I.C.S.

The Hon'ble Mr. Justice S. WADSWORTH, I.C.S., Barrister-at-Law.

The Hon'ble Mr. Justice P. VENKATARAMANA RAO NAYUDU, B.A., B.L. (Rao Bahadur) (*retired on 15th January*).

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

The Hon'ble Mr. Justice ABDUR RAHMAN, Kt., LL.D. (Khan Bahadur) (*on leave from 24th June to 3rd July*).

The Hon'ble Mr. Justice K. S. KRISHNASWAMI AYYANGAR, B.A., B.L. (*on leave from 3rd August to 2nd September*).

The Hon'ble Mr. Justice B. SOMAYYA, B.A., B.L.

The Hon'ble Mr. Justice M. PATANJALI SASTRI, B.A., B.L.

The Hon'ble Mr. Justice L. C. HORWILL, I.C.S., Barrister-at-Law (*on leave from 15th September to 8th October*).



The Hon'ble Mr. Justice A. C. HAPPELL, I.C.S., Barrister-at-Law (*on leave from 2nd to 27th November*).

The Hon'ble Mr. Justice J. A. BELL, Barrister-at-Law (*from 15th January*).

The Hon'ble Mr. Justice C. KUNHI RAMAN, B.A., B.L., Barrister-at-Law (Diwan Bahadur) (*from 16th January*).

The Hon'ble Mr. Justice J. A. BYERS, I.C.S., Barrister-at-Law (*from 18th June*).

TEMPORARY ADDITIONAL JUDGES.

The Hon'ble Mr. Justice C. KUNHI RAMAN, B.A., B.L., Barrister-at-Law (Diwan Bahadur) (*till 15th January*).

The Hon'ble Mr. Justice J. A. BYERS, I.C.S., Barrister-at-Law (*from 16th January to 17th June*).

The Hon'ble Mr. Justice N. CHANDRASEKHARA AYYAR, B.A., B.L. (Rao Bahadur) (*on leave from 3rd to 23rd December*).

The Hon'ble Mr. Justice C. N. KUPPUSWAMI AYYAR, B.A., M.L. (Diwan Bahadur) (*from 29th June*).

OFFICIATING JUDGE.

The Hon'ble Mr. Justice C. N. KUPPUSWAMI AYYAR, B.A., M.L. (Diwan Bahadur) (*till 15th January*).

ADVOCATE-GENERAL.

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

COUNCIL OF LAW REPORTING

1942

PRESIDENT.

The Hon'ble Sir LIONEL LEACH, Barrister-at-Law,
Chief Justice.

MEMBERS.

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

Mr. NUGENT GRANT, Barrister-at-Law.

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

Mr. B. SITARAMA RAO, B.A., B.L.

HONORARY SECRETARY.

Mr. S. P. THOMPSON, B.A. (Hons.) (Cantab.), I.C.S.

TABLE OF CASES REPORTED

PRIVY COUNCIL.

	PAGE
Krishnaswami v. Kamalamma	82
Raja Krishna Yachendra v. Raja Rajeswara Rao	419
Ramanna v. Jagannadha	886
Secretary of State for India v. Vidya Varada Thirtha Swami- gal	893

INSOLVENCY JURISDICTION.

Balakrishna Odayar, <i>In re</i>	189
--	-----

ORIGINAL JURISDICTION—SPECIAL BENCH.

Krishnamurthi, <i>In re</i>	9
-------------------------------------	---

INCOME-TAX REFERENCE.

Commissioner of Income-tax v. Firm of Abdulla Sahib ..	281
_____ v. Maharaja of Pithapuram ..	91
_____ v. Ramaswamy	182
Commissioner of Income-tax, Madras v. Papammal	598
_____ v. G. D. Naidu Industrial Educational Trust	921

APPELLATE CIVIL—FULL BENCH.

Amirthammal v. Vallimayil Ammal	807
An Advocate, <i>In re</i>	428
Cannanore Bank, Ltd. v. Madhavi	336
Chidambaram v. Sellakumara	1
Hamidgani v. Ammasahib	271
Kanakaratnam v. Narasimha Rao	173
Kandaswami v. Vagheesam	13
Krishnaswami, <i>In re</i>	663
Lingayya v. Punneyya	502
Mohana v. Gangaraju	95
Rengaswami v. Sivaprakasam	251
Sreeramulu v. Subbarami	738

	PAGE
Sriramareddi <i>v.</i> Sriramareddi	346
Venkata Chelamiah <i>v.</i> Annapoornamma	590
Venkata Narasimhacharyulu <i>v.</i> Secretary of State for India ..	264
Venkayya <i>v.</i> Sreeramulu	163

APPELLATE CIVIL.

Bhimaji Motiji, Firm of <i>v.</i> Official Receiver, Bellary	635
Chockalinga <i>v.</i> Sankarappa	677
Chokkalinga <i>v.</i> Manicka	448
Egappa <i>v.</i> Ramanathan	526
Gangaraju <i>v.</i> Lakshminarayanamurthi	879
Gangi Reddi <i>v.</i> Narasimha	147
Gopal <i>v.</i> Alagirisami	770
Goverdandoss Takersey <i>v.</i> Abdul Rahiman	775
Guravaiah <i>v.</i> Rangaiah	614
Kailasa <i>v.</i> Sundaram	438
Kamaraju <i>v.</i> Saramma	868
Kathersa <i>v.</i> Abdul Rahim	836
Kesarimull <i>v.</i> Associated Agencies	33
Khaja Moideen <i>v.</i> Abdul Gafoor	455
Krishnayya Rao <i>v.</i> Maharaja of Pithapuram	562
Krishnamurthi <i>v.</i> Jagannadhapadhi	941
Krishnaswami <i>v.</i> Venugopala	376
Maharaja of Pithapuram <i>v.</i> Secretary of State for India ..	532
Maharani of Nabha <i>v.</i> Province of Madras	696
Mallikarjuna <i>v.</i> Official Receiver, Kistna	691
Muthuvayyengar <i>v.</i> Thiruvangadammal	682
Nallamuthu <i>v.</i> Thirumalai	431
Narayanan <i>v.</i> Chathukutti	550
Narikkal Chathan <i>v.</i> Kesavan Namboodri	133
Niladri <i>v.</i> Venkatarama	749
Official Assignee, Madras <i>v.</i> D'Silva	199
Official Receiver, West Tanjore <i>v.</i> Sambasiva	757
Palani <i>v.</i> Natarajan	844
Palaniappa <i>v.</i> Official Liquidator, Pasupathi Bank	875
Pandalai <i>v.</i> South Indian General Assurance Co., Ltd.	230
Panthanam <i>v.</i> Abdul Rahiman	236
Pappayya <i>v.</i> Appa Rao	944
Parama and Doss <i>v.</i> Nannulal Kanji	28

	PAGE
Parasuram Byas <i>v.</i> Sub-Collector, Rajahmundry	831
Ponnuchami <i>v.</i> Muthusami	355
Pottiswami <i>v.</i> Sulaiman	688
Province of Madras <i>v.</i> Ramaswami Ayyar	959
Rajagopala <i>v.</i> Ramachandra	851
Rajah of Tarla <i>v.</i> Rama Rao	927
Ramanathan <i>v.</i> Muthuraman	204
Rama <i>v.</i> Gangi Reddi	862
Ramayya <i>v.</i> Anjayya	405
Rangasami <i>v.</i> Official Receiver, Coimbatore	618
Rayalamma <i>v.</i> Butchiramayya	464
Rego <i>v.</i> Ananthamathi	949
Saradambal <i>v.</i> Subbarama Ayyar	630
Sepulchre Bros. <i>v.</i> Khushal Das	243
Sowdra Bai <i>v.</i> Saraswathi	669
Srinivasa Rao <i>v.</i> Seshacharlu	42
Subba Rao <i>v.</i> Tata Reddi	746
Subbaraya <i>v.</i> Debt Conciliation Board, Chuddalore	220
Subbayya <i>v.</i> Bushanarao	60
Subramania <i>v.</i> Thandavamurthi	933
Subramaniam <i>v.</i> Satyanadham	640
Swaminatha <i>v.</i> Krishna	225
Swayamprabhai <i>v.</i> Muthukrishna	647
Syed Ismail Sahib <i>v.</i> Ethikasha Sarguru	143
Thangathammal <i>v.</i> Veerama	360
Thayyanayaki <i>v.</i> Sundarappa	308
Thiruvengadam <i>v.</i> Muthusami	300
Thiruvengadatha <i>v.</i> Sannappan	57
Venkataratnam <i>v.</i> Venkatayya	316
Venkayya <i>v.</i> Pullayya	654
————— <i>v.</i> Raghavamma	24
Venugopala <i>v.</i> Embaru	137
Viyyamma <i>v.</i> Suryaprakasa Rao	608

APPELLATE CRIMINAL.

Ayyar & Co. <i>v.</i> Srinivasulu	73
Bhuvaraha Iyengar, <i>In re</i>	414
D. K. Reddy, <i>In re</i>	587
Guruswami, <i>In re</i>	77

	PAGE
Inspecting Assistant Commissioner of Income-tax v. Javerbhai.	328
Moongan v. Roshan Ali Sahib	322
Nallappa Goundan v. Chinnammal	158
Narayana, <i>In re</i>	494
Palayan, <i>In re</i>	410
Public Prosecutor v. Kalkura	802
— v. Rajam Ammal	963
Venkatarama Chetti, <i>In re</i>	661
Yelumalai, <i>In re</i>	153

TABLE OF CASES CITED

A	PAGE
Abdul Hadi v. Adul Latif. A.I.R. 1937 Nag. 135, dissented from	144, 145
Abdulkadar v. Mahomed. (1891) I.L.R. 15 Mad. 15 ..	15, 20
Abdul Kadir v. Somasundaram Chettiar. (1922) I.L.R. 45 Mad. 827	339, 342
Abdul Majid Khan v. Saraswatibai. (1933) L.R. 61 I.A. 90; 66 M.L.J. 65 (P.C.)	209
Abdul Rahman v. The King-Emperor. (1926) I.L.R. 5 Ran. 53 (P.C.)	324, 325, 326
Achuta v. Kali. (1884) I.L.R. 7 Mad. 545	554, 555
Adams v. Lindsell. (1818) 1 B. & Ald. 681; 106 E.R. 250.	248
Adamson's case (<i>In re</i> Paraguassu Steam Tramway Company). (1874) L.R. 18 Eq. 670, followed	231, 235
Administrator-General v. Dasai Goundan. (1910) 9 M.L.T. 300	939
Agacio v. Forbes. (1861) 14 Moo. 160; 15 E.R. 267, applied and followed	776, 787
Ahmad Bux v. Fazal Karim. I.L.R. [1940] Mad. 195, distinguished	243, 246
Aiken v. Short. (1856) 1 H. & N. 210; 156 E.R. 1180 ..	671, 672, 674, 675
Aiyapparaju v. Venkatakrishnayya. (1922) 44 M.L.J. 303 ..	867
Aiyyagari Venkataramayya v. Aiyyagari Ramayya. (1902) I.L.R. 25 Mad. 690 (F.B.)	741
A.K.R.M.M.C.T. Chettiar Firm v. S. P. Dayabhoy & Sons. (1935) I.L.R. 13 Ran. 703	883, 884
Alagiri Chetty v. Muthuswami Chetty. (1939) 50 L.W. 571	45, 47, 49
Amarendra Mansingh v. Sanatan Singh. (1933) I.L.R. 12 Pat. 642 (P.C.)	180
Amba Lal v. Ramgopal Madhoprasad. (1932) I. L.R. 55 All. 221	954
Ambalavana Pandara Sannadhi v. Secretary of State for India. (1905) I.L.R. 28 Mad. 539	916
Ananda Rao v. Appa Rao. (1924) 47 M.L.J. 700	530
Anandarao v. Co-operative Credit Society, Pedatadepalli. I.L.R. [1941] Mad. 27	522
Anantharama Iyer v. Kuttimalu Kovilamma. (1916) 30 M.L.J. 611, followed	614, 616, 617

	PAGE
Anganna Reddi v. Subbaraya Chettiar. (1930) I.L.R. 53 Mad. 796	953, 954
Annamalai Chetty v. Murugasa Chetty. (1903) I.L.R. 26 Mad. 544 (P.C.)	517
Annapurnamma v. Appayya Sastri. (1928) I.L.R. 52 Mad. 620 (F.B.)	165
— referred to	173, 175, 179 181
Anne Brahmayya v. Chelasami Rattayya. (1924) 20 L.W. 503, dissented from and overruled	164, 165, 168 169
Appadurai Nainar, <i>In re</i> . (1935) I.L.R. 59 Mad. 165, distinguished and explained	158, 160, 161 162
Appovier v. Rama Subba Aiyan. (1866) 11 M.I.A. 75, considered	887, 891
Appu Pillay v. Perumal Pillai. (1912) 23 M.L.J. 118	15, 20, 21
Armugham Chetty v. Muthu Koundan. (1919) I.L.R. 42 Mad. 711 (F.B.)	509, 516
Arumilli Perrazu v. Subbarayadu. (1921) I.L.R. 44 Mad. 656 (P.C.)	517
Arunachalam v. Official Receiver. A.I.R. 1940 Mad. 733, approved and followed	692, 694, 695
Arunachalam v. Valliappa. A.I.R. 1938 Ran. 130 (F.B.).	395
Ashutosh Sikdar v. Behari Lal Kirtania. (1907) I.L.R. 35 Cal. 61.	644
Asia Bibi v. Malik Aziz Ahmad. (1931) I.L.R. 54 All. 448.	369
Askaram Sowkar v. Venkataswami Naidu. (1920) I.L.R. 44 Mad. 544	676
Atchamma v. Subbarayadu. (1903) 15 M.L.J. 496	443
Athiappa Chettiar v. Ibramsa Pulavar. (1941) 2 M.L.J. 690.	449, 454
Attakoya v. Kunhikoya. I.L.R. [1940] Mad. 50	478, 480
Attorney-General v. Jackson. [1932] A.C. 365	370
Attorney-General, The v. Sillem. (1864) 10 H.L.C. 704; 11 E.R. 1200, distinguished	655, 657
Auraj Joharmal v. Dalpat Supadu. I.L.R. [1937] Bom. 839	529
Ayya Pattar v. Attupurath Mankkal Karnavan. 1919 M.W.N. 805	339, 342

B

Babui Dineshwari Kuer v. Ram Narain Singh. (1936) I.L.R. 15 Pat. 704	393
Badri Das v. Pasupati Banarji. (1932) I.L.R. 12 Pat. 93.	314

	PAGE
Baijnath's case (Baijnath Prasad Singh v. Tej Bali Singh). (1921) L.R. 48 I.A. 195; I.L.R. 43 All. 228	427
Baijnath Sahai v. Ramgut Singh. (1896) I.L.R. 23 Cal. 775 (P.C.), followed	264, 265, 266 268, 269, 270
Baker, <i>In re</i> Nichols v. Baker. (1890) 44 Ch. D. 262	365
Balarama Reddi v. Official Receiver, Nellore. (1939) 1 M.L.J. 205, overruled	758, 766 767, 769
Balkishan v. Kishan Lal. (1888) I.L.R. 11 All. 148 (F.B.)	679, 680
Balusami Ayyar, <i>In re</i> . (1928) I.L.R. 51 Mad. 417 (F.B.).	101, 109, 111 113, 121, 129, 130
Banarsi Das v. Maharani Kuar. (1882) I.L.R. 5 All. 27	367
Bank of New South Wales v. Owston. (1879) 4 App. Cas. 270	625, 627
Barendra v. Martin & Co. (1920) 33 C.L.J. 7	764
Bassu Kuar v. Dhum Singh. (1888) I.L.R. 11 All. 47 (P.C.)	573
Bateman v. Ross. (1813) 1 Dow. 235; 3 E.R. 684	26, 27
Bayley v. Manchester, Sheffield, and Lincolnshire Railway Co. (1872) L.R. 7 C.P. 415	731
Beck v. Pierce. (1889) 23 Q.B.D. 316	111, 116 117, 122, 132
Bell v. The Municipal Commissioners for the City of Madras (1902) I.L.R. 25 Mad. 457	68, 70
Bengal-Nagpur Railway Company, Limited v. Ratanji Ramji. I.L.R. [1938] 2 Cal. 72 (P.C.)	468, 470 492, 579
Benoy Krishna Roy v. Emperor. A.I.R. 1941 Cal. 32	156
Berhampur case, The (Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo). (1876) I.L.R. 1 Mad. 69 (P.C.)	174
Bhagchand Dagadusa v. Secretary of State for India. (1927) I.L.R. 51 Bom. 725 (P.C.)	357
Biddell Brothers v. E. Clemens Horst Company. [1911] 1 K.B. 934, followed	33, 37
Bilas Kunwar v. Desraj Ranji Singh. (1915) I.L.R. 37 All. 557 (P.C.)	845
Blackwood v. London Chartered Bank of Australia. (1874) L.R. 5 P.C. 92, referred to	655, 658
Bogg v. Midland Railway Co. (1867) L.R. 4 Eq. 310	833
Bolding v. Lane. (1863) 1 De G.J. & S. 122; 46 E.R. 47.	313
Bombay Company, Ltd., Karachi v. Kahan Singh. (1931) I.L.R. 13 Lah. 327, not followed	688, 690
Bomman Chetty v. Emperor. 1936 M.W.N. (Cr.) 195	325

	PAGE
Branson, <i>In re Ex parte</i> The Trustee. [1914] 2 K.B. 701 ..	195, 197
Bridges v. Longman. (1857) 24 Beav. 27; 53 E.R. 267 ..	294
Brijmohan Singh v. Choudhury Bhuneshwar Prasad Singh. (1941) I.L.R. 20 Pat. 481 (S.B.)	625, 629
Brij Narain v. Mangal Prasad (Brij Narain's case). (1923) I.L.R. 46 All. 95 (P.C.)	503, 509 510, 516, 517
British Coal Corporation v. The King (British Coal Corpo- ration case). [1935] A.C. 500, applied and followed ..	61, 65, 70, 71
Broadbent v. Ramsbotham. (1856) 25 L.J. Ex. 115 ..	437
Bur Singh v. Sikri Brothers. A.I.R. 1940 Lah. 106 ..	594, 597

C

Carson v. Blazer. (1810) 2 Binney 477	541
C. E. Grey v. Lamond Walker & Co. (1913) 17 C.W.N. 578	198
Chandukutti v. Moosan. A.I.R. 1936 Mad. 616	594
Chhagan Lal v. Firm Mangal Sain. A.I.R. 1938 Lah. 767	359
Chidambaram v. Sellakumara. I.L.R. [1942] Mad. 1 (F.B.).	867
Chidambaram Chettiar v. Venkatasubba Naik. (1937) 1 M.L.J. 262	872
Chidambaram Pandaram v. Lakshminarayana Chettiar. (1941) 2 M.L.J. 109, distinguished	758, 762
Chidambaram Pillai v. Thangathammal. (1918) 16 L.W. 678	369
Chinnammal Achi v. Saminatha Malavaroyan. (1907) I.L.R. 30 Mad. 367, overruled	264, 265, 266, 267, 268, 270
Chinnathayee v. Lakshmi Achi. (1936) 71 M.L.J. 511 ..	273, 278
Chinnaya v. Gurunatham. (1882) I.L.R. 5 Mad. 169 (F.B.).	253, 257
Chittar Mal v. Mt. Ram Devi. A.I.R. 1935 Lah. 164 ..	643
Chockalingam Chettiar v. Muthiah Chettiar. (1938) 2 M.L.J. 390	318
Chokkalinga Pillay v. Velayudha Mudaliar. (1924) 47 M.L.J. 448	391
Chotelal v. Phulchand. I.L.R. [1937] Nag. 425	163
Chudammal v. Nadamuni Naidu. (1909) 3 I.C. 77 ..	51
C. K. Ummer v. C. K. Ali Ummer. (1931) I.L.R. 9 Ran. 165 (F.B.)	459
Clarke Brothers v. Knowles. [1918] 1 K.B. 128	246

	PAGE
Cohen v. Baidya Nath Mukherji. I.L.R. [1937] 1 Cal. 359	860
Collector of Gorakhpur v. Ram Sundar Mal (The Gorakh- pur case). (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468	421, 427
Collector of Madura, The v. Moottoo Ramalinga Sethu- pathy (The Ramnad case). (1868) 12 M.I.A. 397	174, 176 177, 178, 179, 180
Collector of Masulipatam, The v. Cavalry Vencata Narrai- napah. (1860) 8 M.I.A. 500	736
———— (1861) 8 M.I.A. 529	50
Collett v. Emperor. 1929 M.W.N. 395	498, 499
Colonial Bank v. Exchange Bank of Yarmouth, Nova Scotia. (1885) 11 App. Cas. 84	675
Colonial Sugar Refining Company v. Irving. [1905] A.C. 369	389, 399, 402
Commissioner of Income-tax v. Seth Mangoomal Lunida- singh. (1939) 7 I.T.R. 208	282
Commissioner of Income-tax, The v. Binny & Co. (1924) I.L.R. 47 Mad. 837	184, 187
Commissioner of Income-tax, Bengal v. Mercantile Bank of India, Ltd. (1936) L.R. 63 I.A. 457; I.L.R. [1937] 1 Cal. 180	184, 186
Commissioner of Income-tax, Madras v. Valliammai. I.L.R. [1939] Mad. 388	600, 606
Commissioner of Income-tax, Punjab v. Krishna Kishore. (1941) I.L.R. 23 Lah. 1 (P.C.)	421, 427
———— referred to and applied ..	807, 810, 824
Compton, <i>In re</i> Norton v. Compton. (1885) 30 Ch. D. 15	365
Cowan v. O'Connor. (1888) 20 Q.B.D. 640	249
Croft v. Dunphy. [1933] A.C. 156	70
Cursandas Natha v. Ladkavahu. (1895) I.L.R. 19 Bom. 571	528

D

Danmal Parshotamdas v. Baburam Chhotelal. (1935) I.L.R. 58 All. 495	359
Daulat Ram v. Mehr Chand. (1887) I.L.R. 15 Cal. 70 (P.C.)	216
Dawood Hashim Essoof v. C. Tuck Sein. (1931) I.L.R. 9 Ran. 122 (P.C.), explained and distinguished ..	533, 543 544, 545

	PAGE
Davood Mohideen v. Sahabdeen. I.L.R. [1937] Mad. 841	357
De Bernales v. Fuller. (1810) 2 Camp. 426; 170 E.R. 1206	477
Desikachariar v. Rangaswami Pillai. (1932) I.L.R. 56 Mad. 300	948
Dhalbhum case. (Protap Chandra Deo v. Jagadish Chandra Deo). (1927) L.R. 54 I.A. 289; I.L.R. 54 Cal. 955	427
Dineshchandra Ray Chaudhuri v. Jahanali Biswas. (1934) I.L.R. 62 Cal. 457	616
Din Mohammad v. Mt. Walait Begum. A.I.R. 1938. Lah. 856	6
Domi Lal Sahu v. Roshan Dobay. (1906) I.L.R. 33 Cal. 1278, followed	309, 314
Doorga Doss Chowdry v. Ramanauth Chowdry. (1860) 8 M.I.A. 262	626, 629
Duncan v. Topham. (1849) 8 C.B. 225; 137 E.R. 495	248
Duncan, Fox & Co. v. North and South Wales Bank. (1880) 6 App. Cas. 1	851, 852 856, 857, 858
Duncombe v. Brighton Club Co. (1875) L.R. 10 Q.B. 371	477, 478 489, 492
Durgapada Chatterji v. Nilmoni Ghosh. (1934) 60 C.L.J. 472	716

E

E. Clemens Horst Company v. Biddell Brothers. [1912] A.C. 18	37
Edangapurandar v. Narasimhachariar. I.L.R. [1939] Mad. 140, referred to	252, 253, 255 260
Ellen Ma Noo v. William Po Thit. (1924) I.L.R. 2 Ran. 163	27, 31
Emperor v. Gurbaksh Singh. A.I.R. 1934 Lah. 840	805
— v. Lahanu Manaji. (1925) 27 Bom. L.R. 1419	716
— v. Mukandi Lal. A.I.R. 1917 Lah. 93	805
— v. Rama Lala. (1912) 15 Bom. L.R. 103	716
— v. Satyendra Kumar. A.I.R. 1923 Cal. 463	499
— v. Vazirally. (1928) I.L.R. 53 Bom. 57	805
Erroma Variar v. Emperor. (1903) I.L.R. 26 Mad. 656 (F.B.)	588
Evans v. Nicholson. (1875) 32 L.T.N.S. 778, applied and followed	243, 247, 249 250, 251

F

	PAGE
Faroz Shah v. Akbar Khan. (1939) 43 C.W.N. 897 (P.C.).	569
Fazal Din v. Md. Shafi. A.I.R. 1928 Lah. 674	528
Firm Laduram Sagarmal v. Jamuna Prasad Chaudhuri. (1938) I.L.R. 18 Pat. 114	358, 359
Firm of Syed Ibrahim Sahib v. Gurulinga Aiyar. (1937) 2 M.L.J. 717, approved	355, 356
Fludyer v. Cocker. (1805) 12 Ves. Jun. 25; 33 E.R. 10	483
Fraser and Ross v. Krishnaswami Aiyer. (1922) I.L.R. 47 Mad. 47	939, 940

G

Gaekwar Baroda State Railway v. Hafiz Habib-ul-Hag. I.L.R. [1938] All. 601 (P.C.)	645, 646
Ganapathi Asari v. Kuppuswamy Asari. 1939 M.W.N. 320, overruled	158, 160
Ganesh Narhar v. Datratraya Pandurang. (1922) I.L.R. 47 Bom. 632	594
Ganne Kotappa v. Venkataramiah. (1900) 10 M.L.J. 398.	240
Ghouse Khan v. Bala Subba Rowther. (1927) I.L.R. 51 Mad. 833	357
Ghulamsa Ravuthar v. Visvanathan Chettiar. (1917) 5 L.W. 721	208
Gilbert, <i>In re Ex parte</i> Gilbert. [1898] 1 Q.B. 282	371
Girdharee Lall v. Kanto Lall. (1874) L.R. 1 I.A. 321	127
Girdharilal Son & Co. v. Kappini Gowder. (1938) 2 M.L.J. 44	392
—, approved	355, 357
Girindra Nath Ray v. Kedar Nath Bidyanta. (1924) 29 C.W.N. 575	764
G. Lee Morris, Esquire v. Sambamurthi Rayar. (1871) 6 M.H.C.R. 122	393
Glynn v. Margetson & Co. [1893] A.C. 351, followed	33, 38
Gnanasambanda Pandara Sannadhi v. Velu Pandaram. (1899) I.L.R. 23 Mad. 271 (P.C.)	15, 22
Gobardhan Das v. Makundi Lal. (1923) I.L.R. 45 All. 438	339
Gopikabai Mahadev v. Chapsi Purshottam. (1934) I.L.R. 59 Bom. 161, doubted	148, 149
Gooroopersad Khoond v. Juggutchunder. (1860) 8 M.I.A. 166	622
Gopalan v. Lakshminarasamma. I.L.R. [1940] Mad. 382.	352

B

	PAGE
Gopal Sahu Deo v. Joyram Tewary. (1881) I.L.R. 7 Cal. 620	65
Gopeekrist Gosain v. Gungapersaud Gosain. (1854) 6 M.I.A. 53	845, 848
Govindan Nambiar v. Krishnan Nambiar. (1881) I.L.R. 4 Mad. 146	15
Govindappa v. Hanumanthappa. (1912) I.L.R. 38 Mad. 36	954
Govindarajalu v. Chinnathambi. A.I.R. 1928 Mad. 1270.	273, 278
Govindayyar v. Dorasami. (1884) I.L.R. 11 Mad. 5 (F.B.).	685, 686
Greeg v. Wells. (1839) 10 Ad. & E. 90; 113 E.R. 35, followed	226, 228
Grenfell v. The Dean and Canons of Windsor. (1840) 2 Beav. 544; 48 E.R. 1292	645
Groves v. Administrator-General. (1898) I.L.R. 22 Mad. 119	306
Gulab Shanker v. Mul Chand. A.I.R. 1927 All. 444	478, 481
Gumm v. Tyrie. (1864) 33 L.J.Q.B. 97, followed	33, 38
Guntur case, The (Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi). (1876) I.L.R. 1 Mad. 174 (P.C.)	166, 174, 177

H

Haddon v. Haddon. (1887) 18 Q.B.D. 778, followed	24, 26, 27 28, 29, 30
Hakim Mirza Mohammad Jafar Husain Khan v. Mirza. Mohammad Taqi Khan <i>alias</i> Munney Saheb. (1933) I.L.R. 9 Luck. 170	16
Hanmant Kashinath v. Ganesh Annaji. (1918) I.L.R. 43 Bom. 612	522
Hanmantapa v. Jivubai. (1900) I.L.R. 24 Bom. 547	529
Hanumat Mahton v. Sonadhari Singh. (1919) 4 P.L.J. 653	522
Haradas v. The Secretary of State for India in Council. (1917) 26 C.L.J. 590 (P.C.)	539, 542, 543
Har Gopal v. Ram Rachhpal. (1921) I.L.R. 2 Lah. 155, followed	771, 773
Haripada (Berman) v. Surendra Nath Samantha. A.I.R. 1922 Cal. 164 (F.B.)	339
Hari Ramayya v. Venkatachalapati. (1935) 70 M.L.J. 619	175, 179
Harper, <i>Ex parte</i> . <i>In re</i> Tait. (1882) 21 Ch.D. 537, followed	879, 882, 883 884
Harris's case (<i>In re</i> Imperial Land Company of Marseilles). (1872) L.R. 7 Ch. 587	248

	PAGE
Haveli Shah v. Mt. Hussaina Jan. A.I.R. 1938 Lah. 217	453
Henrietta Muir Edwards v. Attorney-General for Canada. [1930] A.C. 124	70
Henry Merieu v. Official Receiver, Madura. A.I.R. 1935 Mad. 907, doubted	636, 639
Hewanchal Singh v. Jawahir Singh. (1888) I.L.R. 16 Cal. 307	557
Hindu Women's Rights to Property Act, <i>In re</i> , The. [1941] F.C.R. 12	632
Hodge v. The Queen. (1883) 9 App. Cas. 117	70
Holland v. Bennett. [1902] 1 K.B. 867	249, 250
Holt v. Gas Right and Coke Co. (1872) L.R. 7 Q.B. 728	834
Honck v. Muller. (1881) 50 L.J.Q.B. 529	41
Hori Ram Singh v. The Crown. [1939] F.C.R. 159	719
Horner, <i>In re</i> Fooks v. Horner. [1896] 2 Ch. 188	478
H. P. Banerjee v. Commissioner of Income-tax, Bihar and Orissa. (1940) 9 I.T.R. 137	92, 95
Hriday Kishore Nandi v. Hari Bhusan Dey. (1933) 58 C.L.J. 171	14
Hunt v. Hunt. (1862) 4 De. G.F. & J. 221; 45 E.R. 1168.	645

I

Illidge, <i>In re</i> Davidson v. Illidge. (1884) 27 Ch. D. 478.	367
Imam Din v. Puran Chand. (1919) I.L.R. 1 Lah. 27	528
Imdad Hasan Khan v. Badri Prasad. (1898) I.L.R. 20 All. 401	558
Imperial Land Company of Marseilles, <i>In re</i> (Harris's case). (1872) L.R. 7 Ch. 587	248
Inland Revenue Commissioners v. Blott. Inland Revenue Commissioners v. Greenwood. [1921] 2 A.C. 171	184, 186, 187
Isri Prasad Tewari v. Chandrabhan Prasad Tewari. I.L.R. [1939] All. 200	594, 596

J

Jaganadha Sahu v. Rama Sahu. (1914) 17 M.L.T. 80	593
followed	405, 408
Jagan Nath v. Allah Dad. A.I.R. 1939 Lah. 539	642
Jagannatha Rao v. Viswesam. (1924) I.L.R. 47 Mad. 621.	119
Jaigobind Singh v. Lachmi Narain Ram. [1940] F.C.R. 61.	628
Jakiuddin v. Vithoba. A.I.R. 1939 Nag. 301	358

	PAGE
Jamiat Dawat v. Mohammad Shariff. A.I.R. 1938 Lah. 869	16
Jamshedji v. Maganlal. (1925) 27 Bom. L.R. 514 ..	108
Janardana Shetti Govindarajan v. Badava Shetti Giri. (1899) I.L.R. 23 Mad. 385	15
J. D. Robinson v. Ayya Krishnama Chariyar. (1872) 7 M.H.C.R. 37, distinguished	432, 436
Jeypore case (Maharajah of Jeypore v. Vikrama Deo Garu). (1919) 24 C.W.N. 226; A.I.R. 1919 (P.C.) 126	427
Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Sing. (1890) L.R. 17 I.A. 128; I.L.R. 18 Cal. 151.	422, 423
Jones, Lloyd & Co., Limited, <i>In re</i> . (1889) 41 Ch. D. 159, followed	231, 235
Joseph Suche & Co., Limited, <i>In re</i> . (1875) 1 Ch. D. 48 ..	392
Jotindra Nath Chowdhury v. Sarfaraj Mia. (1910) 14 C.W.N. 653	940
Juggomohun Ghose v. Manickchand. (1859) 7 M.I.A. 263	477, 491
Juscurn Boid v. Pirthichand Lal Choudhury. (1918) I.L.R. 46 Cal. 670 (P.C.)	265

K

Kalekhan v. Karim. (1934) 37 Bom. L.R. 207, dissented from	144
Kalidas Das v. Krishan Chandra Das. (1869) 2 B. L.R. 103 (F.B.)	818, 819
Kallu Mal v. Barfo. I.L.R. [1938] All. 535	28, 29
Kalu Ram v. Firm Sheonand Rai Jokhi Ram. (1932) I.L.R. 11 Pat. 580, followed	688, 690
Kalyanasundaram Aiyar v. Narasimha Aiyangar. (1922) 44 M.L.J. 427	940
Kamalammal v. Peeru Meera Levvai Rowthen. (1897) I.L.R. 20 Mad. 481	468
Kamaraju v. The Secretary of State for India. (1888) I.L.R. 11 Mad. 309 (F.B.)	241, 961
Kamiseti Subbiah v. Katha Venkatasawmy. (1903) I.L.R. 27 Mad. 355	246
Kanagammal v. Pandara Nadar. (1926) I.L.R. 50 Mad. 663, overruled	24, 28, 29, 31
Kandasami Goundan v. Kuppu Mooppan. (1919) I.L.R. 43 Mad. 421	509, 519
Kandasami Mudaliar v. Sivagurunatha Mudaliar. (1934) 41 L.W. 500	339

	PAGE
Kandaswami Goundar v. Chinnammal. (1933) 37 L.W. 729, overruled	173, 174, 178, 181
*Kanhaya Lal v. National Bank of India. (1923) I.L.R. 4 Lah. 284 (P.C.)	295
Kannabhiran Pillai v. Govindaswami Pillai. (1940) 2 M.L.J. 473	351
Kanna Pisharodi v. Kombi Achen. (1885) I.L.R. 8 Mad. 381	554, 555
Kanthimathi Ammal v. Ganesa Iyer. (1935) I.L.R. 59 Mad. 805	747
Karri Bapanna v. Yerramma. (1921) 45 M.L.J. 324 ..	527, 530
Karuppa Goundan v. Emperor. 1935 M.W.N. (Cr.) 230 ..	325
Karuppanna Nadar v. Karuppa Nadar. (1939) 50 L.W. 154	461
..... (1939) 2 M.L.J. 226	15
Kedar Nath Goenka v. Maharaja Chandra Mauleshwar Prashad Singh Bahadur. (1932) I.L.R. 11 Pat. 532 ..	352
Kelly v. Solari. (1841) 9 M. & W. 54; 152 E.R. 24 ..	667, 672, 674, 675
Kelu Achan v. Parasu Pattar. (1916) 5 L.W. 158, approved	272, 274, 278, 279
Kerwick v. Kerwick. (1920) I.L.R. 48 Cal. 260 (P.C.) ..	845
Khalifa M. S. A. Ganny v. Mohamed Ebrahim. (1931) I.L.R. 9 Ran. 459	15, 16
Khatija v. Shekh Adam Husenally. (1915) I.L.R. 39 Bom. 545	456, 457, 458
Khub Lal Singh v. Ajodhya Misser. (1915) I.L.R. 43 Cal. 574	50
Khupchand Nathmal Marwadi v. Rajeshwar Shankar Deshpande. I.L.R. [1940] Nag. 512, dissented from ..	449, 454
Kilaru Kotayya v. Polavarapu Durgayya. (1918) 35 M.L.J. 451	504, 524, 525
King's case. (1871) L.R. 6 Ch. 196	878
King Emperor v. Rachappa. A.I.R. 1925 Bom. 26 ..	806
Kiranshashi Dasee v. The Official Assignee of Calcutta. (1932) I.L.R. 60 Cal. 8	755
Kissendoss v. Khatau Makanjee Spinning & Weaving Co., Ltd. (1916) 36 I.C. 389	97, 99, 100, 110, 114
Kombi v. Aundi. (1889) I.L.R. 13 Mad. 75	15, 20, 21
*Kotayya v. Venkata Punnayya. (1940) 2 M.L.J. 202 ..	350

	PAGE
Krishan Lal-Ram Lal v. Abdul Ghafur Khan. (1935) I.L.R. 17 Lah. 275	359
Krishna v. Sami. (1885) I.L.R. 9 Mad. 64 (F.B.), followed. 807, 808, 809 810, 811, 812, 815, 818, 820, 821, 822, 823, 824, 828	
Krishna Ayyar v. Krishnasami Ayyar. (1900) I.L.R. 23 Mad. 597	107
Krishnadas Padmanabhrao v. Vithoba Annappa. I.L.R. [1939] Bom. 340 (F.B.)	529, 531
Krishnan v. Somi. I.L.R. [1940] Mad. 815, distinguished.	204, 212
Krishnan Nair v. Kambi. 1937 M.W.N. 299, approved.	678, 680
Krishna Rao v. Sundara Siva Rao. (1931) I.L.R. 54 Mad. 440 (P.C.)	685, 687
Krishna Row v. Appasawmi Aiyar. (1891) 1 Weir 585 ..	162
Krishnasami Konan v. Ramasami Ayyar. (1899) I.L.R. 22 Mad. 519	524
Krishnaswami Naicker v. Thiruvengada Mudaliar. (1934) 68 M.L.J. 63	594
Krishnayya Rao v. Raja of Pittapur. (1928) I.L.R. 51 Mad. 893	174
Kristnayya v. Lakshmi pathi. (1920) I.L.R. 43 Mad. 650 (P.C.)	165, 166, 171
Kristo Kinkur Roy v. Rajah Burrodacaunt Roy. (1872) 14 M.I.A. 465	66
Kudhai v. Sheo Dayal. (1888) I.L.R. 10 All. 570	367
Kumara Goundan v. Thevaraya Reddi. (1924) 48 M.L.J. 616, overruled	336, 339, 343
Kumaretta Servaigaran v. Sabapathy Chettiar. (1906). I.L.R. 30 Mad. 26, approved	272, 274, 277 278, 279
Kumar Suttia Suttia Ghosal v. Rani Gopal Moni Debi. (1897) 5 C.W.N. 27	939
Kunhi Krishnan v. Kunhi Pennu. A.I.R. 1927 Mad. 189. 554, 555, 556	
Kunj Bihari v. Keshavlal Hiralal. (1904) I.L.R. 28 Bom. 567, dissented from	13, 14, 18 19, 20
Kuppusamy Reddy v. Venkatalakshmi Ammal. (1915) 18 M.L.T. 434	685, 686
Kuriyali v. Mayan. (1883) I.L.R. 7 Mad. 255, overruled .. 272, 273, 274 276, 277, 278, 279	

L

Lachmi Narain Marwari v. Balmakund Marwari. (1924) I.L.R. 4 Pat. 61 (P.C.)	64
Laduram Nathmull v. Nandalal Karuri. (1919) I.L.R. 47 Cal. 555	196

	PAGE
Lakshmadu v. Ramudu. I.L.R. [1940] Mad. 123, approved	272, 274, 279
Lakshmanacharyulu v. Venkataramanujacharyulu. (1926) 51 M.L.J. 414, overruled	927, 931, 932
Lakshmana Chettiar v. Muthu Chellia Goundan. (1934) 68 M.L.J. 104	215
Lakshmi Ammal v. Kadiresan Chettiar. (1921) 41 M.L.J. 198	339, 342
Lakshmiah Chetty v. Kothandarama Pillai. (1925) I.L.R. 48 Mad. 605 (P.C.)	845
Lakshmi Naidu v. Gunnamma. (1934) I.L.R. 58 Mad. 418, referred to	252, 254, 262
Lakshminarasamma v. Navugotla Pydanna. A.I.R. 1925 Mad. 265, overruled	336, 339, 343
Lakshminarasimham v. Bharata Mahanty. (1910) 9 M.L.T. 216	409
Lalla Sheo Churn Lal v. Ramnandan Dobey. (1894) I.L.R. 22 Cal. 8	528, 530, 531
Lalta Prasad v. Gajadhar Shukul. (1932) I.L.R. 55 All. 283	122, 521
Lee v. Sangster. (1857) 2 C.B. (N.S.) 1; 140 E.R. 310 ..	192, 197
Leeming v. Lady Murray. (1879) 13 Ch. D. 123	193, 197
Lewin v. Wilson. (1886) 11 App. Cas. 639, referred to ..	309, 313
Lieckbarrow v. Mason. (1787) 2 T.R. 63; 100 E.R. 35, applied	225, 228
Limpus v. London General Omnibus Company. (1862) 1 H. & C. 526; 158 E.R. 993	731
Lingama Naidu v. Official Receiver, Madura. (1928) 110 I.C. 511, overruled	336, 339, 344
Linton v. Linton. (1885) 15 Q.B.D. 239	27
Lloyds Bank, Ltd. Lahore v. Mst. Rehmat Bibi. (1939) I.L.R. 20 Lah. 493	274
Lokanadha v. Lokhono. A.I.R. 1930 Mad. 738	255, 261, 262
Lokramdas v. Tharumal. A.I.R. 1939 Sind 206	786
London Chatham and Dover Railway Co. v. South Eastern Railway Co. [1893] A.C. 429	478, 479
London Chatham and Dover Railway Company v. South Eastern Railway Company. [1892] 1 Ch. 120	478, 488
Lord St. John v. Boughton. (1838) 9 Sim. 219; 59 E.R. 342	932
Lutchumanan Chetty v. Mutta Iburaki Marakkayer. (1869) 5 M.H.C.R. 90	408, 409, 593, 596

M

	PAGE
Ma Fatima and others v. Momin Bibi and others. (1929) I.L.R. 7 Ran. 164	459
Magbul Ahmad v. Pratap Narain Singh. (1935) I.L.R. 57 All. 242 (P.C.)	575
Maharaja of Venkatagiri v. Raja Rajeswara Rao. I.L.R. [1939] Mad. 622	421
Maharajah Sutteeschunder Roy v. Guneschunder. (1860) 8 M.I.A. 164	626
Maharajah of Jeypore v. Vikrama Deo Garu. (Jeypore case). (1919) 24 C.W.N. 226; A.I.R. 1919 (P.C.) 126 ..	427
Maharana Shri Ranmalsangji v. Bai Shri Kundankuwar. (1902) I.L.R. 26 Bom. 707	28, 29
Mahesh Chandra Bayan v. Manindra Nath Das. I.L.R. [1941] 1 Cal. 477	528, 531
Maine and new Brunswick Electrical Power Co. v. Hart. [1929] A.C. 631 (P.C.)	478, 479, 480 488, 492, 579
M. A. Kader Zailany v. The Secretary of State for India in Council. (1931) I.L.R. 9 Ran. 375	734
Mallayya v. Bapi Reddi. (1931) 62 M.L.J. 39	51, 52
Mallesam Naidu v. Jugala Panda. (1899) I.L.R. 23 Mad. 292 (F.B.)	110
Mallikarjuna v. Official Receiver, Kistna. I.L.R. [1938] Mad. 1063, followed	614, 617
Manganna v. Mahalakshamma. (1929) I.L.R. 53 Mad. 167 (P.C.)	621, 622, 623
Manicka Mudali v. Abdul Karim Sahib. (1935) 42 L.W. 710	339
Manjaya v. Shanmuga. (1913) I.L.R. 38 Mad. 684	741
Maple Flock Co. v. Universal Furniture Products (Wembley), Ltd. [1934] 1 K.B. 148, followed	34, 40
Maqbul Ahmad v. Pratap Narain Singh. (1935) I.L.R. 57 All. 242 (P.C.), applied	869, 872, 873
Marukkolandayammal v. Secretary of State for India. (1932) I.L.R. 55 Mad. 876	302
Maruthamuthu Naicker v. Kadir Badsha Rowther. I.L.R. [1938] Mad. 568 (F.B.)	105, 107
—————, applied and followed	204, 210, 213 216, 217, 218
Masilamani v. Arunga Mudali. (1920) 12 L.W. 460	871
Ma Thin On v. Ma Ngwe Hmon. (1934) I.L.R. 12 Ran. 512	456, 458, 459

	PAGE
Mathura Singh v. Rama Rudra Prasad Sinha. (1935) I.L.R. 14 Pat. 824	528
Maund, <i>In re Ex parte</i> Maund. [1895] 1 Q.B. 194, distinguished	317, 319
Maung Pya v. Ma Hla Kyu. (1923) I.L.R. 1 Ran. 481	339
Maung Sin v. Ma Tok. (1927) I.L.R. 5 Ran. 422 (P.C.), followed	771, 773
Maung Tun Pe v. B. K. Haldar. (1936) I.L.R. 14 Ran. 242 (F.B.)	845
Merchant Shipping Co. v. Armitage. (1873) L.R. 9 Q.B. 99	477, 488, 491
Mersey Steel and Iron Co. v. Naylor, Benzon & Co. (1884) 9 App. Cas. 434	41
M. D. Thirumalayappa v. Karuppayi. A.I.R. 1928 Mad. 375, referred to and approved	895, 912
Midland Bank v. Reckitt. [1933] A.C. 1, explained and followed	777, 797 672
Milnes v. Duncan. (1827) 6 B. & C. 671; 108 E.R. 598 ..	
M. K. Kasiviswanathan Chettyar v. R. M. S. L. Lakshmanan Chettyar. [1937] Ran. 421	594, 597
Mohamed Adjim Nacoda v. E. M. Chettyar Firm. (1930) I.L.R. 9 Ran. 7	6
Mohamed Ismail v. King-Emperor. (1935) I.L.R. 13 Ran. 754, referred to	698, 720
Mohana v. Gangaraju. I.L.R. [1942] Mad. 95 (F.B.)	513
Mohanlal v. Krishna Premji. (1927) 30 Bom. L.R. 415 ..	38
Moniram Kolita v. Keri Kolitani. (1880) I.L.R. 5 Cal. 776 (P.C.)	634
Moorcock, The. (1889) 14 P.D. 64 (C.A.)	474
Morgan v. Ashcroft. [1938] 1 K.B. 49	674
Mouji Lal v. Chandrabati Kumari. (1911) I.L.R. 38 Cal. 700 (P.C.), referred to and approved	807, 825, 826
Moulvie Sayyud Uzhur Ali v. Mussumat Bebee Ultaf Fatima. (1869) 13 M.I.A. 232	845
Mrs. Levina Ashton v. Madhabmoni Dasi. (1910) 14 C.W.N. 560	939
Mst. Binia v. Crown and another. I.L.R. [1937] Nag. 338.	163
Muhammād Isa v. Nazim Husain. I.L.R. [1940] All. 314.	163
Muhammad Islam v. Muhammad Ahsan. (1894) I.L.R. 16 All. 237, followed	771, 773
Muhammad Yusuf Sahib, <i>In re</i> . (1938) 2 M.L.J. 583	716
Mummadi Venkatiah v. Boganatham Venkata Subbiah (1921) 42 M.L.J. 51	64

	PAGE
Muniswami v. Kutti. (1933) I.L.R. 56 Mad. 833	100, 102, 103
109, 111, 113, 114, 115, 118, 120, 122, 123, 125	
Murahari Brahma Sastri v. Sumitramma. (1933) I.L.R.	
57 Mad. 411, overruled	173, 174, 179
	181
Muslim Bank of India, Ltd., in Liquidation, Lahore, <i>In</i>	
<i>the matter of</i> , The. I.L.R. [1939] Lah. 299, referred to.	876, 877
Mussumat Raneesurno Moyee v. Shooshee Mokhee	
Burmonia. (1868) 12 M.I.A. 244	574
Muthan Chettiar v. Venkituswami Naicken. (1936) I.L.R.	
59 Mad. 928, not followed	615, 617
Muthu Korakkai Chetty v. Madar Ammal. (1919) I.L.R.	
43 Mad. 185 (F.B.)	575
.. .. ., followed	264, 265, 270
Muthukumaraswamia Pillai v. Subbaraya Pillai. 1931	
M.W.N. 8	14
Muthusami Gurukkal v. Meenammal. (1918) I.L.R.	
43 Mad. 464, approved	807, 809, 810
812, 820, 821, 822, 826, 827	
Mynn v. Joliffe. (1834) 1 Moo. & Rob. 326 ; 42 R.R. 802 ..	793, 794

N

Nachimuthu v. Balasubramania. I.L.R. [1939] Mad. 422,	
approved and affirmed	503, 504, 511
Nagammal v. Sankarappa Naidu. (1930) I.L.R. 54 Mad.	
576	812
Nagappa v. Annapoorani. I.L.R. [1941] Mad. 261 (F.B.),	
distinguished	655, 656
Nagarampalli Kamesam v. Butchamma. (1914) 1 L.W.	
511, approved	164, 165, 166
167, 168, 169	
Nagendra Lal Chowdhury v. Fani Bhusan Das. (1918)	
I.L.R. 45 Cal. 785	339
Nagendran Chetty v. Kuppuswami Aiyen. (1916) 4 L.W.	
148	593
Nainapillai Marakayar v. Ramanathan Chettiar (Tanjore	
<i>case</i>). (1923) L.R. 51 I.A. 83 ; I.L.R. 47 Mad. 337 ..	901, 903
Nanchappa Goundan v. Ittichathara Mannadiar. (1929)	
I.L.R. 53 Mad. 549	468, 485, 579
Naraina Rao v. Shivu Rao. (1918) I.L.R. 41 Mad. 1043 ..	554, 557
Naranappa, <i>In re</i> . (1935) 41 L.W. 578	339
Narasimhamurthy v. Official Receiver, West Godavari.	
(1935) I.L.R. 59 Mad. 438	765
Narasimha Pattamahadevi v. Annan Naidu. (1940)	
1 M.L.J. 350, distinguished	758, 762

	PAGE
Narasimhulu Chetti v. Sundara Chariar. (1910) 20 M.L.J.	
479, doubted	777, 792, 795
Narayanan v. Veerappa. (1916) I.L.R. 40 Mad. 581 ..	254, 258
Narayana Nair v. Bhargavi Amma. (1926) 25 L.W. 151.	498
Naresh Narayan Roy v. Secretary of State for India. (1923)	
I.L.R. 50 Cal. 446 (P.C.)	539, 542
Nasrullah v. Wajid Ali. (1932) I.L.R. 54 All. 475, dis-	
sented from	144
Natabar Ghose v. Adya Nath. A.I.R. 1923 Cal. 690 ..	498
National Bank of Wales, Limited, <i>In re</i> (Massey and	
Giffin's case) [1907] 1 Ch. 582	876, 877
National Insurance Co., Ltd., Calcutta, The v. Seetham-	
mal. (1933) 65 M.L.J. 455, distinguished	243, 246
Nawab Mirza Mohammad Kazim Ali Khan v. Nawab	
Mirza Mohammad Sadiq Ali Khan. (1938) I.L.R. 13	
Luck. 494 (P.C.)	364
Nawal Kishore v. Khiyali Ram. (1929) I.L.R. 11 Lah.	
369	339
Nawbut Pattak v. Mahesh Narayun Lal. (1905) I.L.R.	
32 Cal. 654, followed	837, 841, 842
Niamat Rai v. Din Dayal. (1927) I.L.R. 8 Lah. 597 (P.C.).	294
Niaz Ahmad v. Phul Kunwar. (1931) I.L.R. 54 All. 428.	453
Nicol v. Nicol. (1886) 31 Ch.D. 524	27
Nilkanth Balwant v. Vidya Narasinh. (1930) I.L.R. 54	
Bom. 495 (P.C.)	398
Nutter v. Holland. [1894] 3 Ch. 408, followed	137, 140, 142

O

O. D. Harder v. Emperor. A.I.R. 1934 Sind 149	806
Official Assignee v. S. P. Dayabhoy. A.I.R. 1937 Ran. 234.	884
Official Assignee, Madras v. D'Silva. I.L.R. [1942] Mad.	
199	644
Official Receiver, Coimbatore District, The v. Kanga.	
(1921) 42 M.L.J. 53	198
Ooregum Gold Mining Company of India v. Roper.	
[1892] A.C. 125	183

P

Palaniappa Chettiar v. Ramanathan Chettiar. (1934)	
I.L.R. 57 Mad. 849	954, 956
Panchanada Velan v. Vaithinatha Sastrial. (1905) I.L.R.	
29 Mad. 333 (F.B.)	678, 680
Pandharinath v. Shankar. (1901) I.L.R. 25 Bom. 586 ..	871

	PAGE
Pandurang Balaji v. Mahadev Gopal. (1921) I.L.R. 46 Bom. 195	484
Pangudaya v. Uthandiya. I.L.R. [1938] Mad. 968, approved	252, 253, 255 260, 261, 263
Panna Lal v. Abdullah. A.I.R. 1933 All. 117	884
Paraguassu Steam Tramway Company (Adamson's case). (1874) L.R. 18 Eq. 670, followed	231, 235
Pareshmani Dasi v. Dinanath Das. (1868) 1 B.L.R.A.C. 117	818
Paul Beier v. Chotalal Javerdas. (1904) I.L.R. 30 Bom. 1.	38
Pavayi v. Palanivela. I.L.R. [1940] Mad. 872 (F.B.)	131
explained and distinguished	309, 311
Pearey Lal v. Naraini. (1935) I.L.R. 58 All. 379	28, 29, 31
Peda Venkanna v. Sreenivasa Deekshatulu. (1917) I.L.R. 41 Mad. 136	102, 103, 109 114, 118, 119, 120, 123, 129
Peer Ammal v. Nalluswami Pillai. (1937) 2 M.L.J. 666, approved and followed	439, 444, 445
Peer Bathummam Beevi v. Nagur Meerammam Beevi. (1936) 71 M.L.J. 725	273, 278
Perianna v. Sellappa. I.L.R. [1939] Mad. 218	351, 352
Peria Ponnuswami Goundan, In re. A.I.R. 1927 Mad. 506.	716
Periasami Mudaliar v. Seetharama Chettiar. (1903) I.L.R. 27 Mad. 243 (F.B.)	111, 115, 122 131, 213, 259
Periaswami v. Ramaswami. I.L.R. [1941] Mad. 53	676
Phul Kali v. Harnam. (1888) 8 All. W.N. 210	28
Pisani v. Attorney-General for Gibraltar. (1874) L.R. 5 P.C. 516	753, 754
Poland v. John Parr & Sons. [1927] 1 K.B. 236	731
Ponnuchami v. Muthusami. I.L.R. [1942] Mad. 355	785
Post Master General, Bombay v. Chenmal Mayachand. I.L.R. [1941] Bom. 415, followed	641, 643
Prasad Row v. The Secretary of State for India (Uralam case). (1917) L.R. 44 I.A. 166; I.L.R. 40 Mad. 886	895, 900 915, 917, 918, 919
Prasanna Kumar Roy v. Niranjana Roy. (1921) I.L.R. 48 Cal. 1046	594, 597
Pratt (Bombay), Ltd. v. M. T. Ltd., and Sassoon & Co., Ltd. v. Pratt (Bombay), Ltd. I.L.R. [1938] Bom. 421 (P.C.), applied and followed	231, 233
President, Co-operative Credit Society, Kaikaran v. Narasimha Rao. (1940) 2 M.L.J. 402, overruled	336, 339, 345

	PAGE
Protap Chandra Deo v. Jagadish Chandra Deo (The Dhalbhum case). (1927) L.R. 54 I.A. 289; I.L.R. 54 Cal. 955	427
Pudiava Nadar v. Pavanasa Nadar. (1922) I.L.R. 45 Mad. 949 (F.B.), not followed	807, 810 811, 812, 821, 823
Pugh and Sharman's case. (1872) L.R. 13 Eq. 566, distinguished	876, 877, 878
Punnayyah v. Viranna. (1921) I.L.R. 45 Mad. 425, followed	526, 527 528, 529, 530, 531
Punnun Mal v. Bishambar Dayal. A.I.R. 1940 Lah. 205	528, 531
Q	
Queen, The v. Burah. (1878) 3 App. Cas. 889	70
R	
Radha Charan v. Matilal. (1937) 41 C.W.N. 534	358
Raghubar Dyal Sahu v. Bhikya Lal Misser. (1885) I.L.R. 12 Cal. 69	528
Raichand Motichand v. Dhondo Laxuman. (1918) I.L.R. 42 Bom. 728, not followed	771, 773
Rajagopala Chettiar v. Hindu Religious Endowment Board, Madras. (1933) I.L.R. 57 Mad. 271 (F.B.)	962
—, applied and followed	236, 241
Rajah of Mandasa v. Jagannayakulu. (1931) I.L.R. 55 Mad. 883; 63 M.L.J. 450 (F.B.)	24
Rajah of Pittapur v. Ballapragada Pallamraju. (1920) 40 M.L.J. 18	478, 480
Raja Janki Nath Ray v. Sayed Asad Reza. (1935) I.L.R. 14 Pat. 560	859
Raja Ram v. Raja Bakhsh Singh. (1937) I.L.R. 13 Luck. 61 (P.C.)	108
Raja Rao v. Ananthanarayanan Chetty. (1921) 42 M.L.J. 308	954, 955, 958
Rajnitar Kumar v. Chetan Lal. A.I.R. 1940 Lah. 65	642
Ramachandra Aiyar v. Primathi Ammal. 1910 M.W.N. 834	765
Ramachandra Ayyar v. Sivarama Ayyar. (1936) 44 L.W. 502	446

	PAGE
Ramachandra Ganuji Waikar, <i>In re.</i> (1922) 104 I.C. 378	883, 884
Ramados v. Hanumantha Rao. (1911) I.L.R. 36 Mad. 364	14, 15
Ramakrishna v. Narayana. (1914) I.L.R. 39 Mad. 80 ..	651
Ramakrishna Chetty v. Subbaraya Iyer. (1912) I.L.R. 38 Mad. 101	392
————— v. Venkatasubbiah Chetty. (1914) 17 M.L.T. 139	409, 593
Ramakrishna Nadar v. Ponnaya Thirumalai Vandaya Thevar. (1935) 69 M.L.J. 791	359
Ramakrishna Trimbak v. Narayan. (1915) I.L.R. 40 Bom. 126	522
Ramanathan Chettiar v. Subramania Chettiar. (1924) I.L.R. 48 Mad. 656	761, 764, 766
————— v. Subramania Sastrial. (1902) I.L.R. 26 Mad. 179	763, 764, 766
Raman Pandithan v. Satha Cudumban. (1916) 31 M.L.J. 502, approved	503, 504 506, 513, 525
Ramanuja v. Devanayaka. (1885) I.L.R. 8 Mad. 361 ..	15, 20
Ramaraja Tevan, <i>In re.</i> (1930) I.L.R. 53 Mad. 937 ..	325, 326
Rama Rao v. Rajah of Pittapur (Second Pittapur case). (1918) L.R. 45 I.A. 148 ; I.L.R. 41 Mad. 778	421, 427
Ramasami Aiyar v. Annasami Aiyar. (1898) 8 M.L.J. 124	15, 20, 21
Ramasami Ayyar v. Vengidusami Ayyar. (1898) I.L.R. 22 Mad. 113	53
Ramasami Nadan v. Ulaganatha Goundan. (1898) I.L.R. 22 Mad. 49 (F.B.)	259
Rama Shah v. Lal Chand. (1940) I.L.R. 21 Lah. 470 (P.C.), distinguished	405, 406 407, 590, 591, 592, 595
Ramaswami Ayyar v. Rangaswami Ayyar. (1931) I.L.R. 55 Mad. 26	460
Ramaswami Konar v. Nachiar Ammal. 1940 M.W.N. 867, overruled	158, 160
Rama Vadhyar v. Manian Vadhyar. (1937) 45 L.W. 767	253, 261
Ramayya v. Anjayya. I.L.R. [1942] Mad. 405, approved and affirmed	590, 591 593, 594, 595, 596, 597
————— v. Satyanarayana Jagapathi Raju. 1939 M.W.N. 903	948

	PAGE
Ramchandra v. Mulji Nanabhai. (1896) I.L.R. 22 Bom. 558 (F.B.)	174, 180
Ramchandra Prasad v. Emperor. A.I.R. 1937 Pat. 246	498
Ramier v. Muthukrishna Ayyar. (1932) I.L.R. 55 Mad. 801 (F.B.)	390
Ram Kinkar Banerji v. Satya Charan Srimani. I.L.R. [1939] 1 Cal. 283 (P.C.)	860
Ramnad case, The (The Collector of Madura v. Moottoo Ramalinga Sethupathy). (1868) 12 M.I.A. 397	174, 176 177, 178, 179, 180
Ram Parkash Das v. Anand Das. (1916) I.L.R. 43 Cal. 707 (P.C.)	22, 517
Ram Prasad Ram v. Jadunandan Upadhia. (1934) I.L.R. 56 All. 921, not followed	771, 773
Ramyad Singh v. Rambilas Singh. (1921) 2 Pat. L.T. 463	625
Rangachariar v. Rangaswami Ayyangar. (1935) I.L.R. 59 Mad. 777, approved	678, 680
Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon. (1912) I.L.R. 40 Cal. 21(P.C.), applied and followed	236, 241
Ratanji, (Firm) v. Ramakrishnayya. A.I.R. 1937 Mad. 95, approved	950, 954, 957
Ratanlal Chunilal v. Municipal Commissioner for City of Bombay. (1918) I.L.R. 43 Bom. 181 (P.C.), followed ..	465, 484 485, 493
Rathnasabapathi Pillai v. Ramasami Aiyar. (1910) I.L.R. 33 Mad. 452, approved	13, 15, 17 20, 22, 23
Ravi Veeraraghavulu v. Venkata Narasimha Naidu Bahadur. (1914) I.L.R. 37 Mad. 443 (P.C.)	240
Rawji Dhanji & Co., <i>In re.</i> 1939 I.T.R. 1	600, 607
Rawstron v. Taylor. (1855) 25 L.J. Ex. 33	437
Reckitt v. Barnett, Pembroke and Slater, Ltd. [1929] A.C. 176, explained and followed	777, 797
R. E. Jones, Ltd. v. Waring and Gillow, Ltd. [1926] A.C. 670	672, 674
Regina v. Frost. (1839) 9 Car. & P. 129 ; 173 E.R. 771 ..	497
Rekhabchand Doogar v. J. R. D'Cruz. (1922) 26 C.W.N. 499, distinguished	133, 135
Rex v. Dora Harris. [1927] 2 K.B. 587	497
Rhoades, <i>In re Ex parte</i> Rhoades. [1899] 2 Q.B. 347 ..	365, 366

	PAGE
Richardson's case. (1875) L.R. 19 Eq. 588, distinguished. 876, 877, 878	
Robertson v. French. (1803) 4 East, 130; 102 E.R. 779	38
Roshan Lal v. Kanhaiya Lal. (1918) I.L.R. 41 All. 111 ..	314
Ross v. Secretary of State for India. (1915) I.L.R. 39 Mad. 781	734
Russell v. Plaice. (1854) 18 Beav. 21; 52 E.R. 9 ..	294
Rustam Singh v. Moti Singh. (1896) I.L.R. 18 All. 474	51
S	
Sabapathy Chetty v. Rengappa Naickan. (1902) I.L.R. 26 Mad. 495	268
Sadasiva Pillai v. Ramalinga Pillai. (1875) L.R. 2 I.A. 219	754
Sadasuk Janki Das v. Sir Kishan Pershad. (1918) I.L.R. 46 Cal. 663 (P.C.)	105, 209, 210
Saharabi v. Ali. (1922) 44 M.L.J. 141	339
Sahu Ram Chandra v. Bhup Singh. (1917) I.L.R. 39 All. 437 (P.C.)	504, 507 508, 509, 515, 518, 522
Sakubai v. Ganpat. (1904) I.L.R. 28 Bom. 451	747
Sambasiva Mudali, <i>In re</i> . (1930) 35 L.W. 98	323
Sami Aiyar v. Ramaswami Chettiar. (1922) 44 M.L.J. 171	365, 367
Sami Ayyangar v. Ponnammal. (1897) I.L.R. 21 Mad. 28	515
Saminatha Ayyar v. Venkatasubba Ayyar. (1903) I.L.R. 27 Mad. 21	871
Sankaralingam v. Arumugam. I.L.R. [1939] Mad. 73 ..	367, 368
San Paw v. Ma Yin. (1918) 55 I.C. 258	456, 458
Santhappa v. Holiappa Bulla. (1941) 2 M.L.J. 295 ..	7f
Sanwal Das v. The Collector of Etah. (1924) I.L.R. 46 All. 560, not followed	688, 689
Saraju Bala Dasi v. Jogemaya Dasi. (1917) I.L.R. 45 Cal. 634	456, 458
Sardar Singh v. Kunj Bihari Lal. (1922) I.L.R. 44 All. 503 (P.C.)	50
Sartaj Kuari v. Deoraj Kuari. (1888) I.L.R. 10 All. 272 (P.C.)	813
Satish Chandra Chakravarti v. Ram Doyal De. (1920) I.L.R. 48 Cal. 388 (S.B.)	163

	PAGE
Satish Chandra Giri v. Dharani Dhar Singha Ray. I.L.R. [1940] 1 Cal. 266 (P.C.)	15, 22
Sat Narain v. Sri Kishen Das. Same v. Bank of Upper India (1936) I.L.R. 17 Lah. 644 (P.C.)	109, 113, 121
Satya Charan Srimani v. Ramkinkar Banerjee. (1935) 62 C.L.J. 28	860
Sayamalal Dutt v. Saudamini Dasi. (1870) 5 Beng. L.R. 362, referred to	608, 609, 610
Searle, Hoare & Co., <i>In re</i> . [1924] 2 Ch. 325	882
Secretary of State v. Narayana Ayyar. A.I.R. 1937 Mad. 523	916
_____ v. Raghunatha Tathachariar. (1912) I.L.R. 38 Mad. 108.. .. .	905
Secretary of State for India v. Subbarayudu. (1931) I.L.R. 55 Mad. 268 (P.C.), explained and distinguished. 533, 543, 545	
_____ v. Venkatanarasimha Naidu. (1919) 11 L.W. 256, followed	533, 539
Secretary of State for India, The, v. Somayya. (1926) 51 M.L.J. 446	734
_____ v. Srinivasa Chariar. (1920) L.R. 48 I.A. 56; I.L.R. 44 Mad. 421	908
Secretary of State for India in Council v. Sarojekumar Acharjya Chaudhuri. (1934) L.R. 62 I.A. 53; I.L.R. 62 Cal. 499	580
_____ v. Shreegobinda Chaudhuri. (1932) I.L.R. 59 Cal. 1289	734
Secretary of State for India in Council, The, v. Pisipati Sunkarayya. (1910) I.L.R. 34 Mad. 493	305
Seetaramayya v. Subrahmanyam. (1934) I.L.R. 58 Mad. 936	339, 340, 342
Seetharamamma v. Suryanarayana. (1926) I.L.R. 49 Mad. 969, followed	682, 684
Seshadri Aiyangar v. Narasimhachari. (1931) 36 L.W. 408, approved	432, 435
Seshayya v. Rangiah. (1939) 1 M.L.J. 203, distinguished. 692, 694	
Seth Bansiram Jashamal v. Gunnia Naga Aiyar. (1930) 59 M.L.J. 928, dissented from	439, 443, 444, 445
Sevugan Chettiar v. Secretary of State. A.I.R. 1928 Mad. 261, approved	895, 917
Shah Abu Ilyas v. Ulfat Bibi. (1896) I.L.R. 19 All. 50 ..	28
Shamsing v. Santabai. (1901) I.L.R. 25 Bom. 551, referred to	608, 612
Shanmugasundaram Pillai v. Manicka Mudaliar. 1939 N.W.N. 192 (1), overruled	158, 160

	PAGE
<i>Shanmukam v. Nachu Ammal.</i> (1937) 1 M.L.J. 278 ..	111
..... (1936) 44 L.W. 738 ..	519
<i>Shashi Bhushan Bose v. Manindra Chandra Nandy.</i> (1916) I.L.R. 44 Cal. 890 ..	456, 458
<i>Shia Youngmen's Association, Punjab, Lahore v. Fateh Ali Shah.</i> I.L.R. [1941] Lah. 395 (F.B.), followed ..	144, 146
<i>Shibaprasad Singh v. Prayagkumari Debee</i> (<i>Shibaprasad Singh's case</i>). (1932) I.L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399 ..	421, 427
..... (1932) I.L.R. 59 Cal. 1399 (P.C.) ..	813
<i>Shivabhajan v. Secretary of State for India.</i> (1904) I.L.R. 28 Bom. 314 ..	734
<i>Shivaprasad Singh v. Prayagkumari Debee.</i> (1933) I.L.R. 61 Cal. 711 ..	456, 458
<i>Shoshinath Ghose v. Krishnasunderi Dasi.</i> (1880) I.L.R. 6 Cal. 381 (P.C.) ..	685, 686
<i>Shri Mahadeoji v. Baldeo Prasad.</i> A.I.R. 1941 Nag. 181.	578
<i>Siraj Fatma v. Mahmud Ali.</i> (1932) I.L.R. 54 All. 646 (F.B.) ..	528
<i>Sital Prasad v. Messrs. Clement Robson and Company.</i> (1921) I.L.R. 43 All. 394, not followed ..	688, 689
<i>Sital Singh v. Dalgarnjan Singh.</i> (1913) 12 All. L.J. 15 ..	498, 499
<i>Sitaramaswami v. Mahalakshamma.</i> A.I.R. 1936 Mad. 170 ..	577
<i>Sivaganga Zamindar v. Lakshmana.</i> (1885) I.L.R. 9 Mad. 188 ..	524
<i>Sivaswami Palankondan v. Perumal Palaiyondan.</i> 1931 M.W.N. (Cr.) 262 ..	588
<i>Siyadatun-nissa v. Muhammad Mahmud.</i> (1897) I.L.R. 19 All. 342 ..	871
<i>Smith v. The Earl of Effingham.</i> (1844) 7 Beav. 357; 49 E.R. 1103 ..	939
<i>Sobha Ram v. Tursi Ram.</i> (1924) I.L.R. 46 All. 693 (F.B.) ..	755
<i>Somasundaram Chettiar v. Karuppan Chettiar.</i> (1939) 51 L.W. 606, overruled ..	346, 347 348, 350, 352, 353, 354
<i>Sonachala v. Manika.</i> (1885) I.L.R. 8 Mad. 516 ..	15, 20, 21
<i>Soni Ram v. Kanhaiya Lal.</i> (1913) I.L.R. 35 All. 227 (P.C.) ..	575
<i>Sri Balusu Ramalakshamma v. The Collector of the Godavari District.</i> (1899) I.L.R. 22 Mad. 464 (P.C.) ..	539

	PAGE
<i>Sri Krishnayya Rao v. Surya Rao Bahadur Garu.</i> (1935) 69 M.L.J. 388 (P.C.) ..	174, 178 179, 180
<i>Srinath Roy v. Dinabandhu Sen.</i> (1914) I.L.R. 42 Cal. 489 (P.C.), followed ..	533, 539, 540
<i>Srinivasa Aiyangar v. Kuppuswami Aiyengar.</i> (1920) I.L.R. 44 Mad. 801, disapproved ..	503, 504, 506 510, 512, 513, 514
<i>Srinivasa Swami v. Ramanuja Chariar.</i> (1898) I.L.R. 22 Mad. 117 ..	15, 20, 21
<i>Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards.</i> (1899) I.L.R. 22 Mad. 383 (P.C.) ..	813
<i>Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo.</i> (<i>The Berhampur case</i>). (1876) I.L.R. 1 Mad. 69 (P.C.) ..	174
<i>Stahlschmidt v. Lett.</i> (1853) 1 Sm. & Giff. 415; 65 E.R. 182 ..	366
<i>Steel Brothers & Co., Ltd. v. Government.</i> (1924) I.L.R. 2 Ran. 211 ..	184
<i>Strinivasa Ayyangar v. Strinivasa Swami.</i> (1892) I.L.R. 16 Mad. 31 ..	15, 20, 21
<i>Subbaraya v. The Sub-Collector of Chingleput.</i> (1883) I.L.R. 6 Mad. 303 ..	304
<i>Subbaroya Goundan v. Ranganada Mudaliar.</i> (1915) I.L.R. 40 Mad. 93 ..	305
<i>Subbayya v. Anjaneyalu.</i> I.L.R. [1941] Mad. 389 ..	748
<i>Subbulakshmi Ammal v. Ramanujam Chetty.</i> (1918) I.L.R. 42 Mad. 52, followed ..	61, 64 339
<i>Subedar v. Ramprit.</i> A.I.R. 1929 Pat. 116 ..	
<i>Subrahmania Ayyar v. King-Emperor.</i> (1901) I.L.R. 25 Mad. 61 (P.C.) ..	324, 325, 326
<i>Subramania Ayyar v. Sabapathy Aiyar.</i> (1927) I.L.R. 51 Mad. 361 (F.B.) ..	101, 102, 109 113, 115, 119, 120, 121, 123, 125, 512, 524
..... <i>v. Sellammal.</i> (1915) I.L.R. 39 Mad. 843 ..	623
<i>Subramania Mudaliar v. The East Asiatic Co., Ltd.</i> (1936) 71 M.L.J. 663, approved ..	355, 356
<i>Subramania Reddi v. Emperor.</i> 1936 M.W.N. (Cr.) 163 ..	325
<i>Subramanyam v. Narasimham.</i> (1928) 56 M.L.J. 489, approved ..	2, 3, 5, 6, 8, 9
..... (1920) I.L.R. 43 Mad. 640.	871
<i>Subramanyan Chettiar v. Muthuswami Goundan.</i> (1940) 3 F.L.J. 157 ..	72

	PAGE
Sundaramma v. Abdul Khadar. (1932) I.L.R. 56 Mad. 490 (F.B.)	575
Sundar Lal v. Banarsi Das. I.L.R. [1939] All. 492 ..	453
Sundar Singh-Mallah Singh Sanatan Dharam High School Trust, Indaura v. The Managing Committee, Sunder Singh-Mallah Singh Rajput High School, Indaura. (1937) I.L.R. 19 Lah. 63 (P.C.)	16
Sunitibala Debi v. Dhara Sundari Debi Chowdhurani. (1919) I.L.R. 47 Cal. 175 (P.C.), applied and followed ..	439, 443, 445 447
Suraj Bansi Koer v. Sheo Persad Singh. (1879) I.L.R. 5 Cal. 148 (P.C.)	127
Sureshchandra v. Bai Ishwari. (1937) 40 Bom. L.R. 127 ..	529
Suryanarayana v. Patanna. (1918) L.B. 45 I.A. 209; I.L.R. 41 Mad. 1012	902
_____ v. Venkataramana. (1903) I.L.R. 26 Mad. 681, dissented from and overruled	164, 165, 168 169, 170, 171
_____ (1906) I.L.R. 29 Mad. 382 (P.C.)	165
Swaminatha Aiyar v. Ramier. (1924) 47 M.L.J. 671, overruled	13, 14, 15, 17 18, 22, 23
Swaminatha Ayyar v. Official Receiver, South Malabar. (1933) I.L.R. 57 Mad. 330	766
Swayamprabhai v. Muthukrishna. I.L.R. [1942] Mad. 647	655
Swift & Co. v. Board of Trade. [1925] A.C. 520	493
Syed Saib v. Meeram Bee. (1909) 20 M.L.J. 12	28
T	
Tamiz Bano v. Nand Kishore. (1927) I.L.R. 49 All. 645 ..	372
Tarakdas Acharjee Choudhury v. The Secretary of State for India in Council. (1935) 69 M.L.J. 171 (P.C.) ..	539, 542
Tatayya v. Ramakrishnamma. (1910) I.L.R. 34 Mad. 288.	50
Tavudu v. Venkataratnam. (1935) I.L.R. 59 Mad. 72, followed	927, 931
Tayerali v. Garabad Sadu. A.I.R. 1939 Bom. 252 ..	409, 594, 597
Thakurain Kusum Kumari v. Debi Prosad Dhandhanian. (1935) I.L.R. 15 Pat. 210 (P.C.)	628, 629
Tiruvengada Mudali v. Tripurasundari Ammal. (1926) I.L.R. 49 Mad. 728 (F.B.)	161
Tobin v. The Queen. (1864) 6 C.B. (N.S.) 310; 143 E.R. 1148	733
Toshanpal Singh v. District Judge of Agra. (1934) I.L.R. 56 All. 548 (P.C.)	523

Transvaal Lands Company v. New Belgium (Transvaal) Land and Development Company. [1914] 2 Ch. 488, applied and followed	231, 234
Trimbak Tumbdu v. Siparu Chaturdas. (1932) I.L.R. 57 Bom. 213	339
U	
Udaypal Singh v. Lakshmi Chand. (1935) I.L.R. 58 All. 261 (F.B.)	591, 592, 593 594, 595, 596
Udho Ram v. The Crown. (1928) I.L.R. 10 Lah. 790 ..	499
Ummathu v. Pathumma. (1921) I.L.R. 44 Mad. 817 ..	871
United Provinces, The v. Atiqa Begum. [1940] F.C.R. 110	390
Unnian v. Rama. (1885) I.L.R. 8 Mad. 415	554, 555
U Po Shin v. Ma Sein Mya. (1930) I.L.R. 8 Ran. 460 ..	28
V	
Vallabhadas Naranji v. The Collector. (1929) 56 M.L.J. 750 (P.C.)	834
Varada Pillai v. Jeevarathnammal. (1919) I.L.R. 43 Mad. 244 (P.C.)	45, 47
Varadarajulu Naidu and Kuppuswami Naidu & Co. v. Rajamanika Mudaliar. (1937) 2 M.L.J. 273	785
_____ overruled	355, 357, 358
Vasireddi Veeramma v. Butchayya. (1926) I.L.R. 50 Mad. 646	461
Vasudeva Kamath v. Lakshminarayana Rao. (1918) I.L.R. 42 Mad. 684, overruled	2, 3, 4, 5, 6 7, 9
Vasudeva Mudaliar v. Srinivasa Pillai. (1907) I.L.R. 30 Mad. 426 (P.C.)	858
Veera Basavaraju v. Balasurya Prosadarao. 1914 M.W.N. 502, dissented from and overruled	164, 165, 166 168, 169
Veerabasavaraju v. Balasurya Prasada Rao. (1918) I.L.R. 41 Mad. 998 (P.C.)	165, 166, 170
Veeranna v. Sayamma. (1928) I.L.R. 52 Mad. 398 ..	813
Veerappa v. Emperor. 1935 M.W.N. 179, followed ..	411, 412, 413
Veerasokkaraju v. Papiiah. (1902) I.L.R. 26 Mad. 792 ..	374
Velayudam Pillai v. Vaithialingam Pillai. (1912) 24 M.L.J. 66	254
Velivalli Brahmaiah, In re. (1930) I.L.R. 54 Mad. 252 distinguished	927, 931
Vellaiyappa Chetty v. Natarajan. (1931) L.R. 58 I.A. 402; I.L.R. 55 Mad. 1	423

	PAGE
Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi (The Guntur case). (1876) I.L.R. 1 Mad. 174 (P.C.) ..	166, 174 177
Vencataswara Yettiapah Naicker v. Alagoo Moottoo Serva- garen. (1861) 8 M.L.A. 327, followed	895, 910
Venkatacharyulu v. Mohana Panda. (1920) I.L.R. 44 Mad. 214	504
_____ v. Rangacharyulu. (1890) I.L.R. 14 Mad. 316, referred to and approved	807, 825 826, 827
Venkata Hanumantha Rao v. Gangayya. (1928) I.L.R. 51 Mad. 594, applied and followed	317, 318, 320
Venkatakrishniah v. Subbarayudu. (1916) I.L.R. 40 Mad. 698	593, 594
_____, followed	405, 409
Venkatanarayana v. Somaraju. I.L.R. [1937] Mad. 880 (F.B.)	214, 215
Venkataramanjulu Chetty v. Kanniah Chetty. 1933 M.W.N. 1263, considered and approved	158, 160, 162
Venkataramiah, <i>In re.</i> (1908) 11 Cr. L.J. 192	716
Venkataramier v. Vythilinga Thambiran. (1913) 1 L.W. 89	240
Venkataratnam v. Ranganayakamma. (1918) I.L.R. 41 Mad. 985 (F.B.), followed	336, 338, 339, 340, 341, 343, 344, 345
Venkataratnammah v. Secretary of State. (1912) I.L.R. 37 Mad. 364 (Footnote case)	905
Venkata Reddy v. Nataraja Setti. (1924) 46 M.L.J. 371, followed	243, 245, 246
Venkata Sastrulu v. Seetharamudu. (1919) L.R. 46 I.A. 123; I.L.R. 43 Mad. 166	902
Venkata Seshayya v. Kotiswara Rao. I.L.R. [1937] Mad. 263 (P.C.), explained	526, 529, 531
Venkata Sivayya v. Suryanarayana. 1938 M.W.N. 841, followed	636, 639
Venkatasubba Rao v. Ananda Rao. (1934) I.L.R. 57 Mad. 772	51, 52
Venkatathirisami Naidu v. Appaswami. (1933) I.L.R. 56 Mad. 886	624, 625, 629
Venkateswara Pattar v. Mankayammal. (1934) 69 M.L.J. 410, distinguished	807, 810, 812, 813, 823
Venkureddi v. Venku Reddi. (1926) I.L.R. 50 Mad. 535 (F.B.)	740, 741

	PAGE
Vennimal Pillai v. P. & O. Banking Corporation, Ltd. 1936 M.W.N. 863	519
Venugopala Naidu v. Ramanadhan Chetty. (1912) I.L.R. 37 Mad. 458	522
Vidya Varuthi v. Balusami Ayyar. (1921) I.L.R. 44 Mad. 831 (P.C.)	516
Vijaysingji v. Shivsangji. (1935) I.L.R. 59 Bom. 360 (P.C.)	174
Vijiarangam et al v. Lakshuman et al. (1871) 8 Bom. H.C.R. 244, referred to	608, 612
Viney v. Chaplin. (1858) 27 L.J. Ch. 434	793, 794
Virayya v. Pardhasarathi Appa Rao. (1933) I.L.R. 57 Mad. 190	111, 122
Visvanatha Santhasingaro v. Ramchandra Mardraja Deo. (1914) 17 M.L.T. 78	408, 593
Vudigalapudi Gadu, <i>In re.</i> (1924) 20 L.W. 916, followed. 411, 412	
Vyравan Chettiar v. Official Assignee of Madras. (1932) I.L.R. 55 Mad. 949	857
Vyравan Chetty v. Srimath Deivasikamani Nataraja Desi- kar. (1915) I.L.R. 39 Mad. 939	556

W

Watson v. Russell. (1864) 5 B. & S. 968; 122 E.R. 1090..	674, 675
Webster v. Armstrong. (1885) 54 L.J. Q.B. 236	842
Williams v. Williams. [1904] P. 145	26, 27
Woodward v. Lord Darcy. (1557) 1 Plowden, 184; 75 E.R. 282	370, 371, 372, 373
Woolf v. Horne. (1877) 36 L.T. 705	795

Y

Yahya Ally Saheb v. Secretary of State. A.I.R. 1928 Mad. 97, approved	895, 917
--	----------

Z

Zamindar of Kallikote v. Mongolopur. (1926) 51 M.L.J. 500 (F.B.)	462
Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc., <i>Devastanams.</i> (1909) I.L.R. 32 Mad. 429, approved	272, 274, 277, 278, 279
Zamorin of Calicut v. Sitarama. (1884) I.L.R. 7 Mad. 405	304

GENERAL INDEX

ACTS—

PARLIAMENT—

- 1889 :—*See* INTERPRETATION ACT.
- 1935 :—*See* GOVERNMENT OF INDIA ACT.
- 1937 :—*See* GOVERNMENT OF INDIA (ADAPTATION OF INDIAN LAWS) Order, 1937.
- 1937 :—*See* INDIA AND BURMA (EXISTING LAWS) ACT.

INDIAN—

- 1839—XXXII :—*See* INTEREST ACT.
- 1860—XLV :—*See* PENAL CODE.
- 1870—VII :—*See* COURT FEES ACT.
- 1872—I :—*See* EVIDENCE ACT.
- IX :—*See* CONTRACT ACT.
- 1877—I :—*See* SPECIFIC RELIEF ACT.
- 1882—II :—*See* TRUSTS ACT.
- IV :—*See* TRANSFER OF PROPERTY ACT.
- 1887—VII :—*See* SUITS VALUATION ACT.
- 1894—I :—*See* LAND ACQUISITION ACT.
- 1898—V :—*See* CRIMINAL PROCEDURE CODE.
- 1899—II :—*See* STAMP ACT.
- 1908—V :—*See* CIVIL PROCEDURE CODE.
- IX :—*See* LIMITATION ACT.
- 1909—III :—*See* PRESIDENCY-TOWNS INSOLVENCY ACT.
- 1913—VII :—*See* COMPANIES ACT.
- 1920—V :—*See* PROVINCIAL INSOLVENCY ACT.
- 1922—XI :—*See* INCOME-TAX ACT.
- 1923—XLII :—*See* MUSSALMAN WAKF ACT.
- 1926—XXXVIII :—*See* BAR COUNCILS ACT.
- 1930—III :—*See* SALE OF GOODS ACT.
- 1931—XXIII :—*See* PRESS (EMERGENCY POWERS) ACT.
- 1932—IX :—*See* PARTNERSHIP ACT.
- 1937—XVIII :—*See* HINDU WOMEN'S RIGHTS TO PROPERTY ACT.
- 1939—XXXV :—*See* DEFENCE OF INDIA ACT.

MADRAS—

- 1828—VII :—*See* REGULATION.
- 1859—XXIV :—*See* DISTRICT POLICE ACT.

ACTS—cont.**MADRAS—cont.**

- 1864—II :—See REVENUE RECOVERY ACT.
 1865—VII :—See IRRIGATION CESS ACT.
 1869—VIII :—See INAMS ACT.
 1900—I :—See MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT.
 1908—I :—See ESTATES LAND ACT.
 1920—V :—See DISTRICT MUNICIPALITIES ACT.
 1926—V :—See BORSTAL SCHOOLS ACT.
 1930—III :—See GAMING ACT.
 —XIV :—See MALABAR TENANCY ACT.
 1936—XI :—See DEBT CONCILIATION ACT.
 1938—IV :—See AGRICULTURISTS RELIEF ACT.

ADVANCEMENT—Doctrine of—Indian Christians—Inapplicability to—Indian Trusts Act (II of 1882), sec. 82.

Palani v. Natarajan I.L.R. [1942] Mad. 844

ADVERSE POSSESSION—Interruption of running of:—See HINDU LAW 42

ADVOCATE—Charges—Inquiry by Tribunal consisting of three members—One of them dying without signing report—Invalidity of report—R. 7 of Rules framed by Madras High Court under the Bar Councils Act—Mandatory—Indian Bar Councils Act (XXXVIII of 1926), sec. 12.

An Advocate, in re I.L.R. [1942] Mad. (F.B.) 428

—Enrolment:—See BAR COUNCILS ACT, INDIAN (XXXVIII OF 1926), ss. 8 AND 14 663

AGENCY—Authority to agent to sell goods, implied authority to receive advance:—See PARTNERSHIP ACT, INDIAN (IX OF 1932), SEC. 69 (2) 775

AGRICULTURISTS RELIEF ACT, MADRAS (IV OF 1938)—Judgment in appeal delivered after coming into force of the Act—Application for scaling down of the debt under the Act after delivery of judgment—Incompetency—Procedure to be followed by appellate Court where application for scaling down of the debt under the Act made before delivery of judgment.

Sriramareddi v. Sriramareddi I.L.R. [1942] Mad. (F.B.) 346

—:—See MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (I OF 1900), SEC. 6 (2) 550

AGRICULTURISTS RELIEF ACT, MADRAS (IV OF 1938)—

SEC. 3 (2), proviso (B)—Profession tax—Assessment—Incompetency of Court to go into question of legality or otherwise of assessment for purpose of Act.

Krishnamurthi v. Jagannadhapadhi I.L.R. [1942] Mad. 941

—, ss. 9 AND 13—Debt incurred after commencement of the Act in discharge of a debt incurred before it—Such debt governed by sec. 13 and not by sec. 9.

Thiruvengadatha v. Sannappan I.L.R. [1942] Mad. 57

—, SEC. 13 :—See AGRICULTURISTS RELIEF ACT, MADRAS (IV OF 1938), SEC. 9 57

—, SEC. 15—Arrears of rent—Records showing grant by zamindar to be service inam not subject to jodi and in the enjoyment of grantee at the time of inam settlement—Presumption, grant of melvaram—Post-settlement inam—Rent paid to landholder—Stipulation for enhanced rent—Ascertainment of proper rent—Principles governing rent—Madras Estates Land Act (I of 1908), ss. 24, 27, 28, and 52 (3).

Pappayya v. Appa Rao I.L.R. [1942] Mad. 944

—, SEC. 19—Applicability of, to decisions of Privy Council in appeals from Madras High Court—Such decisions decrees under the Act and governed by its provisions—Prerogative rights of Crown—Laws in derogation of—Competency of Indian Legislatures to make—Government of India Act, 1935, ss. 99, 100 and 110—Preliminary mortgage decree—Application for final decree, dismissal of—Order of dismissal, a decree and appealable—No revision against such order—Fresh application for final decree not precluded—Civil Procedure Code (Act V of 1908), ss. 2 (2), 96 and 115 and O, XXXIV, r. 5.

Subbayya v. Bushanarao I.L.R. [1942] Mad. 60

—, SEC. 28—Rules framed under—Rule 9 providing for rights of appeal and of second appeal from order under r. 7, not *ultra vires*.

Venkayya v. Pullayya I.L.R. [1942] Mad. 654

—, ss. 28 (1) AND 28 (2) (b) AND (c)—Rules framed under—Rule 2 providing remedy by application to Court, not *ultra vires*.

Swayamprabhai v. Muthukrishna I.L.R. [1942] Mad. 647

BAR COUNCILS ACT, INDIAN (XXXVIII OF 1926), SS. 8 AND 14—Madras Bar Council Rules 1, 3, 16 and 22—Advocate enrolled in Rangoon before separation of Burma from India—Application for enrolment as Advocate of Madras High Court after separation—Compliance with rules framed by the Madras Bar Council—Bar Council recommending exemption under proviso to r. 16—Power to order enrolment—Further stamp fee need not be paid—Exemption under art. 30 of the Stamp Act (II of 1899).

Krishnaswamy, In re I.L.R. [1942] Mad. (F.B.) 663

—Mandatory :—See **ADVOCATE** 428

BORSTAL SCHOOLS ACT, MADRAS (V OF 1926), SEC. 1 (2)—Law (General) Department Notification No. 64, dated 26th January 1927—Offender—Adolescent girl cannot be sent to Borstal School.

Public Prosecutor v. Rajam Ammal .. I.L.R. [1942] Mad. 963

C.I.F. CONTRACT :—See **CONTRACT** 33

CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 2 (2) :—See **AGRICULTURISTS RELIEF ACT, MADRAS (IV OF 1938)**, SEC. 19 60

—ESTATES LAND ACT (I OF 1908), SEC. 190 959

—SEC. 11—*Res judicata*—Applicable to appeals and miscellaneous proceedings—Judgment in one suit on same matter becoming final during pendency of appeal in another suit between same parties—Appeal affected by *res judicata* by reason of such judgment.

Chockalinga v. Sankarappa I.L.R. [1942] Mad. 677

—SS. 16, 17 AND 20 :—See **GOVERNMENT OF INDIA ACT, 1935**, SEC. 46 (2). 373

—SEC. 20, CL. (c)—Jurisdiction—Receipt of telegram accepting offer—Part of cause of action—Place of receipt—Suit entertainable by Court having jurisdiction over such place.

Sepulchre Bros. v. Khushal Das .. I.L.R. [1942] Mad. 243

—SS. 34 AND 110 AND O. XXXIV—Suit on mortgage decreed by trial Court, but reversed by High Court on appeal—Valuation for purposes of leave to appeal to Privy Council—Amount with

interest calculated up to date of decree of trial Court—Subsequent interest discretionary and not to be taken into account—Same principle applicable to money as well as to mortgage claims.

Rangasami v. Official Receiver, Coimbatore .. I.L.R. [1942] Mad. 618

CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 47—Scope of—Decree in suit for specific performance—Execution proceedings—Legal representative brought on record—Independent title to suit property—Not to claim in those proceedings—Separate suit lies.

Hamidgani v. Ammasahib .. I.L.R. [1942] Mad. (F.B.) 271

—SEC. 47 :—See **CIVIL PROCEDURE, CODE OF (ACT V OF 1908)**, SEC. 73 .. 360

—SEC. 47 :—See **PROVINCIAL INSOLVENCY ACT (V OF 1920)**, SEC. 51 (3) .. 614

—SEC. 60—Employee in a municipality drawing Rs. 100 salary—Decree obtained against him by creditor—Arrangement to collect Rs. 15 a month out of salary in satisfaction of decree—Legality of.

Subramaniam v. Satyanadham .. I.L.R. [1942] Mad. 640

—SS. 73 AND 47—Judgment-creditor who had attached property of judgment-debtor becoming heir of latter—Realization of attached property by another creditor—Right to rateable distribution of said judgment-creditor (heir) in sale-proceeds—“Principle of retainer”—Scope and applicability of—Merger—Doctrine of—Right of said judgment-creditor under sec. 47 of the Code of Civil Procedure.

Thangathammal v. Veerama .. I.L.R. [1942] Mad. 360

—SEC. 96 :—See **AGRICULTURISTS RELIEF ACT, MADRAS (IV OF 1938)**, SEC. 19 60

—SS. 100 AND 104 :—See **ESTATES LAND ACT, MADRAS (I OF 1908)**, SEC. 190 959

—SEC. 104 (2) :—See **PROVINCIAL INSOLVENCY ACT (V OF 1920)**, SEC. 51 (3) .. 614

—SEC. 110 :—See **CIVIL PROCEDURE, CODE OF (ACT V OF 1908)**, SEC. 34 .. 618

—SEC. 115 :—See **AGRICULTURISTS RELIEF ACT, MADRAS (IV OF 1938)**, SEC. 19 60

CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SS. 144 AND 151 AND O. XXI, R. 89—Restitution—Inherent powers of Court—Mortgage of family property by manager of joint Hindu family—Property alienated as self-acquired property of manager—Suit on mortgage—Other members contesting mortgagee's claim—Suit decreed—Property sold under decree—Members depositing amount under O. XXI, r. 89, and setting aside sale—Deposit attached by creditor of decree-holder and portion of deposit amount paid to such creditor—Subsequent reversal of decree on appeal—Application for restitution of amount deposited in Court—Powers of Court to grant under sec. 151, sec. 144 being inapplicable.	
<i>Rego v. Ananthamathi</i>	I.L.R. [1942], Mad. 949
See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. VIII, R. 6 (1)	836
.. .. ., O. VIII, R. 6 (1)—Defendant pleading set-off, to be deemed plaintiff within O. II, r. 2—Defendant pleading set-off in a former suit for less than the amount due to him—Later suit by defendant's assignee for balance due—Bar under O. II, r. 2.	
<i>Kathersa v. Abdul Rahim</i>	I.L.R. [1942] Mad. 836
.. .. ., O. XXI, R. 16—Decree against principal debtor—Decree amount paid by surety and transfer of decree in favour of his nominee—Nominee assigning decree in favour of <i>bona fide</i> transferee for value—Such transferee entitled to execute decree against surety—Principle in <i>Lickbarrow v. Mason</i> , applied—Transfer of Property Act (IV of 1882), sec. 41—Sale of Goods Act (III of 1930), sec. 27.	
<i>Swaminatha v. Krishna</i>	I.L.R. [1942] Mad. 225
.. .. ., O. XXI, R. 50 (2)—Petitioner, partner of a firm—Respondent's decree against firm in Small Cause Court at Khurai—Decree transferred for execution to another Court—No jurisdiction in that other Court to decide petitioner's liability under O. XXI, r. 50 (2).	
<i>Pottiswami v. Sulaiman</i>	I.L.R. [1942] Mad. 688
.. .. ., O. XXI, R. 58 :—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, R. 63	336
.. .. ., O. XXI, R. 63—Order on claim petition under r. 58 in these terms: "Petition not pressed. It is dismissed."—"Adverse order" within r. 63—Subsequent suit for declaration—Limitation, twelve months from date of order.	
<i>Cannanore Bank, Ltd. v. Madhavi</i> . I.L.R. [1942] Mad. (F.B.)	336

CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, R. 89 :—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SS. 144 AND 151	949
.. .. ., O. XXI, R. 90 :—See PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 51 (3)	614
.. .. ., O. XXI, R. 93 :—See PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 4.	691
.. .. ., O. XXI, R. 97—Application under—Requirements—Sale by Court in execution proceedings and conditions contemplated by r. 95 necessary—Original Side Rules, Madras High Court, O. XIX, r. 17.	
<i>Niladri v. Venkatarama</i>	I.L.R. (1942) Mad. 749
.. .. ., O. XXXIV :—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 34	618
.. .. ., O. XXXIV, R. 1 :—See MORTGAGE	82
.. .. ., O. XXXIV, R. 5 :—See AGRICULTURISTS RELIEF ACT, MADRAS (IV OF 1938), SEC. 19	60
.. .. ., O. XXXIV, R. 6 :—See PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 44 (2)	448
.. .. ., O. XLIII, R. 1 :—See ESTATES LAND ACT, MADRAS (I OF 1908), SEC. 190.	959
.. .. ., O. XLIV, R. 1, proviso—Scope of—Practice of Courts in Madras Presidency regarding hearing applicants.	
<i>Subba Rao v. Tata Reddi</i>	I.L.R. [1942] Mad. 746
.. .. ., O. XLIII, R. 1 (j) :—See PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 51 (3)	614
.. .. ., O. XLIII, R. 1 :—See ESTATES LAND ACT, MADRAS (I OF 1908), SEC. 190.	959
COMMON LAW—Inapplicability :—See WATER RIGHTS	431
.. .. . See Rivers	532

	PAGE
COMPANIES ACT, INDIAN (VII OF 1913), SEC. 91-B (1) — Resolution by directors authorizing receipt in advance of future calls on shares—Quorum for meeting of directors, three—Three directors only present and passing resolution —Two directors personally interested and incompetent to vote—Resolution invalid—Set off—Director not entitled to act on resolution and set off in his own favour. <i>Pandalai v. South Indian General Assurance Co., Ltd.</i> I.L.R. [1942] Mad. 230	
_____, SEC. 184—Applica- tion for shares in company by guardian on behalf of minor —Shares issued in name of minor—Contract void—Company in liquidation—Official Liquidator not entitled to claim contribution either from minor or from guardian. <i>Palaniappa v. Official Liquidator, Pasupathi Bank.</i> I.L.R. [1942] Mad. 875	
CONTEMPT OF COURT —Effect of:—See RECEIVER 933	
CONTRACT ACT, INDIAN (IX OF 1872), SEC. 72 —Mistake— Money paid under—Recovery of—Privity, if essential— Fraudulent Misrepresentation—Two innocent parties—Loss on account of fraud by third party—Who to suffer loss— Underlying principle. <i>Sowdra Bai v. Saraswathi</i> I.L.R. [1942] Mad. 669	
_____, SEC. 126—Surety—Rights of—Not exhaustive in granting relief to person in the position of surety—Applicability in India of third category of cases mentioned in <i>Duncan, Fox & Co. v. The North and South Wales Bank</i> in suitable cases for granting relief to persons standing in the position of sureties by making available to them security in the hands of creditor whose debts they discharged—Transfer of Property Act (IV of 1882), sec. 58 (e)—English mortgage—Mortgage-deed containing following provisions, namely, (i) in a certain event the date of payment was changed from one date to another date and (ii) the mortgagor should pay the cost of insurance and other charges—Character of mort- gage not changed—First provision does not amount to mortgagor not acquiring to pay the debt on a certain date and second provision does not detract from the absolute transfer to the mortgagee within sec. 58 (e). <i>Rajagopala v. Ramachandra</i> I.L.R. [1942] Mad. 851	
CONTRACT, C.I.F. —Time of payment—Absence of stipulation as regards time for payment—Conditions about shipment being satisfied, payment to be made by buyer when bill of	

lading and other necessary shipping documents are pre- sented to him at a reasonable time—Conflict between typewritten portion and printed portion in contract— Typewritten portion to prevail if they cannot be reconciled— Delivery in instalments—Breach by one party to contract in respect of one instalment—How far the other party justified in repudiating the whole contract. <i>Kesarimull v. Associated Agencies</i> .. I.L.R. [1942] Mad. 33	
COSTS :—See CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 526 661	
_____:—See PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 51 (1) 757	
COURT FEES ACT (VII OF 1870), ART. 17-B OF SCH. II —Suit for administration of estate of deceased person—Proper court-fee payable—Jurisdiction of Court—Market value of suit property—Question of jurisdiction—Preliminary stage— Interference in revision. <i>Khaja Moideen v. Abdul Gaffoor</i> .. I.L.R. [1942] Mad. 455	
_____, SEC. 7 (i) :—See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 67 (d) 438	
COURT —Contempt of :—See CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 480 587	
_____, Discretion :—See CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 540 494	
_____, Jurisdiction :—See GOVERNMENT OF INDIA ACT, 1935, SEC. 46 (2) 376	
_____: See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 20, CL. (c) 243	
_____: See COURT FEES ACT (VII OF 1870), ART. 17-B OF SCH. II 455	
_____: See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, r. 50 (2) 688	
_____, Sanction of :—See CRIMINAL PROCE- DURE, CODE OF (ACT V OF 1898), SEC. 195 158	
CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 4 (o) :—See MUSSALMAN WAKF ACT (XLII OF 1923), SEC. 10 143	
_____, ss. 54 (1) AND 56 :—See GOVERNMENT OF INDIA ACT, 1935, SEC. 270 (1) AND (2) 696	

	PAGE
CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC.	
195—Defamation—Person defamed by witness in the witness box—Private complaint—Sanction of Court not necessary—Court itself need not complain.	
<i>Nallappa Goundan v. Chinnammal</i> ..	I.L.R. [1942] Mad. 158
—Misjoinder of persons—Court ordinarily to presume prejudice.	SEC. 239
<i>Moongan v. Roshan Ali Sahib</i> ..	I.L.R. [1942] Mad. 322
—Transfer of Magistrate—Accused's request to recall prosecution witnesses for fresh examination under proviso (a) of section—Some witnesses cross-examined—Request later not to examine the rest—Whether accused could do so—Discretion of Magistrate to examine witnesses under sub-sec. (1) of section, if could be exercised then.	SEC. 350
<i>Palayan, In re</i> ..	I.L.R. [1942] Mad. 410
AND 486 (1)—Contempt of Court—Summary action by Sub-Magistrate—Appeal to District Magistrate—Latter has no power to direct First-class Magistrate subordinate to him to hear appeal.	SEC. 480
<i>D. K. Reddy, In re</i> ..	I.L.R. [1942], Mad. 587
—Transfer—Adjournment—No power to direct costs to be paid.	SEC. 526
<i>Venkatarama Chetti, In re</i> ..	I.L.R. [1942], Mad. 661
—Wide scope—Discretion—Not limited to the benefit of accused.	SEC. 540
<i>Narayana, In re</i> ..	I.L.R. [1942] Mad. 494
CRIMINAL TRIAL —Prosecution eye-witness—Evidence hostile to prosecution in lower Court—Not examined in Sessions Court—Proper procedure to be adopted in such cases—Report by police constable—Summary of a joint statement by two accused implicating them to some extent in crime—Admissibility of—Indian Evidence Act (I of 1872), sec. 27.	
<i>Guruswami, In re</i> ..	I.L.R. [1942], Mad. 77
CROWN —Prerogative rights of—Laws in derogation of—Competency of Indian Legislature:—See AGRICULTURISTS RELIEF ACT, MADRAS (IV OF 1938), SEC. 19 ..	60
DAMAGES —Suit for, against Province of Madras for wrongs of its servants:—See GOVERNMENT OF INDIA ACT, 1935, SEC. 270 (1) AND (2) ..	696

	PAGE
DEBT CONCILIATION ACT, MADRAS (XI OF 1936), ss. 4, 5, 6, 7 AND 17 —Application under sec. 4 dismissed for non-compliance with provisions of sec. 6—Fresh application in compliance—Second application also dismissed under sec. 7 to evade provisions of sec. 17—Dismissal illegal—Order quashed by writ of certiorari.	
<i>Subbaraya v. Debt Conciliation Board, Cuddalore.</i>	I.L.R. [1942] Mad. 220
17:—See DEBT CONCILIATION ACT, MADRAS (XI OF 1936), SEC. 4 ..	220
DEFENCE OF INDIA ACT (XXXV OF 1939), R. 130-A (b) — <i>Intra vires.</i>	
<i>Bhuvarama Iyengar, In re</i> ..	I.L.R. [1942] Mad. 414
DISTRICT MUNICIPALITIES ACT, MADRAS (V OF 1920), SEC. 306, CL. 28 —No provision in the Act to levy licence fees for advertisements—By-laws made by Municipality to levy such fees <i>ultra vires.</i>	
<i>Ayyar & Co. v. Srinivasulu</i> ..	I.L.R. [1942] Mad. 73
DISTRICT POLICE ACT, MADRAS (XXIV OF 1859), ss. 21 AND 53 —Scope of:—See GOVERNMENT OF INDIA ACT, 1935, SEC. 270 (1) AND (2) ..	696
ESTATES LAND ACT, MADRAS (I OF 1908), SEC. 3, CL. 5 —“Landholder”—Nature of receipts of rents of:—See Limitation Act, Indian (IX of 1908), arts. 120 and 109 ..	562
ESTATES LAND ACT (I OF 1908), SEC. 20-A:—See ESTATES LAND ACT (I OF 1908), SEC. 190 ..	959
AND 52 (3):—See AGRICULTURISTS RELIEF ACT, MADRAS (IV OF 1938), SEC. 15 ..	944
Order of District Court confirming the decision of Collector under the section—No second appeal lies to High Court.	
<i>Panthanam v. Abdul Rahman</i> ..	I.L.R. [1942] Mad. 236
of Collector under sec. 20-A—No second appeal under Act—Orders of Collector under sec. 20-A and of the District Judge on appeal therefrom, not decrees—No second appeal under Code of Civil Procedure (Act V of 1908)—Code of Civil Procedure (Act V of 1908), ss. 2, 100, 104 and O. XLIII, r. 1.	
<i>Province of Madras v. Ramaswami Ayyar.</i>	I.L.R. [1942] Mad. 959
EVIDENCE ACT, INDIAN (I OF 1872), SEC. 27:—See CRIMINAL TRIAL ..	77

	PAGE
EXECUTION —Suit by endorsee of promissory note—Decree against maker, manager of joint family—Junior member's share—Not liable in execution. <i>Ramanathan v. Muthuraman</i> I.L.R. [1942] Mad. 204	
GAMING ACT, MADRAS (III OF 1930) , SS. 3 AND 6—House in which betting on horse race took place—"Common gaming-house" as defined in sec. 3 of the Act—Paraphernalia of betting found in it—Evidence under sec. 6 of the Act. <i>Yelumalai, In re</i> I.L.R. [1942] Mad. 153	
GENERAL CLAUSES ACT (X OF 1897) , SEC. 3 (7):— <i>See</i> INCOME-TAX ACT, INDIAN (XI OF 1922), SEC. 4-A (a) (ii) 598	
GOVERNMENT OF INDIA ACT, 1935 , SS. 46 (2), 292 AND 293—India and Burma (Existing Laws) Act, 1937, sec. 1—Government of India (Adaptation of Indian Laws) Order, 1937, paragraphs 1, 9, 10 and 11—Interpretation Act, 1889 (52 and 53 Vic. ch. 63), sec. 38 (b), (c), (d) and (e)—Civil Procedure Code (Act V of 1908), ss. 16, 17 and 20—Suit for partition of movable and immovable properties situate both in Madras Presidency and Burma, filed in 1932 in Court in Madras Presidency—Burma ceasing to be part of British India in 1937—Competency of Court in Madras Presidency to continue hearing of suit for partition in respect of properties in Burma—Jurisdiction. <i>Krishnaswami v. Venugopala</i> I.L.R. [1942] Mad. 376	
....., SS. 99, 100 AND 110— Scope of:— <i>See</i> AGRICULTURISTS RELIEF ACT, MADRAS (IV OF 1938), SEC. 19 60	
....., SEC. 270 (1) AND (2)— "Act done in execution of duty"—"Duty", meaning of—Actual duty and not purported duty—Suit against police officials for damages for wrongful restraint or wrongful confinement—Acts done by officials <i>bona fide</i> though negligently in purported execution of duty—Suit not maintainable without requisite consent under sec. 270 (1)—Suit liable to be dismissed under sec. 270 (2)—Madras District Police Act (XXIV of 1859), ss. 21 and 53—Scope of—Acts of subordinate police officials justified under sec. 21—Suit against officials barred under sec. 53—Code of Criminal Procedure (Act V of 1898), ss. 54 (1) and 56—Sec. 54 (1) not controlled by sec. 56—Acts of superior police officer justified under sec. 54—"Requisition" in sec. 54 (1), cl. 9, meaning of—Includes telephone message—Superior officer entitled to order arrest through telephone message—Indian Limitation Act (IX of 1908), sec. 24 and art. 2—Sec. 24 not applicable to such suit—Art. 2 applicable—"Wrongful confinement", meaning of—No wrongful confinement of person by mere denial to him of	

	PAGE
liberty of going in conveyance of his choice or of taking with him the article desired by him—Tort—Damages, suit for—Suit for damages against Province of Madras for wrong committed by its servants—Maintainability of—Master and servant—Government, if liable for wrongful acts of its servants. <i>Maharani of Nabha v. Province of Madras</i> . I.L.R. [1942] Mad. 696	
GOVERNMENT OF INDIA ACT, 1935 , SS. 292 AND 293:— <i>See</i> GOVERNMENT OF INDIA ACT, 1935, S. 46 (2) 376	
....., SS. 293 AND 311:— <i>See</i> INCOME-TAX ACT, INDIAN (XI OF 1922), SEC. 4-A (a) (ii) 598	
GOVERNMENT OF INDIA (ADAPTATION OF INDIAN LAWS), ORDER, 1937 , PARAGRAPHS 1, 9, 10 AND 11:— <i>See</i> GOVERNMENT OF INDIA ACT, 1935, S. 46 (2) 376	
HINDU LAW —Adoption—Madras Presidency—Senior widow making adoption with consent of sapindas—Junior widow challenging same on the ground of improper motive of senior widow in making adoption—Motive of widow immaterial—Adoption valid. <i>Kanakaratnam v. Narasimha Rao</i> . I.L.R. [1942] Mad. (F.B.) 173	
....., Adoption—No formal ceremony necessary when giving and taking adopted boy—No utterance of any particular words prescribed—Giving and taking adopted boy before death of adoptive father—Performance of <i>datta homam</i> by his widow subsequent to his death, valid. <i>Muthuvayyengar v. Thiruvangadammal</i> . I.L.R. [1942] Mad. 682	
....., Adoption—Consent of sapindas—General authority—Authority given to adopt any boy at any time—Widow making adoption within reasonable time in pursuance of such authority—No change of circumstances between date of authority and date of adoption—Adoption valid. <i>Venkayya v. Sreeramulu</i> I.L.R. [1942] Mad. (F.B.) 163	
....., Adoption—Widow—Receiving adopted boy through agents appointed by her for that purpose—Valid. <i>Viyyamma v. Suryaprakasa Rao</i> I.L.R. [1942] Mad. 608	
....., Alienation—Debt due on promissory note, binding on joint family—Decree against makers personally and their respective sons limited to latter's interests in joint family assets—Makers subsequently adjudicated insolvents—Decree holder's application to make Official Receiver party to execution proceedings, rejected—Sons' interests alone in certain	

items of property belonging to joint family, thereafter sold in execution—Sale-proceeds paid rateably to creditors holding debts binding on joint family—Auction-purchaser entitled not merely to right in equity but to sons' interests absolutely in properties sold—Auction-purchaser not bound to pay other debts binding on joint family.

Sreeramulu v. Subbarami .. I.L.R. [1942] Mad. (F.B.) 738

HINDU LAW—Daughter of propositus—Alienation of reasonable portion of property by, to meet marriage expenses of her daughter's daughter whose parents are indigent—Valid—Vesting of property in a person before his title is perfected by adverse possession—Effect—Opening of succession to property—Legal consequence, vesting of property in heir at law whether he wills it or not.

Srinivasa Rao v. Seshacharlu .. I.L.R. [1942] Mad. 42

Debt—Acknowledgment made by father of prepartition debt, subsequent to partition, in schedule filed by him in insolvency proceedings against him—Debt barred by limitation but for such acknowledgment—Acknowledgment operating to extend limitation against father—Debt therefore enforceable against him—Consequently enforceable against his sons also—Indian Limitation Act (IX of 1908), sec. 19.

Mohana v. Gangaraju .. I.L.R. [1942] Mad. (F.B.) 95

Joint family—Manager—Right of, to give power of sale to mortgagee under sec. 69 of the Transfer of Property Act (IV of 1882) when executing a mortgage of joint family property for family necessity.

Paramanand Doss v. Nannulal Kanji .. I.L.R. [1942] Mad. 287

Joint family—Non-liability of junior member's share :—See EXECUTION .. 204

Maintenance—Impartible estate—Right of junior members of holder's family to maintenance—"Purusha santhathi," meaning of.

Raja Krishna Yachendra v. Raja Rajeswara Rao.
I.L.R. [1942] Mad. (P.C.) 419

Mitakshara—Joint family—Intention of co-parceners to remain joint—Transaction of division for purposes of pretence—Ineffectual to create division in status.

Ramanna v. Jagannadha .. I.L.R. [1942] Mad. (P.C.) 886

Son's liability—Pious obligation—Sale of joint family property by father—No family necessity—Sale set aside at the instance of sons to the extent of their interest in property—Suit by vendee for recovery of proportionate part of purchase price—Liability of sons to refund.

Lingayya v. Punnayya .. I.L.R. [1942] Mad. (F.B.) 502

HINDU LAW—Succession—Congenital idiot—Status of co-parcener in joint family—Share-taker though not share-enjoyer, while disqualification lasts—Can lawfully marry.

Amirthammal v. Vallimayil Ammal.

I.L.R. [1942] Mad. (F.B.) 807

Wife—Maintenance—Decree against husband for—Subsequent co-habitation—Effect of, on decree—Similarity between such decree and order for permanent alimony in decree for judicial separation.

Venkayya v. Raghavamma .. I.L.R. [1942] Mad. 24

HINDU WOMEN'S RIGHTS TO PROPERTY ACT (XVIII OF 1937), SEC. 3, CLS. (2) AND (3)—Nature of interest taken by widow under—Rule of survivorship put an end to—Property in her hands liable for the payment of her husband's debts and liable to be attached by her husband's creditors.

Saradambal v. Subbarama Ayyar .. I.L.R. [1942] Mad. 630

HUSBAND AND WIFE—Maintenance decree—Subsequent cohabitation—Effect of :—See HINDU LAW .. 24

INAM—Service—Presumption—Melwaram—Post settlement Inam :—See AGRICULTURISTS RELIEF ACT (IV OF 1938), SEC. 15 .. 944

Grant—Construction of :—See IRRIGATION CESS ACT, MADRAS (VII OF 1865), SEC. 1, PROVISIO .. 893

INAMS ACT, MADRAS (VIII OF 1869), SEC. 1 :—See IRRIGATION CESS ACT, MADRAS (VII OF 1865), SEC. 1, PROVISIO .. 893

INCOME-TAX ACT, INDIAN (XI OF 1922), SEC. 2 (6-A)—Company—Profits—Issue of bonus shares—Not "dividend" within the meaning of the section.

Commissioner of Income-tax v. Ramaswamy.

I.L.R. [1942] Mad. 182

ss. 4-A (a) (ii), 4-A (a) (iii) AND 4-B—"British India," meaning of—Person residing in Burma before 1937, resident of British India within sec. 4-B in considering residence during ten or seven years referred to therein—Government of India Act, 1935, ss. 293 and 311—General Clauses Act (X of 1897), sec. 3 (7).

Commissioner of Income-tax, Madras v. Papammal.

I.L.R. [1942] Mad. 598

SEC. 4 (3) (i)—Trust deed providing for borrowing by managing trustee for his own purposes on security of trust properties and for selling them for floating companies—Trust not wholly for charitable purpose within sec. 4 (3) (i).

Commissioner of Income-tax, Madras v. G. D. Naidu Industrial Educational Trust .. I.L.R. [1942] Mad. 921

	PAGE
INCOME-TAX ACT, INDIAN (XI OF 1922), SEC. 16 (1) (c)— Revocable settlement—Income arising from, in 1938–39— Assessment year, 1939–40—Amending Act coming into force on 1st April 1939—Inclusion of such income as part of income of assessee—Valid. <i>Commissioner of Income-tax v. Maharaja of Pithapuram.</i> I.L.R. [1942] Mad. 91	
_____, SEC. 26-A—Instru- ment of partnership—Statement of individual shares of partners necessary before instrument can be registered under section—Minors as a body given a share in the instrument with rights of survivorship amongst themselves—Instrument cannot be registered under section. <i>Commissioner of Income-tax v. Firm of Abdulla Sahib.</i> I.L.R. [1942] Mad. 281	
_____, SEC. 52—Submis- sion of income-tax return alleged to be false by agent of firm under power-of-attorney—Partners of firm and their agent charged with offences under the section and under ss. 193 and 196, Indian Penal Code—Legality of prosecution—"Person" in sec. 52 of the Income-tax Act includes person duly autho- rized. <i>Inspecting Asst. Commissioner of Income-tax v. Javerbhai.</i> I.L.R. [1942] Mad. 328	
INDIA AND BURMA (EXISTING LAWS) ACT, 1937, SEC. 1 :— <i>See</i> GOVERNMENT OF INDIA ACT, 1935, SEC. 46 (2)	376
INTEREST —Equitable jurisdiction of Courts to award :— <i>See</i> LIMITATION ACT, INDIAN (IX OF 1908), ARTS. 120 AND 109	562
____—Inherent jurisdiction of Court to grant :— <i>See</i> PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 51 (1)	757
____—Partition arrangement—"Ovelty"—Agreement to pay certain sum to equalise shares in partition—No specific provision to pay interest on said sum—Liability to pay interest—Equity—Interest Act (XXXII of 1839), sec. 1. <i>Rajalamma v. Butchiramayya</i> I.L.R. [1942] Mad. 464	
____—Power of Court to grant :— <i>See</i> PROVINCIAL INSOL- VENCY ACT (V OF 1920), SEC. 4	691
____—Subsequent Interest discretionary :— <i>See</i> CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 34	618
INTEREST ACT (XXXII OF 1839), SEC. 1 :— <i>See</i> INTEREST	464
INTERPRETATION ACT, 1889 (52 AND 53 VIC. CH. 63), SEC. 38 (b), (c), (d) AND (e) :— <i>See</i> GOVERNMENT OF INDIA ACT, 1935, SEC. 46 (2)	376

	PAGE
INTRA VIRES :— <i>See</i> DEFENCE OF INDIA ACT (XXXV OF 1939), R. 130-A (b)	414
IRRIGATION CESS ACT, MADRAS (VII OF 1865), SEC. 1, PROVISO 1—"Engagements with the Government"— Measure of extent—Physical conditions of irrigation channels at village boundary and not area of land cultivated wet— <i>Urlam case</i> , principles of—Applicable to whole inam villages also—Right of inamdar to supply of water free of separate charge—Extent of—Inam grant—Construction of—"Kattu- guthagai village"—Meaning of—Beds of irrigation channels in inam village, if vest in inamdar—Madrass Inams Act (VIII of 1869), sec. 1. <i>Secretary of State for India v. Vidhya Varada Thirtha Swamigul</i> I.L.R. [1942] Mad. (P.C.) 893	
JURISDICTION :— <i>See</i> GOVERNMENT OF INDIA ACT, 1935, SEC. 46 (2)	376
____—Court :— <i>See</i> CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 20, CL. (c)	243
____, O. XXI, R. 50 (2)	688
LAND ACQUISITION ACT (I OF 1894), SEC. 23— Market price— Lease for a term from East India Company with prospect of having land converted into ryotwari tenure—Lessee's interest in the unexpired term of lease together with the added value arising from such prospect to be valued in fixing market price. <i>Parasuram Byas v. Sub-Collector, Rajahmundry.</i> I.L.R. [1942] Mad. 831	
LANKAS— Accretions—Re-formations :— <i>See</i> RIVERS	532
LIMITATION— Starting point of :— <i>See</i> PRESS. (EMERGENCY POWERS) ACT, INDIAN (XXIII OF 1931), SEC. 23	9
LIMITATION ACT, INDIAN (IX OF 1908), SS. 4 AND 12— Appeal against decree—Period of limitation expired during summer vacation—Extension of time, under sec. 4 of the Act, till opening of Court—Instead of filing appeal, copy application filed under sec. 12 of the Act on the date of opening— Extension of time under both sections cannot be combined. <i>Kamaraju v. Saramma</i> I.L.R. [1942] Mad. 868	
____, SEC. 14—Official Receiver filing an application under ss. 53 and 54 of Provincial Insolvency Act (V of 1920) for setting aside alienations by insolvents—Annulment of adjudication—Creditor instituting suit under sec. 53 of Transfer of Property Act (IV of 1882) for avoiding the said alienations—Computation of period of	

limitation of suit—Period taken by Official Receiver in prosecuting applications under ss. 53 and 54—Creditor not entitled to the exclusion of—Competency of creditor to file suit during pendency of insolvency proceedings.

Rama v. Gangi Reddi I.L.R. [1942] Mad. 862

LIMITATION ACT, INDIAN (IX OF 1908), SEC. 19—Acknowledgment of liability—Initialing of, sufficient—Full signature, not necessary.

Rajah of Tarla v. Rama Rao I.L.R. [1942] Mad. 927

—Endorsement on promissory note of payment without appropriation towards principal or interest—Payment endorsed “towards promissory note”—“Towards”, meaning of—Such endorsement, acknowledgment of liability within sec. 19.

Venkata Chelamiah v. Annapoornamma .. I.L.R. [1942] Mad. (F.B.) 590

—:—See
HINDU LAW 95

—, ss. 19 AND 20—
Difference between—Part-payment by mortgagor after parting with equity of redemption—Mortgagor still personally liable for debt—Mortgage kept alive by such part-payment under sec. 20 as regards all persons liable including transferee of equity of redemption.

Thayyanayaki v. Sundarappa I.L.R. [1942] Mad. 308

Payment generally towards debt and endorsement of such payment in general terms—Such open payment not saving limitation under sec. 20—But endorsement valid as acknowledgment under sec. 19—Limitation saved if acknowledgment expressly pleaded.

Ramayya v. Anjappa I.L.R. [1942] Mad. 405

—, ss. 20 AND 21—
Hindu law—Debt—Loan incurred by Hindu father and his youngest son for family purpose—Death of father—Subsequent partition between sons—Under partition, debt agreed to be discharged by youngest son—Payment of interest by him thereafter—Period of limitation not extended against his brothers by such payment.

Rengaswami v. Sivaprakasam I.L.R. [1942] Mad. (F.B.) 251

—, SEC. 24:—See
GOVERNMENT OF INDIA ACT, 1935, SEC. 270 (1) AND (2) .. 696

—, ART. 2:—See
GOVERNMENT OF INDIA ACT, 1935, SEC. 270 (1) AND (2) .. 696

LIMITATION ACT, INDIAN (IX OF 1908), ARTS. 120 AND 109—Dispute about succession to zamindari—Recognition of one of the contestants by Collector as “landholder” within sec. 3, cl. 5, of the Madras Estates Land Act (I of 1908)—Entry into possession by him and collection of rents as “landholder”—Nature of receipt of rents—Final decision by civil Court in a suit by the other contestant recognizing the other contestant as being entitled to zamindari—Suit by first contestant for recovery of mesne profits—Art. 120 and not art. 109 applicable—Equitable jurisdiction of Courts to award interest—Expenses of management—Consolidated allowance—Principle underlying grant of.

Krishnayya Rao v. Maharaja of Pithapuram.
I.L.R. [1942] Mad. 562

—, ART. 181—Preliminary decree in mortgage suit—Provision to pay money in periodical instalments—Defaults in payment—Period of limitation not to be computed only when the first default occurs—Cause of action arises on every fresh default.

Gopal v. Alagirisami I.L.R. [1942] Mad. 770

LIMITATION—Madras Revenue Recovery Act (II of 1864), sec. 38—Confirmation by Deputy Collector of revenue sale under—Application to Collector under cl. 3 (3) of Regulation VII of 1828—Final Order by Collector—Madras Revenue Recovery Act (II of 1864), sec. 59—Six months' period for application to civil Court for redress to be computed from date of final order by Collector and not from the date of confirmation of sale by Deputy Collector.

Venkata Narasimhacharyulu v. Secretary of State for India.
I.L.R. [1942] Mad. (F.B.) 264

MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (I OF 1900), SEC. 6 (2)—Jenmi—Obtaining of decree for arrears of rent—Allowing it to be barred by time—Right to set-off against kanom amount and value of improvements—Such decree for rent not liable to be scaled down under Madras Agriculturists Relief Act (IV of 1938).

Narayanan v. Chathukutti I.L.R. [1942] Mad. 550

MALABAR TENANCY ACT, 1929 (XIV OF 1930), SEC. 20, CL. (5)—“Requires the holding *bona fide*”—Meaning of.

Narikkal Chathan v. Kesavan Namboodri.
I.L.R. [1942] Mad. 133

MERGER—Doctrine of:—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 73 360

MINOR—Decree against—Setting aside on ground of gross negligence of guardian—Suit therefor by minor, competent.

Egappa v. Ramanathan I.L.R. [1942] Mad. 526

	PAGE
MINOR —Application of shares on behalf of contract void :— <i>See</i> COMPANIES ACT, INDIAN (VII OF 1913), SEC. 184	875
MISTAKE —Money paid under—Recovery of :— <i>See</i> CONTRACT ACT, INDIAN (IX OF 1872), SEC. 72	669
MORTGAGE —Equitable mortgage—Deposit of title deeds—Unregistered “collateral security bond”—Equitable mortgage invalid—Subsequent mortgage—Suit on equitable mortgage—Subsequent mortgagee not proper party—Proper decree—Civil Procedure Code (Act V of 1908), O. xxxiv, r. 1—Transfer of Property Act (IV of 1882), sec. 59. <i>Krishnaswami v. Kamalamma</i> I.L.R. [1942] Mad. (P.C.). 82	
MUSSALMAN WAKF ACT (XLII OF 1923) , SEC. 10—Proper Court to try an offence under—Sec. 4 (o), Code of Criminal Procedure (Act V of 1898). <i>Syed Ismail Sahib v. Ethikasha Sarguru</i> . I.L.R. [1942] Mad. 143	
ORIGINAL SIDE RULES, HIGH COURT, MADRAS , O. XLV, R. 1, CL. (d)—Interpretation of—Originating summons under, for an order directing payment into Court of money actually in the hands of executors, administrators or trustees—Competency of—Originating summons for similar order in respect of moneys which ought to be in their hands—Incompetency of. <i>Venugopala v. Embaru</i> I.L.R. [1942] Mad. 137	
....., O. XIX, R. 17 :— <i>See</i> CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, R. 97	749
OWELTY :— <i>See</i> INTEREST	464
PARTNERSHIP ACT, INDIAN (IX OF 1932) , SEC. 69—Registration of firm—Condition precedent to its right to institute suit—Suit filed before registration—Registration subsequent to suit—Defect not cured—Suit, dismissal of. <i>Ponnuchami v. Muthusami</i> I.L.R. [1942] Mad. 355	
PARTNERSHIP ACT, INDIAN (IX OF 1932) , SEC. 69 (2)—Applicable to suit filed on behalf of firm only—Inapplicable to suit filed in name of individual partner—Contract by agent on behalf of individual partner—Suit thereon by individual partner, maintainable—Principal and agent—Contract by agent to sell sandalwood—Power of attorney, construction of—Agent authorized to sell goods—Implied authority to receive advance—Power to sell implying power to receive price of goods sold—Agent purporting to receive	

	PAGE
portion of advance by adjusting his own debts to vendee—Contract not rendered totally invalid thereby—Suit for refund of advance paid—Principal liable to refund only moneys actually paid. <i>Goverdondoss Takersey v. Abdul Rahiman</i> . I.L.R. [1942] Mad. 775	
PENAL CODE, INDIAN (ACT XLV OF 1860) , SS. 193 AND 196 :— <i>See</i> INCOME-TAX ACT, INDIAN (XI OF 1922), SEC. 52	328
....., SEC. 294-A—Accused conducting lottery—No drawing of ticket or number—Not guilty under either part of the section—Meaning of the word “drawing” in the section. <i>Public Prosecutor v. Kalkura</i> I.L.R. [1942] Mad. 802	
PERMANENT SETTLEMENT SANAD —Construction of :— <i>See</i> RIVERS	532
POWER OF ATTORNEY —Construction of :— <i>See</i> PARTNERSHIP ACT, INDIAN (IX OF 1932), SEC. 69 (2)	775
PRACTICE —Courts, Madras Presidency :— <i>See</i> CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XLIV, R. 1, PROVISIO	746
PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909) , SS. 52 AND 60—Future salary of insolvent—Salary below Rs. 100—Official Assignee not entitled to prospective order under sec. 60 regarding such salary—Right of Official Assignee to apply for and get portion of such salary after receipt by insolvent. <i>Official Assignee, Madras v. D'Silva</i> I.L.R. [1942] Mad. 199	
....., SEC. 60 :— <i>See</i> PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909), SEC. 52	199
....., SEC. 68—Official Assignee—Compromise with creditor—Omission to obtain leave of Court—Validity of. <i>Balakrishna Odayar, In re</i> I.L.R. [1942] Mad. 189	
PRESS (EMERGENCY POWERS) ACT, INDIAN (XXIII OF 1931) , SEC. 23—“Order” means notified order—Limitation. <i>Krishnamurthi, In re</i> I.L.R. [1942] Mad. (S.B.) 9	
PRESUMPTION :— <i>See</i> CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 239	322

PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 4—Property of judgment-debtor sold in execution subsequent to his insolvency—Sale set aside on application by Official Receiver—Subsequent application by purchaser for refund of purchase price and poundage together with interest, ordered—Application by Official Receiver to review said order relating to interest, rejected—Further application to insolvency Court to set aside order of executing Court, not maintainable—Code of Civil Procedure (Act V of 1908), O. XXI, r. 93—Power of Court to grant interest under.

Mallikarjuna v. Official Receiver, Kistna I.L.R. [1942] Mad. 691

AND 25—Petition by creditor to adjudicate debtor insolvent—Relationship of creditor and debtor denied by latter—Question complicated—Power of insolvency Court to dismiss petition for adjudication and refer parties to suit—No such power.

Gangi Reddi v. Narasimha I.L.R. [1942] Mad. 147

PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 4 147

Substituted creditor—Not bound to prove the qualification of the original petitioning creditor.

Venkataratnam v. Venkatayya I.L.R. [1942] Mad. 316

25 :—See PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 4 .. 147

Scope :—See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 53 1

Code of Civil Procedure (Act V of 1908), O. XXXIV, r. 6—Mortgage decree against insolvent—Order of discharge in favour of insolvent—Subsequent execution of mortgage decree—Sale proceeds of mortgaged property insufficient to discharge mortgage debt—Right of decree-holder to apply for personal decree for balance against insolvent.

Chokkalinga v. Manicka I.L.R. [1942] Mad. 448

punging creditor's name from list of creditors—No power in Court to direct refund of dividend previously paid to such creditor.

Gangaraju v. Lakshminarayanamurti .. I.L.R. [1942] Mad. 879

PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 51—"The benefit of the execution", meaning of—Property sold in execution of decree—Property purchased by decree-holder with leave to bid and set off—Application by Official Receiver for payment of sale price—Decree-holder not entitled to restore property instead of paying price.

Bhimaji Motiji, Firm of v. Official Receiver, Bellary.
I.L.R. [1942] Mad. 635

Insolvency petition filed on certain date—Order of Judge on the same day to check and file—Checked and filed on the same day—Order of Judge directing petitioner to pay costs of publication on a later date—Costs paid on the later date—Order of adjudication thereafter—Petition to be deemed to have been admitted within sec. 51 (1) on the first date and not on the day when costs of publication were paid—Sale of properties in three lots on one date under one proclamation—Sale of all lots on that date—Whole of purchase price of two lots and twenty-five per cent of the price on third lot paid into Court on that day—The balance of twenty-five per cent of the purchase price of third lot paid into Court on a later date—Intervention of insolvency between the two payments—The whole of the purchase price of the lots distributed rateably among certain creditors under sec. 73 of the Code of Civil Procedure—Application by Official Receiver against creditors for refund of whole amount—Creditors entitled to retain the purchase price of the first two lots—Creditors liable to refund the whole of purchase price of third lot with interest—Inherent jurisdiction of Court—Creditors entitled to costs of execution and not to costs of suit.

Official Receiver, West Tanjore v. Sambasiva.
I.L.R. [1942] Mad. 757

Applicable to sales effected before order of adjudication only—Civil Procedure Code (Act V of 1908), ss. 47 and 104 (2) and O. XXI, r. 90 and O. XLIII, r. 1 (j)—Property sold in execution of mortgage decree subsequent to adjudication of judgment-debtor—Official Receiver not made party in execution—Application by Official Receiver to set aside sale, dismissed—Appeal against order—Appeal allowed—Second appeal lies against appellate order—Execution sale held invalid.

Guravaiah v. Rangaiah I.L.R. [1942] Mad. 614

RECEIVER—Nature of possession of—Decree of competent Court in favour of a person declaring charge on certain property—Property vested in a receiver of Court—Person guilty of

	PAGE
contempt of Court in attaching said property without permission of Court—Effect of—Decree not affected by said contempt of Court.	
<i>Subramania v. Thandavamurthi</i> .. I.L.R. [1942] Mad. 933	
REGULATION VII OF 1828 , CL. 3 (3) :—See LIMITATION ..	264
RETAINER —Principle of :—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 73 ..	360
REVENUE RECOVERY ACT, MADRAS (II OF 1864) —Arrears of revenue—Pattadar—Defaulter—Sale of land of a pattadar—Death of pattadar before sale—Sale infructuous and no title would pass to purchaser—Procedure to be followed in case of death of defaulter before sale.	
<i>Thiruvengadam v. Muthusami</i> .. I.L.R. [1942] Mad. 300	
....., ss. 38	
AND 59 :—See LIMITATION ..	264
RIVERS —Bed of—Public navigable river in Madras Presidency—Ownership of, in Crown—Tidality not essential—Rule of English common law inapplicable—Permanent settlement sanad—Construction of—Long enjoyment by zamindar of formations in bed of public navigable river—Recognition of enjoyment, by Government officials—Ineffective in absence of proof of adverse possession—Lankas—Lateral accretions—Re-formations <i>in situ</i> —Ownership of.	
<i>Maharaja of Pithapuram v. Secretary of State for India.</i>	
I.L.R. [1942] Mad. 532	
SALE OF GOODS ACT (III OF 1930) , SEC. 27 :—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, R. 16 ..	225
SET OFF :—See COMPANIES ACT, INDIAN (VII OF 1913), SEC. 91-B (1) ..	230
—Plea of :—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. VIII, R. 6 (1) ..	836
—: See MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (I OF 1900), SEC. 6 (2) ..	550
SPECIFIC RELIEF ACT (I OF 1877) , SEC. 42—Consequential relief—Suit for declaration of title to office of Mahant of a mutt and for possession of office—No prayer for possession of properties attached to office—Such suit barred under sec. 42—Separation of office from its endowments not permissible.	
<i>Kandaswami v. Vagheesam</i> .. I.L.R. [1942] Mad. (F.B.). 13	

	PAGE
STAMP ACT (II OF 1899) , ART. 30—Exemption under :—See BAR COUNCILS ACT, INDIAN (XXXVIII OF 1926), SS. 8 AND 14 ..	663
SUITS VALUATION ACT (VII OF 1887) , SEC. 8 :—See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 67 (d) ..	438
TORT —Damages—Suit for, against Province of Madras for wrong committed by its servants :—See GOVERNMENT OF INDIA ACT, 1935, SEC. 270 (1) AND (2) ..	696
TRANSFER OF PROPERTY ACT (IV OF 1882) , SEC. 41 :—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, R. 16 ..	225
....., SEC. 53—	
Alienation of immovable property by debtor before adjudication—Suit by creditor to set aside alienation—Leave of Insolvency Court not necessary—Provincial Insolvency Act (V of 1920), sec. 28—Scope.	
<i>Chidambaram v. Sellakumara</i> .. I.L.R. [1942] Mad. (F.B.). 1	
....., SEC. 58 (e)—	
English mortgage :—See CONTRACT ACT, INDIAN (IX OF 1872), SEC. 126 ..	851
....., SEC. 59 :—See	
MORTGAGE ..	82
....., SS. 67 (d) AND	
100—Right of one of several co-mortgagees to recover his share of mortgage—Other co-mortgagees to be made defendants on refusal to be plaintiffs—Suit to be valued and court-fee paid on full amount due under mortgage—Same principle applicable to charges—Court Fees Act (VII of 1870), sec. 7 (i)—Suits Valuation Act (VII of 1887), sec. 8.	
<i>Kailasa v. Sundaram</i> .. I.L.R. [1942] Mad. 438	
....., SEC. 69 :—See	
HINDU LAW ..	287
....., SEC. 100 :—See	
TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 67 (d) ..	438
TRUSTS ACT, INDIAN (II OF 1882) , SEC. 82 :—See ADVANCEMENT.	844
TYPEWRITTEN PORTION —Printed portion—Conflict between, in contract—Which to prevail :—See CONTRACT ..	33
ULTRA VIRES :—See AGRICULTURISTS RELIEF ACT, MADRAS (IV OF 1938), SEC. 28 ..	654
—:—See AGRICULTURISTS RELIEF ACT, MADRAS (IV OF 1938), SS. 28 (1) AND 28 (2) (b) AND (c) ..	647

	PAGE
ULTRA VIRES :—See DISTRICT MUNICIPALITIES ACT, MADRAS (V OF 1920), SEC. 306, CL. 28	73
WATER RIGHTS —Irrigation—Lands in foreshore of rigationir tank subject to submersion of water from tank from time immemorial during several weeks in the year—Land owners putting up bunds to prevent submersion, resulting in inter- ference with customary supply of water to ryots in ayacut of tank—Right of ryots to mandatory injunction against land owners for removal of such bunds—Principles of English common law—Inapplicability. <i>Nallamuthu v. Thirumalai</i> I.L.R. [1942] Mad. 431	
WRIT OF CERTIORARI :—See DEBT CONCILIATION ACT, MADRAS (XI OF 1936), SEC. 4	220

THE INDIAN LAW REPORTS (MADRAS SERIES)

APPELLATE CIVIL—FULL BENCH.

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

CHIDAMBARAM CHETTIAR (DIED) AND FOUR OTHERS
HIS LEGAL REPRESENTATIVES (PLAINTIFF AND NIL),
APPELLANTS,

1941,
September 1.

v.

SELLAKUMARA GOUNDAN AND THREE OTHERS
(DEFENDANTS), RESPONDENTS.*

*Transfer of Property Act (IV of 1882), sec. 53—Alienation of
immovable property by debtor before adjudication—Suit
by creditor to set aside alienation—Leave of Insolvency Court
not necessary—Provincial Insolvency Act (V of 1920),
sec. 28—Scope.*

Held by the Full Bench: A suit by a creditor under
section 53 of the Transfer of Property Act to set aside an
alienation made by the debtor before he is adjudged an
insolvent is maintainable without the leave of the Insolvency
Court, but if the creditor desires to make the Official
Receiver or Official Assignee a party to the suit, he can only
do so with the consent of the Insolvency Court.

A suit under section 53 of the Transfer of Property Act
is not a suit in respect of the property of the insolvent, but
is a suit in respect of property which had been the property
of the insolvent and which he had transferred in fraud of his
creditors. Such a suit does not fall within the prohibition

* Appeals Nos. 161 of 1938 and 251 of 1939.

CHIDAMBARAM
v.
SELLAKUMARA. mentioned in section 28 of the Provincial Insolvency Act. Moreover, the very definite right given by section 53 of the Transfer of Property Act to a creditor cannot be taken away without an express provision by the Legislature to this effect and there is nothing in the Provincial Insolvency Act which can be read as taking away his right.

Subramanyam v. Narasimham(1) approved.

Vasudeva Kamath v. Lakshminarayana Rao(2) overruled.

APPEALS against the decrees of the Court of the Subordinate Judge of Coimbatore in Original Suit Nos. 214 of 1936 and 176 of 1937 respectively.

These appeals at first came on for hearing before PANDRANG ROW and SOMAYYA JJ. who made the following

ORDER OF REFERENCE TO THE FULL BENCH:—

SOMAYYA J.—The question that arises in these appeals is whether leave of the Insolvency Court is required for a suit under section 53 of the Transfer of Property Act brought by a creditor to set aside an alienation made by the debtor before he was adjudged an insolvent.

On this question there is a direct decision of this Court in *Vasudeva Kamath v. Lakshminarayana Rao*(2). The lower Court dismissed the suit relying on the above decision as indeed it was bound to do.

The plaintiff appeals and contends that the above decision needs reconsideration and that the entire reasoning of the learned Judges in that case has been dissented from by WALLACE and THIRUVENKATACHARI JJ. in *Subramanyam v. Narasimham*(1).

In the latter case, a decree-holder attached certain property of his judgment-debtor which had been alienated to a third party. On a claim petition filed by the vendee the attachment was raised and the decree-holder filed a suit under Order XXI, rule 63, Civil Procedure Code, to set aside the order on the claim petition and to have it declared that the alienation was in fraud of creditors. Before this suit was filed the debtor was adjudged an insolvent and the suit was filed without the leave of the Insolvency Court. Objection was taken that the suit was bad for want of leave of the Insolvency Court and relying

(1) (1928) 56 M.L.J. 489.

(2) (1918) I.L.R. 42 Mad. 684.

on the decision in *Vasudeva Kamath v. Lakshminarayana Rao*(1) PHILLIPS J. held that the suit was bad for want of requisite leave. On appeal under section 15 of the Letters Patent, it was held that no leave was required. Dealing with the decision in *Vasudeva Kamath v. Lakshminarayana Rao*(1) both WALLACE and THIRUVENKATACHARIAR JJ. in separate but concurrent judgments pointed out that the reasoning of the Judges in that case could not be accepted. Ultimately, they held that in any event an adverse order on a claim petition gave the individual creditor a special right of action personal to him and that this right could be exercised by him without any leave from the Insolvency Court. They therefore did not expressly dissent from the decision in *Vasudeva Kamath v. Lakshminarayana Rao*(1).

Though the decision is ultimately rested on this ground, we find that there is considerable force in the argument of Mr. K. V. Ramachandra Ayyar for the appellant that the reasoning of the decision in *Subramanyam v. Narasimham*(2) is a dissent on every point from the reasoning in the earlier case.

In fact, it is doubtful how far the distinction drawn by WALLACE and THIRUVENKATACHARIAR JJ. is supportable and whether the two decisions can stand alongside of each other.

We therefore think that it is desirable that the question must be considered by a Full Bench.

Even apart from the dissent expressed in the latter case, we think that the decision in *Vasudeva Kamath v. Lakshminarayana Rao*(1) should be reconsidered.

In a case where a debtor alienates his property under circumstances which render it voidable by the creditors under section 53 of the Transfer of Property Act, the alienation is binding on the debtor. If avoided by the creditors who alone can do so, and there is a surplus, it goes to the vendee. The title to the property continues to be in the vendee subject only to the rights of the creditors. When, after such an alienation, the debtor is adjudged an insolvent, it is clear that the property itself does not vest in the Official Receiver.

In a case where the property had ceased to be that of the insolvent and a creditor desires to fight the alienee and have it cleared that the alienation is bad against him and other

(1) (1918) I.L.R. 42 Mad. 684.

(2) (1928) 56 M.L.J. 489.

CHIDAMBARAM
v.
SELLAKUMARA.

creditors, it is difficult to see how such a suit requires the leave of the Insolvency Court. The right of the creditors to file suits against strangers can be taken away only by express language. Further, the decision in *Vasudeva Kamath v. Lakshminarayana Rao*(1) is based mainly on the reasoning contained on page 686 :

“ A suit by a judgment-creditor such as I have mentioned without the leave of the Court, would, I think, be in contravention of this section and would enable the judgment-creditor to obtain satisfaction of his decree out of the property declared in the suit to be the property of the insolvent ”.

This reasoning appears to us to be erroneous. At any rate after the Transfer of Property Act was amended, the benefit of success goes to all the creditors. Once the creditor's suit succeeds, the right to realize the property and to distribute the proceeds will be that of the Official Receiver.

On the other side it may be suggested that the Official Receiver can file the suit under section 53 of the Transfer of Property Act in the ordinary civil Court as the statutory representative of all the creditors and that, where there is a representative of the creditors who can and ought ordinarily to take whatever steps are necessary in their interests, an individual creditor ought not to exercise that right at any rate without the leave of the Insolvency Court which will ordinarily give the leave only if the Official Receiver declines to act. Would a suit by an individual creditor be an interference with the administration of the estate by the Official Receiver ?

If an individual creditor files the suit which has to be a representative one, is the Official Receiver a necessary party to it and would the decision in such a suit bind the Official Receiver even if he is not a party ? In reason, it ought to, for he represents all the creditors and the suit is now at any rate one on behalf of all the creditors.

We are not impressed by the distinction sought to be drawn by the appellant's Advocate that in a case where the alienation is beyond two years before the insolvency, the Official Receiver cannot move the Insolvency Court under section 53 of the Provincial Insolvency Act (section 55 of the Presidency-towns Insolvency Act) and that in such a case the prohibition under

(1) (1918) I.L.R. 42 Mad. 684.

section 28 of the Provincial Insolvency Act does not apply. In fact, in *Vasudeva Kamath v. Lakshminarayana Rao*(1) the alienation was beyond two years before the insolvency but this was evidently not thought to be material. CHIDAMBARAM
v.
SELLAKUMARA.

We therefore refer the following question to a Full Bench :—

“ Is a suit by a creditor under section 53 of the Transfer of Property Act to set aside an alienation made by the debtor before he is adjudged an insolvent maintainable without the leave of the Insolvency Court ? ”

These appeals then came on for hearing before the Full Bench constituted as above.

ON THE REFERENCE :

K. V. Ramachandra Ayyar for appellants.—Where a creditor files a suit under section 53 of the Transfer of Property Act to set aside an alienation made by a debtor before he was adjudged an insolvent, no leave of the Insolvency Court is necessary ; vide *Subramanyam v. Narasimham*(2). The reasoning in that case supports the contention of the appellants and runs counter to the decision in *Vasudeva Kamath v. Lakshminarayana Rao*(1) which supports the case of the respondents. The latter decision is wrong. When property is alienated by the debtor the vendee has the title to that property till the alienation is set aside ; Vide section 53 of the Transfer of Property Act. The sale is voidable and it is avoided only after a creditor files a suit and obtains a declaration that the sale is bad. Till then the purchaser has the title to the property. When the debtor is adjudged an insolvent later, the property that was alienated previous to his insolvency does not vest in the Official Receiver. It continues to be with the purchaser. When the alienation is set aside, the benefit of it goes to all the creditors. [Section 53 of the Transfer of Property Act, section 17 of the Presidency-towns Insolvency Act and section 28 of the Provincial Insolvency Act were referred to.] The statutory right given to a creditor under section 53 of the Transfer of Property Act cannot be taken away without an express provision by the Legislature. Neither the Provincial Insolvency Act nor the Presidency-towns Insolvency Act contains any provisions taking away

(1) (1918) I.L.R. 42 Mad. 684.

(2) (1928) 56 M.L.J. 489.

CHIDAMBARAM
v.
SELLAKUMARA. that right of a creditor. So no leave of the Insolvency Court is necessary in this case.

R. Sundaralingam for *K. Periasami Goundar* for the third respondent.—The Official Receiver is the representative of all the creditors. It is he who should file the suit. An individual creditor ought not to be allowed to exercise the right to file a suit without the leave of the Insolvency Court. If the creditor who files the suit colludes with the purchaser all the other creditors would suffer. The decision in *Vasudeva Kamath v. Lakshminarayana Rao*(1) supports my contention. *Mohamed Adjim Nacoda v. E. M. Chettyar Firm*(2) and *Din Mohammad v. Mt. Walait Begum*(3) follow that decision.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—The question which has been referred is this :—

“Is a suit by a creditor under section 53 of the Transfer of Property Act to set aside an alienation made by the debtor before he is adjudged an insolvent maintainable without the leave of the Insolvency Court?”

In *Vasudeva Kamath v. Lakshminarayana Rao*(1) a Bench of this Court (WALLIS C. J. and AYLING J.) held that such a suit could not be instituted without the leave of the Insolvency Court and this decision was accepted as being correct by the Rangoon High Court in *Mohamed Adjim Nacoda v. E. M. Chettyar Firm*(2) and by the Lahore High Court in *Din Mohammad v. Mt. Walait Begum*(3). The decision was, however, strongly criticised by another Bench of this Court (WALLACE and THIRUVENKATACHARIAR JJ.) in *Subramanyam v. Narasimham*(4). We consider that there is full justification for the criticism.

Section 53 of the Transfer of Property Act states that every transfer of immovable property made with intent to defeat or delay the creditors of the

transferor shall be voidable at the option of a creditor defeated or delayed. Before 1929 a creditor could bring a suit under this section in his individual capacity, but in that year the section was amended and there is now a specific direction that the suit shall be instituted on behalf of or for the benefit of all the creditors. Section 17 of the Presidency-towns Insolvency Act and section 28 of the Provincial Insolvency Act vest the property of the insolvent in the Official Assignee or the Official Receiver as the case may be and these sections prohibit, without the leave of the Insolvency Court, a creditor of the insolvent filing a suit against the insolvent during the pendency of the insolvency proceedings. All matters regarding the insolvent's estate have to be decided by the Insolvency Court in proceedings contemplated by the Act.

Property which the insolvent has transferred in fraud of his creditors is not his property. The transaction is voidable, but until it has been set aside the transferee has a valid title. Therefore, where property has been transferred by a deed which falls within the mischief of section 53 and the transferor becomes insolvent, the property does not form part of his estate and come within the purview of section 17 of the Presidency-towns Insolvency Act or section 28 of the Provincial Insolvency Act. Of course it comes within the purview of these sections when the Official Assignee or the Official Receiver or a creditor obtains a declaration that the transaction offends against section 53.

In *Vasudeva Kamath v. Lakshminarayana Rao*(1) certain creditors filed a suit for a declaration that an alienation of immovable property by an insolvent was

(1) (1918) I.L.R. 42 Mad. 684.
(3) A.I.R. 1938 Lah. 856.

(2) (1930) I.L.R. 9 Ran. 7.
(4) (1928) 56 M.L.J. 489.

(1) (1918) I.L.R. 42 Mad. 684.

CHIDAMBARAM
v.
SELLAKUMARA.
LEACH C.J.

void under section 53 of the Transfer of Property Act. They did not ask for the leave of the Insolvency Court, notwithstanding that the Official Receiver was made a party to the suit. The Court held that the effect of an adjudication under section 16 (1) of the Provincial Insolvency Act (III of 1907), which corresponds to section 28 (2) of the present Provincial Insolvency Act, was to prohibit a creditor bringing a suit under section 53 of the Transfer of Property Act without the consent of the Insolvency Court. The learned Judges who decided that case overlooked the fact that a suit under section 53 of the Transfer of Property Act is not a suit in respect of the property of the insolvent, but is a suit in respect of property which had been the property of the insolvent and which he had transferred in fraud of his creditors. Such a suit does not fall within the prohibition of the Insolvency Act. Moreover, the very definite right given by section 53 of the Transfer of Property Act to a creditor cannot be taken away without an express provision by the Legislature to this effect and there is nothing in the Presidency-towns Insolvency Act or the Provincial Insolvency Act which can be read as taking away his right. This was pointed out in *Subramanyam v. Narasimham*(1). The learned Judges, who decided that case, also pointed out that a suit to set aside a transfer because it offends against the provisions of section 53 of the Transfer of Property Act is not a suit respecting the property of the insolvent. As already indicated, once a declaration has been obtained, the property does become the property of the insolvent and automatically vests in the Official Assignee or the Official Receiver as the case may be. A creditor can get no personal advantage out of it, as the section now stands.

(1) (1928) 56 M.L.J. 489.

CHIDAMBARAM
v.
SELLAKUMARA.
LEACH C.J.

A creditor who brings a suit under section 53 of the Transfer of Property Act may desire to make the Official Assignee or the Official Receiver a party, but he can only do so with the consent of the Insolvency Court. This is quite a different matter from saying that the Insolvency Court must give its consent before a suit can be instituted under section 53 of the Transfer of Property Act when the representative of the insolvent's estate is not made a party.

It follows from what we have said that we are in full agreement with the decision in *Subramanyam v. Narasimham*(1) and that *Vasudeva Kamath v. Lakshminarayana Rao*(2) was wrongly decided. Consequently the answer to the question referred will be in the affirmative.

The costs of this reference will be costs in the appeals.

V.V.C.

ORIGINAL JURISDICTION—SPECIAL BENCH.

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

IN RE S. KRISHNAMURTHI AYYAR, PETITIONER.*

Indian Press (Emergency Powers) Act (XXIII of 1931)
sec. 23—"Order" means notified order—Limitation.

The Provincial Government declared a book entitled "Vira Savarkar" to be forfeited to His Majesty under section 19 of the Indian Press (Emergency Powers) Act (XXIII of 1931), read with section 4 (1) (a). The order of forfeiture was passed on 26th November 1940 but it was not published

* Original Petition No. 51 of 1941.

(1) (1928) 56 M.L.J. 489. (2) (1918) I.L.R. 42 Mad. 684.

1941,
April 4.

KRISHNA-
MURTHI,
In re.

in the Fort St. George Gazette until 3rd December 1940. On 3rd February 1941 the petitioner who is the author of the book applied to the High Court under section 23 of the Act for an order to set aside the declaration of forfeiture. On a preliminary objection that the application was barred by time as it was not presented within two months from the date of the passing of the order as required by section 23 of the Act,

held that the period of limitation was to run from the date of the notification of the order and not from the date on which the order was passed and that the application of the petitioner was in time. The word "order" in section 23 of the Act must be read as being the notified order because there can be no forfeiture until the declaration has been notified.

In the matter of the Indian Press (Emergency Powers) Act XXIII of 1931 and In the Matter of "Vira Savarkar."

Crown Prosecutor (P. Govinda Menon) for the Crown.—There is a preliminary objection to the application of the petitioner on the ground of limitation. The Provincial Government declared the book to be forfeited to His Majesty on 26th November 1940. The order was published in the Fort St. George Gazette on 3rd December 1940. This petition to set aside that order was filed on 3rd February 1941. Section 23 of the Indian Press (Emergency Powers) Act requires that the petition should be filed within two months from the date of the order. As this petition was filed two months after the date of the passing of the order it was out of time. The provisions of limitation should be construed strictly. If section 23 of the Act is so read, time runs from the date of the order and not from the date of its publication.

[LEACH C.J.—A person cannot be bound by an order which has not been communicated to him. Where a strict construction of the section leads to an absurdity we have to read it intelligently.]

T. R. Venkatarama Sastri for R. Chakravarti for petitioner.—The mere passing of an order will have no effect until it is communicated. Section 19 of the Act says that the Government may by "notification" declare the book to be forfeited.

KRISHNA-
MURTHI,
In re.

Time runs only from the date of the publication of the order. "Order" in section 23 means the notified order. Unless it is so read, it would work great hardship. Suppose the Government passes an order forfeiting a book and for some reason or other it is not notified for two months. Then the person against whom the order is passed would have no knowledge of it and he would be left without a remedy. He cannot file an application to set aside the order then as it would be barred by time. This petition was presented within two months from the date of the publication of the order and so it is in time.

[Their Lordships overruled the preliminary objection and Counsel then proceeded to argue on the merits of the case.]

JUDGMENT.

LEACH C.J.—The petitioner is the author of a book written in Tamil and entitled "Vira Savarkar" which has been translated as "Savarkar the Hero". It purports to be a biography of Mr. V. D. Savarkar, who has been the President of the Hindu Mahasabha since 1937. On 26th November 1940 the Provincial Government declared the book to be forfeited to His Majesty under section 19 of the Indian Press (Emergency Powers) Act, 1931, read with section 4 (1) (a). The petitioner has applied to this Court under section 23 for an order setting aside the declaration of forfeiture. The learned Crown Prosecutor has raised the preliminary objection that the application is out of time, and therefore it is necessary to decide this question before dealing with the merits of the application.

Section 23 states that a person having an interest in property in respect of which an order of forfeiture has been made may within two months from the date of the order apply to the High Court to set it aside. The order of forfeiture in this case was not published in the Fort St. George Gazette until 3rd December 1940.

LEACH C.J.

KRISHNA-
MURTHI,
In re.

LEACH C.J.

The petition was filed on 3rd February 1941. If time is to run from the date on which the order was passed the application is out of time, but if the period of limitation runs from the date of the notification of the order the application is in time. The learned Crown Prosecutor says that as the words of section 23 are "within two months from the date of such order" the Court is bound to hold the petition to be out of time. To accept this contention might lead to an absurd situation. If the Government omitted to notify the order until two months had elapsed, the aggrieved person would have no remedy at all. It is the duty of the Court to interpret a statute according to the ordinary meaning of the words used, unless this would lead to a manifest absurdity and this would be the case here if the word "order" were taken to refer to the document which was signed on 26th November 1940. In my judgment the word "order" contemplates the notified order. Section 19 says that where a book appears to the Provincial Government to contain any words, signs or visible representations of the nature described in section 4, sub-section 1, the Provincial Government may, by notification in the Official Gazette, stating the grounds of its opinion, declare every copy of the book to be forfeited to His Majesty. The word "order" in section 23 must be read as being the notified order because there can be no forfeiture until the declaration has been notified. For these reasons I hold that the petition has been filed in time.

* * * * *

MOCKETT J.—I entirely 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.

KANDASWAMI THAMBIRAN (PLAINTIFF), APPELLANT,
v.

1941,
March 6.

VAGHEESAM PILLAI (FIRST DEFENDANT), RESPONDENT.*
*Specific Relief Act (I of 1877), sec. 42—Consequential relief—
Suit for declaration of title to office of Mahant of a mutt and
for possession of office—No prayer for possession of pro-
perties attached to office—Such suit barred under sec. 42—
Separation of office from its endowments not permissible.*

A suit for a declaration of the plaintiff's title to the office of Mahant of a mutt and for possession thereof, without a prayer for possession of the properties attached to the office when the plaintiff is not in possession of them, is barred by reason of the provisions of section 42 of the Specific Relief Act. Such an attempt to separate the office from its endowments is not permissible and the failure to ask for possession of the mutt properties vitiates the suit.

Rathnasabapathi Pillai v. Ramasami Aiyar(1) approved.

Swaminatha Aiyar v. Ramier(2) overruled.

Kunj Bihari v. Keshavlal Hiralal(3) dissented from.

Case law reviewed and discussed.

APPEAL against the decree of the Subordinate Judge of Sivaganga in Original Suit No. 27 of 1934.

This appeal came on for hearing at first before KING and PATANJALI SASTRI JJ. who, in consequence of the conflict between the decisions of this Court in *Rathnasabapathi Pillai v. Ramasami Aiyar*(1) and *Swaminatha Aiyar v. Ramier*(2), referred to a Full Bench the issue whether the suit is barred by reason of the provisions of section 42 of the Specific Relief

* Appeal No. 137 of 1938.

(1) (1910) I.L.R. 33 Mad. 452. (2) (1924) 47 M.L.J. 671.

(3) (1904) I.L.R. 28 Bom. 567.

KANDASWAMI
v.
VAGHEESAM.

Act. The appeal then came on for hearing before the Full Bench constituted as above.

ON THE REFERENCE :

A. C. Sampath Ayyangar for S. Narasinga Rao for appellant. —The suit is not barred by the provisions of section 42 of the Specific Relief Act. In a suit for possession of an office no possession of the properties relating to the office need be asked. It is submitted that the decision in *Swaminatha Aiyar v. Ramier*(1) is correct. This decision follows *Kunj Bihari v. Keshavlal Hirallal*(2) and *Ramados v. Hanumantha Rao*(3). The real question in dispute in such a case is the right of management of the trust. The object of the suit is only to exclude the defendant from the management. There is no necessity for asking for possession of the trust properties in such cases. See *Muthukumaraswamia Pillai v. Subbaraya Pillai*(4) and *Hridoy Kishore Nandi v. Hari Bhusan Dey*(5). The right to an office is itself property and a suit to recover an office is well known to law. Section 9 of the Civil Procedure Code recognises this. Where property is attached to an office the right to the property will follow the right to the office. It would work great hardship if a person who sues for possession of an office is compelled to sue also for possession of the properties attached to the office.

The proviso to section 42 of the Specific Relief Act requires only that a plaintiff being able to seek further relief than a mere declaration of title should not omit to do so. A plaintiff is not obliged under that provision to ask for all consequential reliefs. It is sufficient if he asks for the immediate consequential relief. The relief for possession of the office satisfies this requirement. The prayer for possession of the office is an appropriate consequential relief in this case.

Further, all the properties except the mutt and its buildings are in the possession of the tenants. Once the right to the office is established, the tenants would attorn to the rightful holder. The decision in *Ramados v. Hanumantha Rao*(3) holds that, where properties are in the possession of tenants, no prayer for possession of the properties attached to the office

(1) (1924) 47 M.L.J. 671.

(2) (1904) I.L.R. 28 Bom. 567.

(3) (1911) I.L.R. 36 Mad. 364.

(4) 1931 M.W.N. 8.

(5) (1933) 58 C.L.J. 171.

need be asked in the suit. The decisions in *Govindan Nambiar v. Krishnan Nambiar*(1) and *Janardana Shetti Govindarajan v. Badava Shetti Giri*(2) are also to similar effect. *Ramados v. Hanumantha Rao*(3) distinguishes *Rathnasabapathi Pillai v. Ramasami Aiyar*(4), and *Govindan Nambiar v. Krishnan Nambiar*(1) is followed in *Karuppanna Nadar v. Karuppa Nadar*(5).

K. Rajah Ayyar for V. Ramaswami Ayyar for respondent.—A person cannot maintain a suit for possession of an office only, without asking for possession of the properties attached to the office. The office and the properties go together and cannot be separated; see *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*(6) and *Satish Chandra Giri v. Dharani Dhar Singha Ray*(7). In a long course of decisions this Court has held that a suit for mere declaration or for declaration and injunction without a prayer for possession of properties attached to an office is not maintainable; see *Ramanuja v. Devanayaka*(8), *Sonachala v. Manika*(9), *Kombi v. Aundi*(10), *Abdulkadar v. Mahomed*(11), *Srinivasa Ayyangar v. Srinivasa Swami*(12), *Srinivasa Swami v. Ramanuja Chariar*(13), *Ramasami Aiyar v. Annasami Aiyar*(14), *Appu Pillay v. Perumal Pillay*(15) and *Rathnasabapathi Pillai v. Ramasami Aiyar*(4).

The decision in *Swaminatha Aiyar v. Ramier*(16) is not in consonance with these earlier decisions. It is commented upon and dissented from in *Khalifa M. S. A. Ganny v. Mohamed Ebrahim*(17). A prayer merely for possession of the office is not a sufficient further relief within the meaning of the proviso to section 42 of the Specific Relief Act. The consequential relief prayed for must be appropriate to the declaration claimed in the suit. It has been held that neither a prayer for mere declaration nor a prayer for declaration and injunction is sufficient where a person is not in possession of the properties attached to an office; see *Sunder Singh-Mallah Singh Sanatan Dharam High School Trust, Indaura v. The Managing*

(1) (1881) I.L.R. 4 Mad. 146.

(2) (1899) I.L.R. 23 Mad. 385.

(3) (1911) I.L.R. 36 Mad. 364.

(4) (1910) I.L.R. 33 Mad. 452.

(5) (1939) 2 M.L.J. 226.

(6) (1899) I.L.R. 23 Mad. 271 (P.C.).

(7) I.L.R. [1910] 1 Cal. 266 (P.C.).

(8) (1885) I.L.R. 8 Mad. 361.

(9) (1885) I.L.R. 8 Mad. 516.

(10) (1889) I.L.R. 13 Mad. 75.

(11) (1891) I.L.R. 15 Mad. 15.

(12) (1892) I.L.R. 16 Mad. 31.

(13) (1898) I.L.R. 22 Mad. 117.

(14) (1898) 8 M.L.J. 124.

(15) (1912) 23 M.L.J. 118.

(16) (1924) 47 M.L.J. 671.

(17) (1931) I.L.R. 9 Ran. 459.

KANDASWAMI
v.
VAGHEESAM.

KANDASWAMI
v.
VAGHEESAM.

Committee, Sunder Singh-Mallah Singh Rajput High School, Indaura(1) and Jamiat Dawat v. Mohammad Sharif(2).

A. C. Sampath Ayyangar in reply.—The declaration that is asked for in the suit is merely ancillary. So, even if a prayer for possession of the office is considered to be insufficient as a consequential relief, section 42 cannot be a bar to the maintainability of the present suit. The decision in *Khalifa M.S.A. Gannay v. Mohamed Ebrahim*(3) is not followed in *Hakim Mirza Mohammad Jafar Husain Khan v. Mirza Mohammad Taqi Khan alias Munney Saheb*(4).

LEACH C.J. The OPINION of the Court was delivered by LEACH C.J.—This reference arises out of a suit filed by the appellant in the Court of the Subordinate Judge of Sivaganga to establish the title claimed by him to the office of Pandarasannadhi or Mahant of the Tiruvannamalai Mutt in the Ramnad District. In his plaint the appellant asked the Court to pass a decree in his favour for *inter alia* the following reliefs:—

“(a) Declaring that the first defendant is not entitled to be the Pandarasannadhi of the Tiruvannamalai Athinam and (by way of consequential relief) ejecting him from the office of Pandarasannadhi of the Athinam and restoring its possession to the plaintiff as the only Thambiran of the Athinam qualified and entitled to its headship or at least to be in charge of the mutt and its properties till a new Pandarasannadhi comes.

(b) Restraining the first defendant by a perpetual injunction from in any way interfering with the spiritual or secular affairs of the Athinam.”

The respondent was the first defendant who claims to be the lawful holder of the office. It is admitted that he is in possession of the properties but, notwithstanding the terms of paragraph (a) of the prayer, the appellant said that he was not asking for an order for possession because “the servants and tenants” on the lands were prepared to hand over possession and pay rent to the holder of the office. In addition to

(1) (1937) I.L.R. 19 Lah. 63 (P.C.).

(3) (1931) I.L.R. 9 Ran. 459.

(2) A.I.R. 1938 Lah. 869.

(4) (1933) I.L.R. 9 Luck. 170.

denying the right claimed by the appellant, the respondent, relying on the provisions of section 42 of the Specific Relief Act, averred that the suit was not maintainable because the appellant had failed to ask for a decree directing that possession of the mutt properties be given to him. The Subordinate Judge held that this plea was well founded and dismissed the suit. The appellant appealed to this Court and in due course the case came on for hearing before a Division Bench consisting of KING and PATANJALI SASTRI JJ. In consequence of the conflict between the decisions of this Court in *Rathnasabapathi Pillai v. Ramasami Aiyar*(1) and *Swaminatha Aiyar v. Ramier*(2), the learned Judges have referred to a Full Bench the issue whether the suit is barred by reason of the provisions of section 42 of the Specific Relief Act.

When the case was before KING and PATANJALI SASTRI JJ., the learned Advocate for the appellant applied for and obtained an order permitting the amendment of the plaint by the omission of the words “or at least to be in charge of the mutt and its properties till a new Pandarasannadhi comes” from the prayer for a declaration. The prayer for a perpetual injunction stands, but Mr. Sampath Ayyangar has stated that he is willing to waive this relief also, should it be deemed to be in the way of his client's success in the appeal. In these circumstances the Court will treat the appellant's claims to be for (i) a declaration of his title to the office, and (ii) possession of the office but not of the properties attaching to it.

In *Rathnasabapathi Pillai v. Ramasami Aiyar*(1) a trustee of a temple who had been ousted by his co-trustees sued for a declaration that his dismissal from

(1) (1910) I.L.R. 33 Mad. 452.

(2) (1924) 47 M.L.J. 671.

KANDASWAMI
v.
VAGHEESAM.
LEACH C.J.

KANDASWAMI
v.
VAGHEESAM.
LEACH C.J.

the trusteeship was invalid and for an injunction restraining his co-trustees and the Temple Committee from interfering with the exercise of his rights as a trustee. There was no prayer for consequential relief in the nature of an order for possession against the co-trustees. In these circumstances the Court (SANKARAN NAIR and KRISHNASWAMI AYYAR JJ.) held that the suit was not maintainable. In that case the plea was raised that the lands of the temple were in the physical possession of the tenants and the plaintiff could not get such possession himself; but it was held that the fact that the lands were in the physical possession of the tenants did not excuse the plaintiff from suing for possession.

Swaminatha Aiyar v. Ramier(1) was decided by SPENCER J., who was then officiating as Chief Justice, and SRINIVASA AYYANGAR J. That was a suit for a declaration that the plaintiffs were the lawful trustees of a Hindu temple and its endowments, for a direction that the defendants who claimed to be trustees should be made to restore the office to them and for an injunction restraining the defendants from interfering with the exercise by the plaintiffs of the duties of the office. Relying on the decision of the Bombay High Court in *Kunj Bihari v. Keshavlal Hiralal*(2) (which SANKARAN NAIR and KRISHNASWAMI AYYAR JJ. had refused to follow), SPENCER and SRINIVASA AYYANGAR JJ. held that it was not necessary for the plaintiffs to sue for the consequential relief and therefore section 42 of the Specific Relief Act was no bar to the suit. The learned Judges appear to have separated the office from the properties forming the endowments of the trust.

(1) (1924) 47 M.L.J. 671.

(2) (1904) I.L.R. 28 Bom. 567.

KANDASWAMI
v.
VAGHEESAM.
LEACH C.J.

In *Kunj Bihari v. Keshavlal Hiralal*(1) the facts were these. The plaintiff brought a suit alleging that he had been installed on the *gadi* of the God Swaminarayan. He claimed that he was the *gadipathi* and that nobody else had a right to be installed on the *gadi*. He complained that the defendants were wrongly attempting to place some other person on the *gadi*. The reliefs asked for were: (i) a declaration that a will set up by the defendants was a fraudulent document but, if established, it was not binding, (ii) a declaration that the right to become the acharya was in the plaintiff and that he was the owner of the *gadi*, (iii) a perpetual injunction restraining the defendants from offering any obstruction to his occupying the *gadi*, and (iv) a perpetual injunction restraining the defendants from placing anybody else on the *gadi*. The Court (JENKINS C.J. and BATTY J.) accepted the plaintiff's contention that the suit was not for possession of the trust properties, but one to determine who was to occupy the *gadi*, and considered that in these circumstances the plaintiff was entitled to ask for an injunction without any further relief. JENKINS C.J., in delivering the judgment, said:

"We do not say that the plaintiff might not in terms have asked for possession of the office he says is his; we will assume he could, but how would practical effect be given to an award of possession of an office otherwise than by preventing interference with the rights of which it is made up?"

The defendants were in possession of the trust properties and therefore it was not open to the Court to grant the plaintiff an injunction when he was not asking for possession against those actually in possession. This was pointed out by SANKARAN NAIR and KRISHNASWAMI AYYAR JJ. in their judgment in

(1) (1904) I.L.R. 28 Bom. 567.

KANDASWAMI
v.
VAGHESAM.
LEACH C.J. *Rathnasabapathi Pillai v. Ramasami Aiyar*(1). We cannot regard *Kunj Bihari v. Keshavlal Hirallal*(2) as being correctly decided.

The Judgment in *Rathnasabapathi Pillai v. Ramasami Aiyar*(1) receives support from the decisions of this Court in *Ramanuja v. Devanayaka*(3), *Sonachala v. Manika*(4), *Kombi v. Aundi*(5), *Abdulkadar v. Mahomed*(6), *Strinivasa Ayyangar v. Strinivasa Swami*(7), *Srinivasa Swami v. Ramanuja Chariar*(8), *Ramasami Aiyar v. Annasami Aiyar*(9) and *Appu Pillay v. Perumal Pillay*(10).

In *Ramanuja v. Devanayaka*(3), which was a suit by six plaintiffs for a declaration that certain proceedings of a District Temple Committee removing them from office as trustees of a temple were illegal, TURNER C.J. and MUTTUSAMI AYYAR J. observed :

“ Possession, whether it is of property or of an office may be regarded either as a physical fact, or in contemplation of the legal right to it, and it is in the former sense it should be understood in coming to a finding under section 42 as to whether the plaintiff is, or is not, able to seek further relief.”

In *Abdulkadar v. Mahomed*(6) MUTTUSAMI AYYAR J. sitting with PARKER J. held that a suit was not maintainable by reason of section 42 of the Specific Relief Act in these circumstances. The plaintiff claimed that he was entitled to the office of Sheik of Kallai and to the properties forming the endowments of the office. He did not sue for possession of the properties which were in the possession of the defendant. He merely claimed a declaration that the defendant had no right either to the office of Sheik

(1) (1910) I.L.R. 33 Mad. 452.
(3) (1885) I.L.R. 8 Mad. 361.
(5) (1889) I.L.R. 13 Mad. 75.
(7) (1892) I.L.R. 16 Mad. 31.
(9) (1898) 8 M.L.J. 124.

(2) (1904) I.L.R. 28 Bom. 567.
(4) (1885) I.L.R. 8 Mad. 516.
(6) (1891) I.L.R. 15 Mad. 15.
(8) (1898) I.L.R. 22 Mad. 117.
(10) (1912) 23 M.L.J. 118.

of Kallai or to the properties and prayed for an injunction restraining the defendant from interfering with the properties or doing anything in any way inconsistent with the plaintiff's right to the office.

The cases of *Strinivasa Ayyangar v. Strinivasa Swami*(1) and *Srinivasa Swami v. Ramanuja Chariar*(2) concerned mutts. In *Strinivasa Ayyangar v. Strinivasa Swami*(1) the plaintiffs were three disciples of a mutt. They sued under section 539 of the Code of Civil Procedure of 1882, alleging that the defendant was in possession under a false claim of title as the successor to the last Jheer and praying that it be declared that he was not the duly appointed successor to the office and that an appointment to the vacant office be made by the Court. As no consequential relief was asked for, it was held that the suit was not maintainable. *Srinivasa Swami v. Ramanuja Chariar*(2) was a case of a similar nature.

The same principle was applied in *Sonachala v. Manika*(3) which referred to a choultry and in *Kombi v. Aundi*(4) in which the plaintiff claimed a declaration of his title to the stanom of the fifth Raja of Palghat. *Ramasami Aiyar v. Annasami Aiyar*(5) had reference to temple properties. It was there held that a person who was in joint possession of the temple properties with others who claimed to be joint trustees with him could not sue to exclude the other persons from management without suing for sole possession of the properties. A mere declaration that he was the proper trustee, and the others were not, was not sufficient in the circumstances. In *Appu Pillay v. Perumal Pillay*(6) ABDUR RAHIM and SADASIWA

(1) (1892) I.L.R. 16 Mad. 31.
(3) (1885) I.L.R. 8 Mad. 516.
• (5) (1898) 8 M.L.J. 124.

(2) (1898) I.L.R. 22 Mad. 117.
(4) (1889) I.L.R. 13 Mad. 75.
(6) (1912) 23 M.L.J. 118.

KANDASWAMI
v.
VAGHEESAM.
LEACH C.J.

AYYAR JJ. followed *Rathnasabapathi Pillai v. Ramasami Aiyar*(1).

In the face of these decisions it is not feasible to accept the judgment in *Swaminatha Aiyar v. Ramier*(2) in preference to that in *Rathnasabapathi Pillai v. Ramasami Aiyar*(1). Moreover, it has to be borne in mind that it is not possible to separate the office from the properties which form the endowments of the office. This has been very clearly laid down by the Privy Council in *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*(3) which concerned the right to the office of trustee of a certain temple. Sir RICHARD COUCH, in delivering the judgment of the Board, said :

“ Their Lordships are of opinion that there is no distinction between the office and the property of the endowment.”

This was emphasized by Lord SHAW in delivering the judgment of the Board in *Ram Parkash Das v. Anand Das*(4). When referring to the position of a Mahant, Lord SHAW said :

“ He sits upon the *gadi* ; he initiates candidates into the mysteries of the cult ; he superintends the worship of the idol and the accustomed spiritual rites ; he manages the property of the institution ; he administers its affairs ; and the whole assets are vested in him as the owner thereof in trust for the institution itself.”

In delivering the judgment of the Privy Council in *Satish Chandra Giri v. Dharani Dhar Singha Ray*(5), Mr. JAYAKAR quoted this passage from the judgment of Lord SHAW and went on to say :

“ The two capacities are thus closely intermingled and a proper and efficient discharge of the one depends on the control of the other. The Mahant must have authority over the funds and income of the institution to be able to discharge his religious duties efficiently, in conformity with the customary and

(1) (1910) I.L.R. 33 Mad. 452.

(2) (1924) 47 M.L.J. 671.

(3) (1899) I.L.R. 23 Mad. 271 (P.C.).

(4) (1916) I.L.R. 43 Cal. 707 (P.C.) (5) I.L.R. [1940] 1 Cal. 266 (P.C.).

traditional obligations of the office and to the satisfaction of those who claim the benefit of the worship. He necessarily enjoys large patronage in the discharge of his religious functions. He cannot, in consequence, depend, for the due performance of such duties on the mercy or caprice of another functionary, with separate or co-ordinate authority over the funds of the institution. Any division of the two capacities would lower his prestige, as also impair the efficiency of his religious functions.”

Here the appellant is endeavouring to separate the office from its endowments. This he clearly cannot do and, as he is asking for a declaration of his title to the office and is not in possession of its properties, he must by reason of section 42 of the Specific Relief Act ask for possession. His failure to do so vitiates his suit. It may be regrettable that a person who has been ousted wrongly from an office and the control of the properties attached to it should be required to pay a court-fee based on the value of the properties before he can file a suit to remedy the wrong, but the Court cannot take such hardship into consideration when deciding the effect of section 42 of the Specific Relief Act. When a court-fee fixed by the Court Fees Act is unfair, it is for the Legislature to interfere. The Court cannot do so.

We consider that *Rathnasabapathi Pillai v. Ramasami Aiyar*(1) was rightly decided and that *Swaminatha Aiyar v. Ramier*(2) was not. Consequently the answer which we give to the reference is that the present suit cannot be maintained by reason of the fact that the plaintiff has failed to ask for possession of the mutt properties.

N.S.

(1) 1910) I.L.R. 33 Mad. 452.

(2) (1924) 47 M.L.J. 671.

KANDASWAMI
v.
VAGHEESAM.
LEACH C.J.

APPELLATE CIVIL.

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

VASANTAM VENKAYYA (FIRST RESPONDENT),
APPELLANT,

VASANTAM RAGHAVAMMA (PETITIONER),
RESPONDENT.*

*Hindu law—Wife—Maintenance—Decree against husband
for—Subsequent cohabitation—Effect of, on decree—
Similarity between such decree and order for permanent
alimony in decree for judicial separation.*

A Hindu wife who has obtained a decree for maintenance against her husband cannot enforce it after again cohabiting with her husband. A decree obtained by a Hindu wife against her husband for maintenance differs in no important respect from an order for permanent alimony embodied in a decree for judicial separation and the English authorities are applicable. The decree becomes annulled by reason of the subsequent resumption of cohabitation and is not merely suspended during such period of resumption.

Haddon v. Haddon(1) followed.

Kanagammal v. Pandara Nadar(2) overruled.

Case-law reviewed and discussed.

APPEAL against the order of the Court of the Subordinate Judge of Tenali in Appeal Suit No. 63 of 1940 (Appeal Suit No. 557 of 1939, District Court, Guntur) preferred against the order of the Court of the District Munsif of Tenali in Execution Petition No. 174 of 1939 in Original Suit No. 645 of 1928, District Munsif's Court, Bapatla.

A. Lakshmayya for appellant.

K. Kotayya for respondent.

* Appeal Against Appellate Order No. 261 of 1940.

(1) (1887) 18 Q.B.D. 778.

(2) (1926) I.L.R. 50 Mad. 663.

JUDGMENT.

VENKAYYA
v.
RAGHAVAMMA.
LEACH C.J.

LEACH C.J.—This appeal raises the question whether a wife who has obtained a decree for maintenance can enforce it after having cohabited with her husband. The appellant is the husband of the respondent. In 1930 the respondent instituted a suit in the Court of the District Munsif of Bapatla for a decree for maintenance. She alleged that her husband had so ill-treated her that she was unable to live with him. On 23rd June 1930, by consent a decree was passed in her favour for Rs. 120 per annum. Shortly after this decree had been passed the parties decided that they could live together happily and the wife returned to the husband. They lived together for several years. According to the appellant, the second separation did not take place until 24th August 1937, but according to the respondent it took place on 15th July 1935. Admittedly they lived together for over five years and during this period the respondent bore a son to her husband. On 2nd May 1939 the respondent filed an application for execution of the decree which she had obtained on 23rd June 1930. She asked for the payment of Rs. 663-12-0, being maintenance calculated at the decretal rate from 15th January 1935. The appellant opposed the application. He contended that by reason of the fact that his wife had returned to him and had lived with him for five years thereafter the decree had become a nullity. The District Munsif overruled the objection and his decision was concurred in by the Subordinate Judge of Tenali on appeal. This appeal is from the order of the Subordinate Judge. The appellant maintains the contention which he advanced below. For the respondent it is said that the decree not having been set aside, adjusted or satisfied, she is at liberty to execute it. Her learned

VENKAYYA
v.
RAGHAVAMMA.
LEACH C.J.

Advocate went so far at one stage as to say that she could have executed the decree against her husband during the five years she was living with him but later asked the Court to regard the decree as being suspended during the period they were living together.

In *Bateman v. Ross*(1) Lord ELDON held the general doctrine to be clear, that a reconciliation after a separation entirely did away with the effects of the separation. This doctrine was applied by a Divisional Bench composed of HAWKINS and A. L. SMITH JJ. in *Haddon v. Haddon*(2), and by JEUNE P. and GORELL BARNES J. in *Williams v. Williams*(3). In *Haddon v. Haddon*(2) the Justices of the County of Leicester made an order under section 4 of the Matrimonial Causes Act, 1878, that the wife should be no longer bound to cohabit with her husband and that he should pay to her a weekly sum for her maintenance. After the order had been passed the wife resumed cohabitation with the husband but the reunion did not prove to be permanent. The question was whether she was entitled to enforce the order which she had obtained against him before she resumed cohabitation. It was held that the order was annulled by reason of the subsequent resumption of cohabitation and therefore the wife could not enforce payment of the weekly sums. HAWKINS J. said :

“It is impossible to suppose that the Legislature, in giving magistrates power to release a wife from the obligation of cohabitation by reason of imminent danger from her husband's violence, intended to confer upon them jurisdiction to make an order which should give a wife liberty to live apart from, and resume cohabitation with, her husband when and as often as she should think fit, and compel her husband to

(1) (1813) 1 Dow. 235 ; 3 E.R. 684. (2) (1887) 18 Q.B.D. 778.
(3) 1904] P. 145.

maintain her at all times when it pleased her to separate from him, even though her safety no longer required a separation.” If she was compelled to leave him after resuming cohabitation she should apply for a new order. In discussing the judgment of Lord ELDON in *Bateman v. Ross*(1) HAWKINS J. pointed out that the general principle stated by Lord ELDON was expressly recognised by the Court of Appeal in *Nicol v. Nicol*(2), and that in *Linton v. Linton*(3) Lord ESHER, in speaking of weekly alimony ordered to be paid to a wife by the Divorce Court, had said that they were not payments of a life annuity ; they might be stopped at any moment if the husband and wife returned to cohabitation.

In *Williams v. Williams*(4) it was held that the effect of the condonation of an offence which is specified as a ground of complaint within the terms of the Summary Jurisdiction (Married Women) Act, 1895, does not depend on the wording of any section of the Act, but on the Common law. In that case the Court had no hesitation in holding that the resumption of cohabitation put an end to the cause of complaint and therefore the power of the Justices to make an order passed away altogether.

The decision in *Haddon v. Haddon*(5) was applied by BEASLEY J. in *Ellen Ma Noo v. William Po Thit*(6). In that case the petitioner obtained a decree for judicial separation from her husband and embodied in it was an order for the payment to her of permanent alimony. The decree was passed in 1903 and the wife lived apart from her husband until 1st February 1907. On that date she returned to him and they lived together until 25th October 1921, a period of over fourteen years. The wife then left the husband and

VENKAYYA
v.
RAGHAVAMMA.
LEACH C.J.

(1) (1813) 1 Dow. 235 ; 3 E.R. 684. (2) (1886) 31 Ch. D. 524.
(3) (1885) 15 Q.B.D. 239, 245. (4) [1904] P. 145.
(5) (1887) 18 Q.B.D. 778. (6) (1924) I.L.R. 2 Ran. 163.

VENKATTA
RAGHAVAMMA
LEACH C.J. applied for execution of the decree for alimony which she had obtained in 1903. Relying on *Haddon v. Haddon*(1) **BEASLEY J.** held that she was not entitled to execute the decree. If she desired to obtain an order for maintenance or alimony she was bound to institute fresh proceedings, founded on her allegations of further cruelty. The same principle was applied in *U Po Shin v. Ma Sein Mya*(2) where it was held that a *bona fide* reunion must be interpreted as removing the basis on which an order for maintenance rests and therefore as vacating the order. In *Syed Saib v. Meeram Bee*(3) a Division Bench of this Court held that a Magistrate was bound to refuse to enforce an order under section 488 of the Code of Criminal Procedure on the ground that the relationship of husband and wife had ceased to exist since the date of the order. The Allahabad High Court has given similar decisions. See *Phul Kali v. Harnam*(4) and *Shah Abu Ilyas v. Ulfat Bibi*(5).

The learned Advocate for the respondent has relied on *Kanagammal v. Pandara Nadar*(6), *Pearey Lal v. Naraini*(7), *Kallu Mal v. Barfo*(8) and *Maharana Shri Ranmalsangji v. Bai Shri Kundankuwar*(9) and this is a convenient stage to examine these decisions. In *Kanagammal v. Pandara Nadar*(6) **CURGENVEN J.** held that, when a wife has obtained an order for maintenance under section 488 of the Code of Criminal Procedure and has subsequently returned to her husband, the order is not thereby put an end to but its operation is merely suspended during the period of cohabitation. This decision runs directly counter

(1) (1887) 18 Q.B.D. 778.

(3) (1909) 20 M.L.J. 12.

(5) (1896) I.L.R. 19 All. 50.

(7) (1935) I.L.R. 58 All. 379.

(9) (1902) I.L.R. 26 Bom. 707.

(2) (1930) I.L.R. 8 Ran. 460.

(4) (1888) 8 All. W.N. 210.

(6) (1926) I.L.R. 50 Mad. 663

(8) I.L.R. [1938] All. 535.

to the principle embodied in the judgment in *Haddon v. Haddon*(1). I can see no difference in principle between an order passed under section 488 of the Indian Code of Criminal Procedure and an order under the Matrimonial Causes Act, 1878, or the English Summary Jurisdiction (Married Women) Act, 1895. If the principle stated by Lord **ELDON** is to be applied there can be no question of the suspension of the order. The order goes entirely.

In *Maharana Shri Ranmalsangji v. Bai Shri Kundankuwar*(2) a wife had obtained a decree for maintenance against her husband and when she applied to execute it he objected to the execution on the ground that she had lost her right to maintenance inasmuch as she left his house without any cause and without his consent. It was held that no modification of the decree could be allowed in execution on grounds not recognized in the decree itself as giving a right to such modification. This decision has really no bearing here. *Pearey Lal v. Naraini*(3) was decided by a single Judge of the Allahabad High Court who concurred in the opinion expressed by **CURGENVEN J.** in *Kanagammal v. Pandara Nadar*(4). In *Kallu Mal v. Barfo*(5) the question was whether reduction of a decree for maintenance could be claimed in execution proceedings but it was held that it could not. That question is also far from the present one.

The English authorities are in favour of the appeal and most of the Indian authorities. The learned Advocate for the respondent has, however, suggested that the English decisions have no application because the provisions of the Indian Divorce Act cannot be applied to them and a Hindu wife is not entitled

(1) (1887) 18 Q.B.D. 778.

(3) (1935) I.L.R. 58 All. 379.

(2) (1902) I.L.R. 26 Bom. 707.

(4) (1926) I.L.R. 50 Mad. 663.

(5) I.L.R. [1938] All. 535.

VENKAYYA
v.
RAGHAVAMMA.
LEACH C.J. to sue for a judicial separation. This is an argument which I am not prepared to accept. It is true that the Indian Divorce Act does not apply to the parties and that a Hindu wife may not sue for a decree for judicial separation, but she can sue for a decree requiring her husband to maintain her if she is compelled to live apart. A decree obtained by a Hindu wife against her husband for maintenance differs in no important respect from an order for permanent alimony embodied in a decree for judicial separation. There being no difference in principle I can see no reason why the English authorities should not be applied.

The respondent mainly relies on the provisions of the Code of Civil Procedure. She points to the fact that under that Code a decree remains in force unless it has been satisfied or adjusted and the satisfaction or the adjustment has been recorded. The present case is not concerned with a matter of procedure or the adjustment or satisfaction of a decree. The question is whether the Court is to disregard a sound principle of law and enforce a decree the basis of which has by the action of the parties themselves been demolished. By returning to her husband the respondent became disentitled to claim maintenance against him. The decree which she had obtained must, it seems to me, be regarded in the circumstances as having become ineffective. By going back to her husband the wife restores the position to what it was when they were married. It seems to me that the rule stated in *Haddon v. Haddon*(1) must be given effect to here if justice is to be done.

For these reasons I would allow the appeal and dismiss the application for execution. This will not

(1) (1887) 18 Q.B.D. 778.

VENKAYYA
v.
RAGHAVAMMA.
LEACH C.J. prevent the respondent from obtaining a fresh decree if she left her husband on the second occasion as the result of his ill-treatment of her, but this is not a question which can be considered in this case. There will be no order as to costs here or below.

MOCKETT J.—I agree with the judgment of my Lord. I prefer the judgment of BEASLEY J. in *Ellen Ma Noo v. William Po Thit*(1) to the judgment of CURGENVEN J. in *Kanagammal v. Pandara Nadar*(2) and to that of GANGANATH J. in *Pearey Lal v. Naraini*(3). I consider that the judgment of BEASLEY J. should be followed. As the learned Judge has pointed out, and as my Lord has pointed out, the decree in a case such as this, in the words of A. L. SMITH J., comes to an end from the resumption of cohabitation. I have asked the learned Counsel for the respondent whether it is possible for him to distinguish a decree passed in a suit for maintenance from a decree passed under the Indian Divorce Act or an order passed under section 488 of the Code of Criminal Procedure. He has said that it is impossible to do so so far as the basis is concerned. That must be so because the basis of all these orders is that if the husband neglects to maintain his wife, she by reason of his unlawful neglect is entitled to maintenance. That is important in this case for this reason. The parties, as my Lord has indicated, went before the Court and admitted that, shortly after the consent decree, they had lived together as husband and wife, there being a difference as to whether the period was five or seven years. That fact was therefore within the knowledge of the Court and therefore no investigation by the Court was required to ascertain

(1) (1924) I.L.R. 2 Ran. 163.

(2) (1926) I.L.R. 50 Mad. 663.

(3) (1935) I.L.R. 58 All. 379.

VENKAYYA v. RAGHAVAMMA. MOORETT J. it. In a decision *(unreported) of BURN J. and myself in which BURN J. gave the judgment of the Court, a question arose which is of some assistance to us here. It is a well-ascertained principle, and supported by innumerable decisions, that an uncertified adjustment cannot be recognized by an executing Court. In the case before us it was within the knowledge of the Court from its own records that the decree sought to be executed had been paid. The Court took the view that no question of Order XXI, rule 2, Civil Procedure Code, arose as there was no question of an uncertified adjustment. The only question was whether there was any provision in the Code of Civil Procedure which compelled the Court to perpetrate what it knew to be an injustice, and the decision was that with those facts within its knowledge execution should be refused. I think that the position is analogous to this case. It was within the knowledge of the executing Court that the whole basis of this decree had disappeared by the act of parties. I think that it would be equally wrong for such a decree to be executed with that knowledge as it would be to execute the decree in the case to which I have just referred. I desire to emphasize again as my Lord has done that nothing in the decision in any way affects the law as it has been held to be by this High Court in relation to Order XXI, rule 2, of the Code. I further wish to guard myself against deciding anything with regard to a case in which the Court is invited to make an inquiry in the circumstances of the case. When such a case arises it can be decided. As already indicated I agree with my Lord that this appeal should be allowed.

G.R.

* Appeal Against Order No. 446 of 1938.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Venkataramana Rao.

MESSRS. SHA MOOLCHAND KESARIMULL
BY ITS PARTNER MITA LAL (PLAINTIFF), APPELLANT,

v.

MESSRS. ASSOCIATED AGENCIES, A FIRM OF MERCHANTS,
MOUNT ROAD, MADRAS (DEFENDANTS), RESPONDENTS. *

Contract—C.I.F.—Time of payment—Absence of stipulation as regards time for payment—Conditions about shipment being satisfied, payment to be made by buyer when bill of lading and other necessary shipping documents are presented to him at a reasonable time—Conflict between typewritten portion and printed portion in contract—Typewritten portion to prevail if they cannot be reconciled—Delivery in instalments—Breach by one party to contract in respect of one instalment—How far the other party justified in repudiating the whole contract.

Held: (i) In a C.I.F. contract, in the absence of any stipulation as regards the time of payment, the payment must be made when the bill of lading and other necessary shipping documents are presented to the buyer, provided that the goods have been shipped within the stipulated period and the documents are presented at a reasonable time.

Biddell Brothers v. E. Clemens Horst Company(1) followed.

(ii) If the typewritten and printed portions of a contract can be read together, effect must be given to all the provisions; but if the printed portion cannot be reconciled with the typewritten portion, the typewritten portion must prevail.

Gumm v. Tyrie(2) and *Glynn v. Margetson & Co.*(3) followed.

(iii) In deciding whether the breach in respect of one or more instalments of a contract justifies a party in repudiating

* Original Side Appeal No. 22 of 1940.

(1) [1911] 1 K.B. 934.

(2) (1864) 33 L.J. Q.B. 97.

(3) [1893] A.C. 351.

KESARIMULL
v.
ASSOCIATED
AGENCIES.

the whole contract, regard must be had, first, to the ratio quantitatively which the breach bears to the contract as a whole and secondly, to the degree of probability or improbability that the breach will be repeated.

Maple Flock Co. v. Universal Furniture Products (Wembley), Ltd. (1) followed.

APPEAL against the judgment and decree of GENTLE J., dated 30th January 1940, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 215 of 1939.

K. Rajah Ayyar for *K. S. Rajagopalachari* and *P. V. Subramanyan* for appellant.

Advocate-General (Sir A. Krishnaswami Ayyar) for *T. A. Rangachari* for respondent.

JUDGMENT.

LEACH C.J.

LEACH C.J.—The appellant sued on the original side of this Court to recover a sum of Rs. 7,920 claimed as damages for breach of contract. The appellant also asked for an order directing specific performance of part of the contract and put his claim for damages here in the alternative. The nature of the contract, however, precludes any decree for specific performance being granted and the claim for damages alone calls for consideration. GENTLE J. who tried the suit came to the conclusion that there had been no breach of the contract by the respondents, but that the appellant himself had broken it.

The contract is partly typewritten and partly printed and is dated 5th July 1939. A printed form commonly used by the respondents, who are a firm of merchants carrying on business in Madras, was used, but the main provisions were inserted by means of a typewriter at the beginning of the document. By the

(1) [1934] 1 K.B. 148.

KESARIMULL
v.
ASSOCIATED
AGENCIES.
—
LEACH C.J.

typewritten portion the appellant agreed to buy and the respondents agreed to sell sixty bottles of quicksilver, each bottle to contain 34.5 kilograms net. The quicksilver had to be obtained from Italy and it was stipulated that there should be a shipment of half the quantity in July and half in August 1939. The typewritten portion of the document includes these terms :

“ Price.—£16-12-0 per steel bottle C.I.F. Madras.

Terms.—Document against sight payment.”

It is a C.I.F. contract and if the document had stopped at the end of the typewritten portion there could be no doubt that the appellant would have made himself liable to pay for each consignment as soon as the bill of lading and the other shipping documents were presented to him, irrespective of the arrival of the goods. Mr. Rajah Ayyar on behalf of the appellant has rightly conceded this, but he relies on the following statement in paragraph 3 of the printed conditions :

“ On arrival of the steamer by which the goods have been shipped, the indenter shall take up the documents. The documents shall be delivered against payment only.”

He says that this clause gave him liberty to refuse to pay until the goods had actually arrived in Madras. The case for the respondents is that the printed clause is in direct conflict with the typewritten portion of the document and that the typewritten portion must prevail.

The goods comprising the first consignment were duly shipped from Italy, but the ship never arrived in Madras. The goods were placed on board a German vessel which was at sea when the present war broke out on 3rd September 1939. The vessel was apparently in the vicinity of Mormagao in Portuguese territory on the outbreak of hostilities and sought refuge there.

KESARIMULL
v.
ASSOCIATED
AGENCIES.
LEACH C.J.

The August portion of the contract was duly shipped on a Dutch vessel and arrived in Madras on 19th September 1939. On 18th August 1939 the respondents wrote to the appellant informing him that they had received the relevant shipping documents with regard to the first consignment and they would be sending their invoice for the amount due in respect of the goods in the course of the week. The invoice and the relative shipping documents were forwarded to the appellant the next day and on 23rd August the respondents wrote to the appellant enclosing a copy of the invoice which had been certified by the customs and asked him to pay the amount into the Eastern Bank, Limited, Madras. On the same day, the manager of the Eastern Bank, Limited, wrote to the appellant informing him that he had received instructions to collect the amount and requested him to make arrangements for payment. The appellant took no notice of these communications. On 8th September 1939 the respondents wrote to him demanding payment within twenty-four hours and informing him that, on his failure to comply with the demand, the contract would stand cancelled and he would be held responsible for the damages which might be incurred as the result of his non-compliance with the demand. This letter brought a reply from the appellant two days later, in which he stated that he would make arrangements for payment to the bank as soon as the steamer had arrived in port. He did not challenge the validity of the respondents' demand for immediate payment.

When the second consignment arrived on 19th September 1939 the appellant, through an Advocate, wrote to the respondents claiming that delivery should be given to him, but the respondents refused to do so on the ground that the contract had been cancelled

KESARIMULL
v.
ASSOCIATED
AGENCIES.
LEACH C.J.

by reason of the appellant's breach in respect of the first consignment. Thereupon the appellant filed this suit. He maintained that he was fully justified in refusing to pay for the first consignment until the ship carrying the goods had reached Madras and that, as there had been no breach of contract on his part, he was entitled to delivery of the goods which had been consigned in August and had arrived here in September. He also averred that, even if there had been a breach of the agreement on his part, the breach was not of a nature which warranted the respondents cancelling the contract, and therefore he was entitled in law to delivery of the second consignment. The learned Judge decided against the appellant on all his contentions.

The contract is a C.I.F. contract, whether it is to be construed in the way the appellant would have it construed or in the respondents' way. The effects of a C.I.F. contract are fully stated in the judgment of KENNEDY L.J. in *Biddell Brothers v. E. Clemens Horst Company*(1), which received the approval of the House of Lords in *E. Clemens Horst Company v. Biddell Brothers*(2). The tender of the goods under a C.I.F. contract is effected by the tender of the bill of lading and accompanied, in case the goods have been lost in transit, by the policy of marine insurance, which it is the seller's duty to take out for the protection of the buyer. As the result of the decision in *Biddell Brothers v. E. Clemens Horst Company*(1) it is now settled law that, in the absence of any stipulation with regard to the time for payment, the payment must be made when the bill of lading and other necessary shipping documents are presented to the buyer, provided, of course, that the goods have been

(1) [1911] 1 K.B. 934.

(2) [1912] A.C. 18.

KESARIMULL
v.
ASSOCIATED
AGENCIES.
LEACH C.J.

shipped within the stipulated period and the documents are presented at a reasonable time.

If the typewritten and printed portions of the contract can be read together, effect must, of course, be given to all the provisions, but if the printed portion cannot be reconciled with the typewritten portion the typewritten portion must prevail. See *Gumm v. Tyrie*(1) and *Glynn v. Margetson & Co.*(2). In *Glynn v. Margetson & Co.*(2) the House of Lords had to construe a charter party, and in his judgment in this case Lord HERSCHELL said :

“ Where general words are used in a printed form which are obviously intended to apply, so far as they are applicable, to the circumstances of a particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, having in view that object and intent. ”

Lord HALSBURY agreed and in so doing laid stress on the principle stated by Lord ELLENBOROUGH C.J. in *Robertson v. French*(3) where Lord ELLENBOROUGH said :

“ the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied), are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects. ”

The same principle has been accepted in India ; see *Paul Beier v. Chotalal Javerdas*(4) and *Mohanlal v. Krishna Premji*(5).

(1) (1864) 33 L.J. Q.B. 97.

(2) [1893] A.C. 351.

(3) (1803) 4 East, 130, 136; 102 E.R. 779, 782.

(4) (1904) I.L.R. 30 Bom. 1.

(5) (1927) 30 Bom. L.R. 415.

Therefore clause 3 of the printed terms of this contract must be given effect to if this can be done without doing violence to the typewritten portion, but not otherwise. Before turning to examine in detail the two portions of the document, I would mention that this contract was entered into at a time when war clouds were gathering. The goods had to be obtained from Italy, a direction from which some of the war clouds were coming. The printed form represented the usual conditions on which the respondents did business in normal times. Therefore it can be well understood that in entering into the contract the sellers insisted that the buyer should pay the price as soon as the bill of lading and other relevant documents were presented to him. The intention of the parties must be gathered from the words used, but in deciding what was the intention the Court is not called upon to ignore the surrounding circumstances.

I have already indicated that in my opinion the typewritten portion of the document, if read alone, entitled the respondents to present the bill of lading and other documents to the appellant when they did and that the presentation required him to pay then and there for the goods represented by the documents. Reading the typewritten portion in conjunction with the printed portion I am of the opinion that there is a direct conflict. The expression “ at sight ” means on demand, and therefore the words “ document against sight payment ” can only mean that the appellant was to pay when the documents were presented to him. The printed portion relied upon by the appellant stipulates that the appellant should only be required to pay after the arrival of the steamer in Madras. Mr. Rajah Ayyar has suggested that the two portions can be reconciled by reading them as embodying these conditions : (i) The appellant should not be

KESARIMULL
v.
ASSOCIATED
AGENCIES.
LEACH C.J.

KESARIMULL
v.
ASSOCIATED
AGENCIES.
LEACH C.J.

required to pay until the goods arrived and (ii) after arrival the appellant should pay as soon as the shipping documents were presented to him. I cannot accept this construction. In the typewritten portion of the document, which is the governing portion, there is an unqualified statement to the effect that goods must be paid for at sight, that is, whenever the shipping documents were presented. The subsequent printed condition is a negation of this condition. The learned Judge has read the contract in this way and I am in full agreement with what he has said. The parties could, of course, have contracted that payment should not be demanded until after the arrival of the goods, but this they have not done, and no doubt the war clouds were responsible for the respondents refusing to do business in these goods on the condition to be found in clause 3 of their printed form. The appellant's refusal to pay the price of the goods comprised in the first consignment when the documents were presented to him and payment demanded means that he broke the contract and therefore can have no claim in respect of that consignment.

It remains to decide whether the appellant had the right of demanding that delivery should be made of the goods consigned in August 1939. In *Maple Flock Co. v. Universal Furniture Products (Wembley), Ltd.*(1) Lord HEWART C.J. in delivering the judgment of the Court of Appeal pointed out that, in deciding whether there has been a repudiation of the contract, regard must be had first, to the ratio quantitatively which the breach bears to the contract as a whole, and secondly, the degree of probability or improbability that the breach will be repeated. In the present case GENTLE J. considered that the reasons given by the appellant

(1) [1934] 1 K.B. 148.

KESARIMULL
v.
ASSOCIATED
AGENCIES.
LEACH C.J.

for refusing the first consignment was a breach which the respondents might well expect to be repeated with regard to the second half of the consignment and I see no reason for dissent from this opinion. The first consideration referred to by Lord HEWART C.J. also applies here. The breach which took place when the appellant refused to pay for the first consignment was a refusal to perform the contract to the extent of one half. When there is a contract for the sale of goods to be delivered in two instalments and the buyer wrongly refuses to take delivery of the first instalment, the breach of contract is so extensive that the seller is entitled to cancel the contract and be compensated for any loss suffered by him. In *Honck v. Muller*(1) the Court of Appeal held that a seller was entitled to cancel a contract when the buyer had refused to take delivery of goods representing one third of the total sold under the contract. The considerations which applied in *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.*(2) do not arise here, but *Honck v. Muller*(1) has direct bearing. I hold that the contract was lawfully cancelled by the respondents and consequently the appellant had no claim to the goods which comprised the second consignment.

For these reasons I would dismiss the appeal with costs. I also consider that there should be a certificate for two Counsel.

VENKATARAMANA RAO J.—I agree with my Lord the CHIEF JUSTICE that the view of GENTLE J. on both the points is correct and the appeal should be dismissed with costs.

VENKATA-
RAMANA RAO J.

G.R.

(1) (1881) 50 L.J.Q.B. 529. (2) (1884) 9 App. Cas. 434.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao.

1941,
March 14.

T. SRINIVASA RAO AND ANOTHER (PLAINTIFFS), APPELLANTS,
v.

ANNADHANAM SESHACHARLU AND ANOTHER
(DEFENDANTS 3 AND 2), RESPONDENTS.*

Hindu law—Daughter of propositus—Alienation of reasonable portion of property by, to meet marriage expenses of her daughter's daughter whose parents are indigent—Valid—Vesting of property in a person before his title is perfected by adverse possession—Effect—Opening of succession to property—Legal consequence, vesting of property in heir at law whether he wills it or not.

Held : Under the Hindu law an alienation of a reasonable portion of property by the daughter of a propositus to defray the marriage expenses of her daughter's daughter whose parents are indigent is valid.

Held further : If, before the title to a property is perfected by adverse possession by a person, the property vests in him, the legal consequence is that the adverse possession which was running against the owner comes to an end.

Under the Hindu law succession to a property cannot remain in abeyance and, whether the heir at law desires it or not, the property will vest in him.

Case law reviewed and texts discussed.

APPEAL against the decree of the Court of the Subordinate Judge of Chittoor in Appeal Suit No. 1 of 1936 (Appeal Suit No. 201 of 1934, District Court, Chittoor) preferred against the decree of the Court of the District Munsif of Tirupati in Original Suit No. 310 of 1932.

M. S. Ramachandra Rao for A. Bhujanga Rao and D. R. Krishna Rao for appellants.

* Second Appeal No. 970 of 1937.

S. V. Venugopalachariar for first respondent.
Other respondent was not represented.

SRINIVASA RAO
v.
SESHACHARLU.

Cur. adv. vult.

JUDGMENT.

VENKATARAMANA RAO J.—This second appeal arises out of a suit for a declaration that the sale of a house and lands (Exhibit X) executed by defendants 1 and 2 in favour of the third defendant is not binding on the plaintiffs beyond the lifetime of the first defendant. The first defendant is the daughter of one Tirupati Ramarao who died without any male issue, leaving him surviving his widow, Janaki Bai, and his daughter, the first defendant. The case for the plaintiffs is that the suit properties belonged to Ramarao and devolved on Janaki Bai by right of inheritance and, on her death, on the plaintiffs, and that the said alienation by the first defendant was not for any legal necessity. The case for the defendants is that the properties were the absolute properties of Janaki Bai, that she gifted them to the first defendant in or about 1904, that ever since the said date she had been in absolute possession and enjoyment of the properties and acquired title thereto by adverse possession. The first defendant also pleaded that the said sale was made for discharging a prior mortgage which was executed for a necessary purpose, namely, for discharging certain debts incurred for repairs to the house, for medical treatment and for obsequial ceremonies of her mother and for the marriage expenses of her daughter's daughter. She also denied that the plaintiffs were the reversioners. The learned District Munsif found that the plaintiffs were the reversioners of Ramarao and also of Janaki Bai, that the property belonged to Janaki Bai, that though the property was gifted to the first defendant in 1904 she

VENKATA-
RAMANA RAO J.

SRINIVASA RAO
v.
SESHACHARLU.
—
VENKATA-
RAMANA RAO J.

did not acquire title thereto by adverse possession because Janaki Bai died within twelve years before succession opened, that the mortgage for the discharge of which the sale was executed was valid only to the extent of Rs. 600 on the ground that that sum must be deemed to have been spent towards the necessary expenses binding on the estate and that the balance of Rs. 1,200 spent for the marriage expenses of her daughter's daughter was not a legal necessity and that the said sale was therefore binding upon the plaintiffs only to the extent of Rs. 600. On appeal the learned Subordinate Judge confirmed the finding as to the status of the plaintiffs as the reversioners of Janaki Bai and also in regard to the question of adverse possession. He upheld the sale in its entirety on the ground that the amount borrowed for the marriage of the daughter's daughter of the first defendant was for a necessary purpose. He took the view that the marriage of the daughter's daughter was a proper religious object which would conduce to the spiritual benefit of the first defendant's father, Ramarao, and her mother Janaki Bai.

This appeal is preferred by the plaintiffs and on their behalf their learned Counsel, Mr. Bhujanga Rao, contended that the view taken by the learned Subordinate Judge in regard to the expenses incurred towards the first defendant's daughter's daughter's marriage was wrong and that, in any event, the amount borrowed was excessive. The questions therefore to be decided are: (i) was the amount borrowed for the expenses of the said marriage for a necessary purpose so as to bind the estate, and (ii) was the amount of Rs. 1,200 spent in connection therewith proper and justifiable; if not, what is the reasonable amount that can be allowed?

Before dealing with these questions, I shall deal with the argument of Mr. Venugopalachari on the finding of the lower Court in regard to the question of adverse possession. He contended that the finding was wrong and, if it was decided in his favour, the decree of the lower Court could be supported on that ground. He put his argument thus: long before succession opened the property was gifted away by Janaki Bai to the first defendant and from the date of the gift the first defendant was dealing with the property in her own right, and when Janaki Bai died she did not take the property as her heir but continued to hold it adversely to the estate, and, no suit having been filed within twelve years from the date of the gift, she acquired title thereto by adverse possession after the lapse of the said period. In support of his contention he relied on the decision of the Privy Council in *Varada Pillai v. Jeevarathnammal*(1) and a decision of this Court reported as *Alagiri Chetty v. Muthuswami Chetty*(2). On principle it seems to me that the contention is untenable. On the death of Janaki Bai the property vested in the first defendant by right of inheritance. Under the Hindu law succession cannot remain in abeyance and, whether the heir-at-law wills or not, the property will vest in him. Before the title to the suit property was perfected by adverse possession by the first defendant the property vested in her. The legal consequence of that vesting is that the adverse possession which was running against the owner came to an end. The first defendant became the owner and adverse possession could not run against herself. In *Varada Pillai v. Jeevarathnammal*(1) the facts were as follows: Gopalakrishna Pillai and

(1) (1919) I.L.R. 43 Mad. 244 (P.C.).

(2) (1939) 50 L.W. 571.

SRINIVASA RAO v. SESHACHARLU. VENKATA-RAMANA RAO J. Parthasarathi Pillai owned a mitta in equal shares. Gopalakrishna died leaving his widow, Rajammal, and Parthasarathy Pillai died leaving his widow, Alangammal, to whom he bequeathed absolutely his share in the said mitta. The whole mitta was registered in the names of both Rajammal and Alangammal. On 10th October 1895 two petitions were presented to the Collector of Chingleput, one by Alangammal and the other by Rajammal stating that each had gifted away the share in the mitta to which each was entitled to Duraisani Ammal on 8th October 1895 and that therefore the mitta might be transferred in her name. This was accordingly done and ever since that date until the date of her death in 1911, Duraisani Ammal enjoyed the property and was in receipt of rents and profits solely. Rajammal died in 1901 and Alangammal died in 1912, a year after Duraisani Ammal's death. Duraisani left a daughter, Jeevaratnammal, who succeeded to her property. The plaintiffs, who were the reversioners of Parthasarathy Pillai, and his widow, Alangammal, sued to recover a half share of the mitta. Among other pleas Jeevaratnammal pleaded that Duraisani Ammal acquired title to that share by adverse possession. This plea was upheld by their Lordships of the Privy Council. They took the view that the gift was invalid on the ground that it was not made in conformity with the provisions of the Transfer of Property Act but Duraisani must be deemed to have enjoyed the property adversely to both Rajammal and Alangammal from the date of the gift and that, as by the date of her death in December 1911 twelve years had elapsed, the claim of Alangammal and therefore of her heirs, the plaintiffs, was barred by adverse possession. It was contended before their Lordships that, when Rajammal

died in 1901, Duraisani succeeded to her moiety by right of inheritance and therefore her possession from that date must be deemed to have been as a co-owner and that the possession of Duraisani as such co-owner could not be adverse to Alangammal or her heirs. This contention was negatived by their Lordships and they remarked thus :

“ In the present case it is plain that during the life of Rajammal the possession of Duraisani was adverse as against both the co-owners ; and this being so, there is no reason for holding that, when on the death of Rajammal she became legally entitled to a moiety of the property, the character of her possession of the other moiety as against Alangammal was changed. There having been an ouster of Alangammal before the death of Rajammal, this ouster continued after her death, and the possession of Duraisani was adverse to Alangammal throughout. This contention therefore also fails.”

It will thus be seen that their Lordships dealt only with the adverse possession regarding the share of Alangammal. The possession of Duraisani even of the share of Rajammal during her lifetime was not as co-owner and therefore it was *prima facie* adverse to Alangammal in respect of her share. Thus on the death of Alangammal as against her heirs the character of this possession would continue. She was not an heir of Alangammal and therefore had no interest in her share. But their Lordships did not decide the question that, if Rajammal had left a co-heir along with Duraisani Ammal, whether Duraisani could plead adverse possession in respect of Rajammal's moiety. In *Alagiri Chetty v. Muthuswami Chetty*(1) this question pointedly arose and my learned brother PATANJALI SASTRI J. took the view that the principle of the decision in *Varada Pillai v. Jeevaratnammal*(2)

(1) (1939) 50 L.W. 571.

(2) (1919) I.L.R. 43 Mad. 244 (P.C.).

SRINIVASA RAO v. SESHACHARLU. VENKATA-RAMANA RAO J. would apply to it. In that case there were two brothers, Servaraya Chetti and Alagiri Chetti. Servaraya died in 1891 leaving him surviving his widow who also died in the same year. Alagiri was therefore the person who became entitled to the property. But on the date of the death of the widow, one of the sons of Alagiri (Alagiri had five sons) was in possession of the house and continued to be in sole possession thereof until the date of Alagiri's death in 1900. The plaintiffs who were the grandsons of Alagiri by two of his sons, Annaswami and Kandaswami, sued to recover the share of their fathers. The first respondent resisted the claim on the ground of limitation and his plea was upheld on the ground that under article 141 of the Limitation Act the suit should have been filed within twelve years from the date of the widow's death. It would seem to me that *prima facie*, on the death of Alagiri Chetti, the property having vested in all the heirs of Alagiri Chetti as tenants in common, the adverse possession which was running against Alagiri Chetti must be deemed to have come to an end. In the case of a tenancy in common each tenant has the entire possession as well of every part as of the whole. It cannot be said that one tenant in common who is in possession of the property can be held to be exclusively in possession of that whole because the principle is each has got an undivided moiety of the whole and not the whole of the undivided moiety. Therefore on the death of Alagiri Chetti all the heirs became entitled to the property and there was thus unity of title. The question is whether there was unity of possession. It cannot be denied that, so far as possession of the first respondent was concerned, he cannot be said to be holding adversely to himself in respect of any portion of the property because the character of

possession must necessarily change in consequence of the vesting in himself as part owner. As the possession of one tenant in common is *prima facie* possession of the other, the possession therefore of the first respondent must only be held to be adverse after the date of the death of Alagiri. There must be distinct evidence of ouster after that date because it cannot be said that at the moment of vesting there was ouster. In order to constitute ouster there must be assertion of a hostile title after vesting and notice thereof to the other co-heirs, direct or indirect, inferable from acts and circumstances which would warrant such an inference. It may be possible for the Court to infer that the possession of the first respondent from the date of the death of Alagiri cannot be said to be on behalf of all the heirs of Alagiri, having regard to the prior hostile possession of the first respondent. Whether *Alagiri Chetty v. Muthuswami Chetty*(1) was correctly decided or not, the present case is distinguishable. The property vested solely in the first respondent on the death of Janaki Bai. The person to sue and the person to be sued being one and the same person, the owner must be deemed to have regained possession, thus putting an end to any prior hostile title. I am therefore of the opinion that the view taken by the lower appellate Court that the first respondent did not acquire title by adverse possession as against reversionary heirs is correct.

I shall now deal with the question regarding the validity of the mortgage in so far as it was executed for borrowing moneys for the expenses of the marriage of the daughter's daughter of the first defendant. Under the Hindu law the daughter as heiress of her father or mother takes a restricted interest similar to that

(1) (1939) 50 L.W. 571.

SRINIVASA RAO taken by a widow with a similar power of disposal.
 SESHACHARLU. The power of disposal of a Hindu widow inheriting her
 husband's property is thus defined by the Privy
 Council in *The Collector of Masulipatam v. Cavalry*
Vencata Narrainapah(1):

"For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she (the widow) has a larger power of disposition than that which she possesses for purely worldly purposes."

Dealing with this passage BENSON and KRISHNASWAMI AYYAR JJ. in *Tatayya v. Ramakrishnamma*(2) remarked thus:

"Their Lordships did not attempt to further define the spiritual purpose. We have endeavoured to suggest the further limitation that the spiritual purpose should be such as is regarded by the Hindu community as reasonable and proper though not absolutely necessary."

The learned Judges further pointed out that

"if the expenditure by the daughter is for the spiritual needs of the father's soul, it stands on the same footing as the expenditure by the widow for the spiritual needs of her husband."

I would add that, in the case of an alienation by a daughter of her mother's stridhanam, if the expenditure by the daughter was for the spiritual needs of the soul of her parents, it stands on the same footing as the expenditure by the widow for the spiritual needs of her husband. The views expressed in *Tatayya v. Ramakrishnamma*(2) have received the approval of the Privy Council in *Sardar Singh v. Kunj Bihari Lal*(3). Their Lordships of the Judicial Committee also cited with approval the observations of MUKERJEE J. in *Khub Lal Singh v. Ajodhya Misser*(4), namely, that

"it is absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes, because it must depend upon

(1) (1861) 8 M.L.A. 529, 551.
 (3) (1922) I.L.R. 44 All. 503 (P.C.).

(2) (1910) I.L.R. 34 Mad. 288.
 (4) (1915) I.L.R. 43 Cal. 574.

the circumstances of the disposition whenever such disposition shall be made, and must be consistent with the law regulating such disposition."

• Their Lordships further pointed out in that case that the necessity for the alienation need not be of the same character as in the case of alienations for secular purposes, that the Hindu system recognizes two sets of religious acts, one obligatory and the other optional, and that the alienation for both the sets of acts would be binding on the reversionary heir but only in regard to acts which are optional, the alienation must relate only to a reasonable portion of the property. Their Lordships upheld the gift of a small portion of the property for the offerings to the Diety and for the maintenance of the priest charged with the performance of that duty on the ground that it was a pious act in the Hindu system.

The question in the present case is whether the marriage of a daughter's grand-daughter could be said to be a pious and meritorious act which would conduce to the spiritual benefit of the deceased parents of the first defendant. Judicial decisions have upheld alienations made for the marriage of a daughter's daughter or a daughter's son of a propositus. If in this case the marriage expenses had been incurred for the expenses of the daughter of the first respondent (the mother of the girl whose marriage is the subject of consideration) there could be no doubt as to the validity of the mortgage; vide *Chudammal v. Nadamuni Naidu*(1) following *Rustam Singh v. Moti Singh*(2), *Venkatasubba Rao v. Ananda Rao*(3) and *Mallayya v. Bapi Reddi*(4). In the case of the marriage of the daughter's daughter of the propositus the alienation was upheld on the ground that the husband of the

(1) (1909) 3 I.C. 77.

(3) (1934) I.L.R. 57 Mad. 772.

(2) (1896) I.L.R. 18 All. 474.

(4) (1931) 62 M.L.J. 39.

Srinivasa Rao daughter and the father of the girl was indigent and **Seshacharlu** the propositus, if he had been alive, would be under a moral duty to perform her marriage. In the case of **Venkata-Ramana Rao J.** a daughter's son **Venkatasubba Rao J.** in *Mallayya v. Bapi Reddi*(1) took the view that a Hindu would be morally bound to perform the marriage of his indigent daughter's son. In that same case he observed that, so far as the marriage of a daughter's daughter is concerned, there could be no question that the costs incurred for her marriage would be a proper legal necessity to justify an alienation. In *Venkatasubba Rao v. Ananda Rao*(2) the learned Judges upheld an alienation made by a Hindu widow for debts contracted for the thread marriage ceremonies of one of her daughter's sons even in a case where the father was not indigent. The learned Judges took the view that the expenditure incurred must be said to be for purposes connected with the husband's spiritual welfare. In disapproving the contrary view taken by the lower Court the learned Judges remarked thus :

" The pious endeavour of this widow to promote her husband's spiritual bliss by honouring his daughter's son may for aught we know in its result fall short of her intention ; but so long as she acted with piety and in consonance with prevalent notions we do not think it incumbent upon us to interfere any more than the Judicial Committee interfered with the gift to the idol."

The *ratio decidendi* of these cases appears to be that if the acts for which alienations were made can be considered to be pious and meritorious according to the prevalent Hindu notions, the alienations, provided the quantum is reasonable, should be upheld.

The question in this case is whether the marriage of a daughter's grand-daughter would satisfy this test.

(1) (1931) 62 M.L.J. 39.

(2) (1934) I.L.R. 57 Mad. 772.

It is recognized by Hindu Shastras that the gift of a virgin in marriage is a very pious and meritorious act that will confer spiritual benefit ; *Ramasami Ayyar v. Vengidusami Ayyar*(1). In *Danachandrika Anukramanika* by Divakara Bhatta we find the following :

हेमाद्रौ—

सहस्रमेव धेनूनां शतं वा जडुहं समम् ।
दशानडुत्समं यानं दशयानं समो हयः ॥
दशवाजिसमाकन्या भूमिदानं च तत्समम् ।
तस्मात् सर्वेषु दानेषु कन्यादानं विशिष्यते ॥ इति

अग्निपुराणे—

श्रुत्वा कन्याप्रदानं च पितरश्च पितामहाः
विमुक्ताः सर्वपापेभ्यो ब्रह्मलोकं व्रजन्ति ते ॥ इति

" (Then the gift of a Kanya) in Hemadri (it is said)—

The gift of a thousand cows or that of a hundred is equal to that of a bull. The gift of a vehicle (vahanam) is equal to that of ten bulls. The gift of a horse is equal to that of ten vehicles. The gift of a kanya is equal to that of ten horses or to that of land. Hence gift of kanya is highly praiseworthy.

In Agnipurana (it is said) :

Hearing about the gift of a Kanya (by a descendant) one's parents and grand parents are liberated from all sins and attain heaven (the abode of Brahman)."

In *Samskara Ratnamala* of Bhatta Gopinatha (First canto of Grihya Sutras, edited by V. S. R. Kasi-natha Sastri Bahu Sastri Padke, 1899 Edn.) it is stated thus :

Page 499 :—

अनायायाः कन्यायाः धर्मार्थविवाहकारणं तत्फलं च उक्तं पुराणान्तरे :—

आत्मीकृत्य सुवर्णेन परकीयांतु कन्यकाम् ।
धर्म्येण विधिनां दातुं असंगोऽपि युज्यते ॥
अनायां कन्यकां दद्यात् यो दद्यात् सहस्रे वरे ।
द्विगुणं फलमाप्नोति कन्यदानेयदीरितम् ॥

(1) (1898) I.L.R. 22 Mad. 113, 115.

SRINIVASA RAO Page 501 :—

SESHACHARLU. सारलंकार कन्यादाने फलविशेषमाह

VENKATA-
RAMANA RAO J.

कुकुद्श्चा श्वमेधी च प्राणदाताभयेषु च ।

समं याति रथायेषां त्रयोवे नास्तंशयः ॥

NOTE :—

यत्कृत्यालकृतां कन्यां योददाति सकुकुदः

Page 499 : "The benefits accruing from the shastraic gifting of a destitute kanya are told thus in Puranas. It is advisable to make one's own, another's daughter (kanya) in exchange for gold, even though the kanya does not belong to one's own gotra and gift her away according to Shastraic injunctions—He who on perceiving a destitute girl makes a gift of her to a proper bridegroom obtains twofold the benefits accruing from the gift of a kanya.

Page 501 : The benefits accruing from the gifting of a kanya—bejewelled and with ornaments (kookuda) i.e., a person making such a gift mentioned above, a man performing Asvamedha sacrifice, a man who protects another in peril, all three are invited to Indra's abode in his car."

In Mahabaratham, Anusasana Parvam XIII, Chapter 235, stanzas 67 to 73, the spiritual benefit of kanyadhanam is thus described :

उमोवाच—

६७. भगवन् कानिदेयानि धर्ममुद्दिश्य मानवैः ।
तान्यहं श्रोतुमिच्छामि तन्मे शंसितुमर्हसि ॥

ईश्वर उवाच—

६८. अतः परं प्रवक्ष्यामि कन्यादानं यथाविधि ।
कन्यादेयाम् देवि परेषामात्मनोपि ॥
६९. कन्यां शुद्धव्रताचा । कुरुरूपसमन्विताम् ।
यस्मैदिसतिपात्नाय तेनापिभृशकापिताम् ।
७०. प्रथमं तस्मा कन्या बन्धुभिः कृतनिश्चयः ।
का यिरा गृहं पूर्वं दासिदासपरिच्छदेः ॥
७१. गृहोपकणेश्चैव पशुधान्येन संयुताम् ।
तदर्थिने तदर्हाय कन्यां तां समलंकृताम् ॥

७२. सविवाहं यथा न्यायं प्रयच्छेदमिसाक्षिकम् ।
कुल्यायतां यथाकृत्वा सदृष्टौ निवेद्यायेत् ।
७३. एवं कृत्वा वधूदानं तस्य दानस्य गौरवात् ।
प्रेत्यभावे महीयेत स्वर्गलोके यथा सुखम् ॥
पुनर्जातस्य सौभाग्यं कुलवृद्धिं समाप्नुयात् ॥

SRINIVASA RAO
S. SESHACHARLU,
VENKATA-
RAMANA RAO J.

67. "(Goddess) Uma said (to Iswara) : Oh Lord, what are the things that can be given as gifts with a view to dharma. Please explain them to me. I wish to hear the same."

Iswara replied.

68 to 73 : "After this, I shall say about kanyadhanam (gift of a maiden). Oh Mahadevi, one must give a girl with clean vratams, good conduct, good caste and good looks, either his own girl or another's girl, to a good boy who has an affection for her, after first coming to a decision himself, on the propriety of the boy and then in consultation with the relations, the gift to be made according to shastras. That girl is to be gifted with house, with all jewels, maid servants, men servants, gifts, household articles, cattle, grains, etc., to one who is fit for her and who loves her, before agni (fire) and the marriage celebrated according to shastras. The couple must be provided with means of livelihood and they both must be settled in a good house. If kanyadhanam is done in this manner, by virtue of that dhanam, the giver after death will reach swarga, be praised there and be happy. Even in the next birth, he will acquire wealth and progeny."

Thus the gift of a destitute virgin in marriage is a pious and meritorious act from a religious point of view. Much more so, it must be in the case of a daughter's grand-daughter whose parents are indigent. According to prevalent Hindu notions the propositus would be morally bound to perform her marriage. It is clear from the evidence in this case that the mother of the girl was dead and the father was poor and not possessed of any means to perform the marriage. The girl and her parents lived with the first defendant and she was being brought up by her. I would therefore hold that the marriage of this girl is a pious and

SRIIVASA RAO meritorious act according to the Hindu system and the expenses incurred therefor must be deemed to be expenses incurred for charitable or religious purposes within the meaning of the rule laid down by the Privy Council and that it was open to the first defendant to mortgage the property for the expenses in connection therewith.

The question is whether the sum of Rs. 1,200 spent towards the expenses of the marriage was justifiable ; if not, what is the reasonable amount to be allowed ? The property was sold for Rs. 2,700. It appears to me that a sum of Rs. 1,200 towards marriage is a little excessive. Having regard to the fact that the girl was given away to a well educated bridegroom, I would hold that the widow would be justified in this case to alienate a third of her property and I would therefore uphold the mortgage to the extent of Rs. 900.

The result of my finding is that the sale in favour of the third defendant must be upheld subject to the obligation of refunding a sum of Rs. 300 to the next reversioner. I accordingly hold that the sale is valid and binding on the reversioners but I direct the third defendant to refund after the death of the first defendant a sum of Rs. 300 with interest at six per cent per annum to the plaintiffs from that date if they happen to be the next reversioners or to the persons who happen to be the next reversioners on the date of her death. The parties will bear their own costs in this appeal.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth and Mr. Justice Patanjali Sastri.

THIRUVENGADATHA AYYANGAR (PLAINTIFF),
PETITIONER,

1941,
May 2.

v.

SANNAPPAN SERVAI (DEFENDANT), RESPONDENT.*

Madras Agriculturists Relief Act (IV of 1938), ss. 9 and 13—Debt incurred after commencement of the Act in discharge of a debt incurred before it—Such debt governed by sec. 13 and not by sec. 9.

Section 9 of the Madras Agriculturists Relief Act (IV of 1938) does not apply to a debt incurred by an agriculturist after the commencement of the Act in discharge of an anterior debt incurred before the commencement of the Act. Section 13 of the Act applies to all debts incurred after the commencement of the Act, whether they be in discharge of prior debts or not.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Devakottai in Small Cause Suit No. 721 of 1939.

A. V. Narayanaswami Ayyar for petitioner.

G. N. Chari for respondent.

The JUDGMENT of the Court was delivered by **WADSWORTH J.**—This civil revision petition raises the question whether section 9 of Madras Act IV of 1938 applies to a debt incurred by an agriculturist after the commencement of the Act in discharge of an anterior debt incurred before the commencement of the Act. The debt in question is due on a promissory note, dated 2nd October 1938, which discharged

* Civil Revision Petition No. 1513 of 1940.

THIRU.
VENGADATHA
v.
SANNAPPAN.
—
WADSWORTH J.

a prior promissory note, dated 1st October 1935. The learned District Munsif has applied the proviso to section 9, clause 1, and has treated the debt as a renewal of an earlier debt upon which interest up to 22nd March 1938 is to be reduced to five per cent.

Section 9 in terms applies to debts incurred on or after 1st October 1932, and it does not say that the section shall not apply to debts incurred after the commencement of the Act, namely, 22nd March 1938. But the scaling down machinery under this section has the effect only of reducing interest up to the date of the commencement of the Act, and from this it may reasonably be inferred that the Legislature did not intend the section to apply to those debts which had no existence before the last point of time up to which the scaling down under this section could be effected. A debt scaled down under section 9 suffers reductions of interest under that section only up to the commencement of the Act, and for future interest rates the Court has to look to the provisions of section 12. Section 9 therefore could have no application to a debt incurred for the first time after 22nd March 1938; for section 9 would not provide for any scaling down at all of such a debt, and section 12 would have no application, for it only relates to interest on debts after the date up to which they have been scaled down under some other provision. On the other hand, section 13 seems to provide a complete machinery for dealing with debts incurred after the commencement of the Act, and it appears to have been designed as part of a regular scheme whereby debts of agriculturists are divided into three categories; firstly, those incurred before 1st October 1932 which fall under section 8; secondly, those incurred from 1st October 1932 to 22nd March 1938

THIRU.
VENGADATHA
v.
SANNAPPAN.
—
WADSWORTH J.

which fall under section 9; and thirdly, those incurred after 22nd March 1938. The only point in seeking to apply section 9 to the last class of debts is to get the advantage of the proviso to section 9 (1). It seems to us that, having regard to the scheme of the Act, if it had been the intention of the Legislature to introduce the theory of renewals into the scaling down operations in respect of debts incurred after the commencement of the Act, some specific provisions would have been made in this behalf. We are of opinion that all debts incurred after the commencement of the Act, whether they be in discharge of prior debts or not, will fall only under section 13.

In the result therefore we allow the revision petition with costs and grant the plaintiff a decree for the principal amount of the suit promissory note with interest at $6\frac{1}{4}$ per cent less the amount of the three payments which will be credited in the first instance to interest at $6\frac{1}{4}$ per cent as on the dates on which they were made. The plaintiff will be entitled to costs in the trial Court.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth and Mr. Justice
Patanjali Sastri.

1941,
May 1.

GADE SUBBAYYA (DECREE-HOLDER), PETITIONER,

v.

RAJAH KANDUKURI VENKATA HANUMANTHA
BUSHANARAO (JUDGMENT-DEBTOR), RESPONDENT.*

Madras Agriculturists Relief Act (IV of 1938), sec. 19—Applicability of, to decisions of Privy Council in appeals from Madras High Court—Such decisions decrees under the Act and governed by its provisions—Prerogative rights of Crown—Laws in derogation of—Competency of Indian Legislatures to make—Government of India Act, 1935, ss. 99, 100 and 110—Preliminary mortgage decree—Application for final decree, dismissal of—Order of dismissal, a decree and appealable—No revision against such order—Fresh application for final decree not precluded—Civil Procedure Code (Act V of 1908), ss. 2 (2), 96 and 115 and O. XXXIV, r. 5.

S obtained against V a preliminary mortgage decree for Rs. 26,302-3-6 which was upheld by the Privy Council on 26th September 1936 in appeals preferred to it. V applied in 1938 to the trial Court to scale down the decree under section 19 of the Madras Agriculturists Relief Act and S applied in 1939 for passing a final decree for the balance of the amount due under the preliminary decree after giving credit for amounts paid from time to time by V. These applications were heard together and the Subordinate Judge finding that the sums already paid by V amounted to more than twice the principal amount of the debt, after adjusting such payments towards costs decreed including costs in the appeals before the Privy Council, directed full satisfaction of the decree to be recorded under section 19 and dismissed the application for a final

* Civil Revision Petitions Nos. 1270 of 1940 and 656 of 1941 and Civil Miscellaneous Petition No. 5982 of 1940.

decree. From these orders S preferred civil revision petitions to the High Court and filed also an alternative civil miscellaneous petition for payment of the costs awarded by the Privy Council out of the amount deposited by V in the High Court as security for costs of the Privy Council appeals.

Held : (i) An application for a final decree for sale is appealable as a decree and consequently the civil revision petition against the order dismissing the application for a final decree was incompetent.

Subbulakshmi Ammal v. Ramanujam Chetty(1) followed.

(ii) The dismissal of the application for a final decree did not preclude the maintainability of the revision petition against the order directing satisfaction of the decree under section 19 of the Madras Agriculturists Relief Act.

(iii) The Privy Council is a Court and its decision in an appeal from a preliminary mortgage decree is a decree of Court within the meaning of the Madras Agriculturists Relief Act.

British Coal Corporation v. The King(2) applied and followed.

(iv) In applying the provisions of the Madras Agriculturists Relief Act to a decree or order passed on appeal to the Privy Council no prerogative of the Crown is affected. The prerogative has no concern with the curtailment or modification of the rights of parties by a local law although such rights may have been ascertained and defined by an order of the Privy Council.

(v) It is within the competence of the Legislatures in India to make laws derogating from the prerogative rights of the Crown except in so far as such prerogatives may be comprised in matters specially excepted. The Madras Agriculturists Relief Act is valid even when it affects a decree or order passed on appeal to the Privy Council.

(vi) The Privy Council is not functioning as a foreign tribunal in respect of decrees or orders passed by it in appeals taken to it from the Madras Province. The provisions of the Madras Agriculturists Relief Act are applicable to such decrees and orders.

(1) (1918) I.L.R. 42 Mad. 52.

(2) [1935] A.C. 500.

SUBBAYYA
v.
BUSHANARAO.

SUBBAYYA
v.
BUSHANARAO.

(vii) S was not entitled to any payment of costs out of the deposit in the High Court by V. The liability for costs must be deemed to have been discharged under section 19 of the Madras Agriculturists Relief Act.

PETITIONS under section 115 of Act V of 1908 praying the High Court to revise the orders of the Court of the Subordinate Judge of Narasapur, dated 23rd January 1940, and passed in Civil Miscellaneous Petitions Nos. 949 of 1939 and 506 of 1938 respectively in Original Suit No. 51 of 1927 and PETITION praying that, in the circumstances stated in the affidavit filed therewith, the High Court may be pleased to issue an order directing that the sum of £138-13-11, converted into Indian currency, be paid over to the abovenamed petitioner herein out of the deposit of Rs. 4,000 made by the respondent herein in Civil Miscellaneous Petition No. 356 of 1932, petition presented to the High Court for leave to prefer an appeal to His Majesty in Council against the decree of the High Court, dated 22nd October 1931, and passed in Appeal No. 197 of 1930 preferred to the High Court against the decree of the Court of the Subordinate Judge of Narasapur, dated 22nd July 1929, and passed in Original Suit No. 51 of 1927.

M. Appa Rao for petitioner.

Advocate-General (Sir A. Krishnaswami Ayyar) for Government.

P. Satyanarayana Rao and *S. Venugopala Rao* for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by PATANJALI SASTRI J.—These petitions relate to the petitioner's claim to recover his costs, etc., in Privy Council Appeals Nos. 99 and 100 of 1933 in which a preliminary mortgage decree for Rs. 26,302-3-6 passed

PATANJALI
SASTRI J.

in favour of the petitioner was upheld by His Majesty in Council on 26th September 1936.

The petitioner applied in Civil Miscellaneous Petition No. 949 of 1939 in the lower Court for a final decree for the balance of the amount due under the preliminary decree after giving credit for amounts paid from time to time by the respondent judgment-debtor, and the latter filed Interlocutory Application No. 506 of 1938 to scale down the decree under the Madras Agriculturists Relief Act (hereinafter referred to as the Act). Both these applications were dealt with together, and the learned Subordinate Judge finding that sums already paid by the respondent amounted to more than twice the principal amount of the debt, after adjusting such payments towards all costs decreed to the petitioner including the costs now claimed, directed full satisfaction of the decree to be recorded under section 19 of the Act and dismissed the application for a final decree. From these orders the decree-holder has preferred these civil revision petitions, and he has also filed Civil Miscellaneous Petition No. 5982 of 1940 in this Court as an alternative remedy praying that the sum of £138-13-11 awarded as costs by His Majesty in Council be paid over to him out of the deposit of Rs. 4,000 made by the respondent as security for costs of the Privy Council appeals. It may be mentioned here that the only dispute between the parties related to the adjustment of the costs of the Privy Council appeals under the proviso to section 19 of the Act.

Preliminary objections were raised on behalf of the respondent to the maintainability of the civil revision petitions. The dismissal of the application for a final decree for sale being appealable as a decree, it was contended that Civil Revision Petition No. 1270

SUBBAYYA
v.
BUSHANARAO.

PATANJALI
SASTRI J.

SUBBAYYA
v.
BHUSHANARAO.
—
PATANJALI
SASTRI J.

was incompetent. This objection must prevail, as this Court has held in *Subbulakshmi Ammal v. Ramannujam Chetty*(1) and *Mummadi Venkatiah v. Bogannatham Venkata Subbiah*(2) that the dismissal of an application for a final decree in a suit for sale on a mortgage is appealable as a decree under section 96 of the Civil Procedure Code. As regards Civil Revision Petition No. 656 of 1941, it was urged that the refusal of the Court below to pass a final decree having now become final, the petitioner could not be allowed to contend that a balance was still due to him under the preliminary decree as affirmed by the Privy Council. There is no force in this objection. The Court below did not purport to dismiss the suit as, indeed, it could not, having regard to the decision of the Privy Council in *Lachmi Narain Marwari v. Balmakund Marwari*(3) and it would be open to the petitioner, if he succeeded in this civil revision petition, to ask for a final decree to be made for the balance claimed to be due under the preliminary decree, as the refusal to pass a final decree was based solely on the order made under section 19 of the Act. Furthermore, it is still open to the respondent to apply for a decree in terms of Order XXXIV, rule 5 (1) of the Civil Procedure Code, and the suit must be considered to be pending till a final decree under either sub-rule 1 or sub-rule 3 of Order XXXIV, rule 5, is passed. We therefore overrule the preliminary objection.

Turning now to the merits, the petitioner raised two contentions, viz., first, that the Privy Council was not a "Court" and its decision was not a decree properly so called and did not therefore fall within the purview of the Act, and secondly, assuming that the

(1) (1918) I.L.R. 42 Mad. 52.

(2) (1921) 42 M.L.J. 51.

(3) (1924) I.L.R. 4 Pat. 61 (P.C.).

SUBBAYYA
v.
BHUSHANARAO.
—
PATANJALI
SASTRI J.

order of His Majesty in Council was a decree of a Court within the meaning of section 19 of the Act, the order being one made in exercise of His Majesty's prerogative, the Provincial Legislature had no power to pass any law affecting such order. As these contentions involved questions of general importance in which the Provincial Government might be interested, we directed notice of the petitions to be issued to the Advocate-General and we had accordingly the advantage of hearing his arguments.

On the first point, it is no doubt true that, in the case of an appeal to the Privy Council, the Judicial Committee make a report to His Majesty containing their recommendations regarding the disposal of the case and the final order disposing of the appeal is that of His Majesty in Council. But this form is a survival from the past history of the status and function of the Privy Council, and its preservation, doubtless due to the peculiar tendency which has often marked British constitutional changes of masking them by the retention of the original forms, should not be allowed to obscure the real character and function of the Judicial Committee after its reorganization by the Judicial Committee Acts of 1833 and 1844. As observed by FIELD J. in *Gopal Sahu Deo v. Joyram Tewary*(1),

"the essentials of a Court are (i) the *actor*, or plaintiff; (ii) the *reus*, or defendant; and (iii) the *judex*, or judicial power which ascertains the facts, applies the law, and, if injury has been done, affords a remedy by its officers or otherwise. An examination of the statutes which regulate the Judicial Committee of the Privy Council will show that this tribunal possesses all these essential elements of a Court".

The same view was expressed by their Lordships of the Privy Council in *British Coal Corporation v. The King*(2) where, after examining the provisions

(1) (1881) I.L.R. 7 Cal. 620, 626.

(2) [1935] A.C. 500, 510.

SUBBAYYA
v.
BHUSHANARAO.

PATANJALI
SASTRI J.

of the statutes referred to above, their Lordships observed :

“ It is clear that the Committee is regarded in the Act as a judicial body or Court, though all it can do is to report or recommend to His Majesty in Council, by whom alone the Order in Council which is made to give effect to the report of the Committee is made.

But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of law, to which by the statute of 1833 all appeals within their purview are referred.”

The petitioner's learned Counsel however placed reliance upon the observation in *Kristo Kinkur Roy v. Rajah Burrodacaunt Roy*(1) where their Lordships say that an Order in Council is

“ not properly speaking the decree of a Court but an order of Her Majesty made on the recommendation of a Committee of Her Privy Council ”.

But this was said with reference to the forms and procedure employed by their Lordships and it was indicated that in substance an Order in Council did no more than “ prescribe what shall be the final decree in the cause leaving it to be executed by the ordinary process of the Courts in India ”. It is worthy of note that Order XLV, rule 15, which prescribes the procedure to enforce orders of the King in Council, speaks of “ the decree passed or order made on appeal to His Majesty ”. We have therefore no hesitation in rejecting this contention of the petitioner.

The next question relates to the competency of the Provincial Legislature to make laws affecting a decree or order passed on appeal to His Majesty. It was said that an order of His Majesty in Council was

(1) (1872) 14 M.I.A. 465.

an act done in exercise of His prerogative right and the Provincial Legislature had no power to affect prerogative rights by legislation. In the first place, it is somewhat difficult to see how any royal prerogative can be said to be affected by a provision which, so far as it is material here, enacts that a judgment-debtor, if he is an agriculturist, shall be entitled to have all payments made or amounts recovered in respect of any decree applied first in payment of the costs decreed to the creditor. In doubting the correctness of the view adumbrated in some decisions in India that an Order of His Majesty in Council was not subject to any law of limitation on the ground that, such an order being an act done by virtue of royal prerogative, it was not competent to the Indian Legislature to prescribe a time limit for its enforcement, their Lordships observed at page 493 in the case last mentioned :

“ It (the Order in Council) may well thus finally ascertain and define the rights of parties without relieving them from the obligation imposed upon them by the general law of enforcing those rights with due diligence—a matter with which the prerogative has no concern.”

It seems to us for a similar reason that the prerogative has no concern with the curtailment or modification of the rights of parties by a local law although such rights may have been ascertained and defined by an order of His Majesty in Council.

However that may be, we are clearly of opinion that it is competent, generally speaking, for the Provincial Legislature to make laws affecting His Majesty's prerogative rights. There was some difference of opinion under the Indian Councils Act, 1861, as to whether a Provincial Council had power to affect the prerogatives of the Crown, although this Court

SUBBAYYA
v.
BHUSHANARAO.

PATANJALI
SASTRI J.

SUBBAYYA
v.
BHUSHANARAO.
—
PATANJALI
SASTRI J.

held that it had such power after an elaborate examination of the relevant provisions of that Act; see *Bell v. The Municipal Commissioners for the City of Madras*(1). The matter was however placed beyond doubt by section 84 (i) (a) of the Government of India Act, 1915, as amended by the Government of India (Amendment) Act, 1916, and it was settled law before the present Constitution Act was passed in 1935 that a local Legislature had power to make laws affecting the prerogatives of the Crown. This power was of considerable practical importance for, as observed by BHASHYAM AIYANGAR J. in *Bell v. The Municipal Commissioners for the City of Madras*(1),

“if it were otherwise, the powers of the Provincial Legislature to make laws for the peace, order and good government of the Province would be unduly hampered. There is no small degree of uncertainty as to the extent of the prerogative of the Crown in India and the validity of no few enactments of the Provincial Legislature will be called into question in Courts on the ground that they directly or indirectly affect the Royal prerogative”.

It would indeed be odd if the new Constitution Act, which was passed in response to much political agitation in the country, aimed at securing substantially enlarged powers to the Legislatures in India, should be found in practice to have deprived them of an important power which they had previously possessed. We see no reason to suppose that this could have been the intention of Parliament and we are convinced on an examination of the relevant provisions that such is not their effect. Section 99 provides that “subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State and a

(1) (1902) I.L.R. 25 Mad. 457, 480.

SUBBAYYA
v.
BHUSHANARAO.
—
PATANJALI
SASTRI J.

Provincial Legislature may make laws for the Province or any part thereof”, and section 100 defines and delimits the respective jurisdictions of the Federal and the Provincial Legislatures with reference to the subject matter of legislation. The legislative authority thus conferred is “subject only to the provisions of this Act” and is otherwise unrestricted. There is no provision which excepts generally the prerogatives of the Crown. It was suggested that section 110, clause (b), sub-clause (i), saving *inter alia*, “the sovereignty . . . of the Crown in any part of India” was such a provision, as a law affecting the prerogative of the Crown affected its “sovereignty.” We cannot agree that this term imports the prerogative rights of His Majesty. Prerogative is no doubt an attribute of sovereignty but is not the same thing as territorial sovereignty which alone is saved. On the other hand, we find sub-clause (iii) of the same provision expressly saving a particular prerogative right of His Majesty, viz., the right to grant special leave to appeal from any Court. The conclusion is therefore irresistible that it is within the competence of the Legislatures in India to make laws derogating from other prerogative rights except of course in so far as such prerogatives may be comprised in matters specially excepted.

In this connexion learned Counsel for petitioner laid stress on the absence in the new Act of provisions like section 80-A and section 84 (i) (a) of the earlier Act, and argued that it must be inferred that Parliament did not intend to confer such power on the Legislatures in India. We cannot attach any significance to the omission of these provisions in the present Act which discloses a totally different scheme with its practically exhaustive enumeration of legislative

SUBBAYYA
v.
BHUSHANARAO.
—
PATANJALI
SASTRI J.

powers and their distribution among the Central and Provincial Legislatures on a federal basis. The matters enumerated in the various legislative lists in schedule VII to the Act and the residual powers of legislation provided for in section 104 cover the entire field of governmental activities compendiously described as "peace and good government" in section 80-A of the Act of 1919, while section 84 (i) (a) of that Act was, as pointed out by BHASHYAM AIYANGAR J. in *Bell v. The Municipal Commissioners for the City of Madras*(1), really superfluous and came to be inserted only *ex majore cautela* for reasons connected with the history of constitutional development in this country. It is a well established principle that, within the limits of subject and area assigned to a Legislature by the Imperial Parliament, its powers to make laws are as supreme and plenary as those of Parliament itself; *The Queen v. Burah*(2), *Hodge v. The Queen*(3) and *Croft v. Dunphy*(4). In this connexion the weighty observations of their Lordships in the *British Coal Corporation* case(5), already referred to, should also be borne in mind :

"In interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted. This principle has been again clearly laid down by the Judicial Committee in *Henrietta Muir Edwards v. Attorney-General for Canada*(6). Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs."

(1) (1902) I.L.R. 25 Mad. 457.
(3) (1883) 9 App.Cas. 117.
(5) [1935] A.C. 500.

(2) (1878) 3 App. Cas. 889.
(4) [1933] A.C. 156.
(6) [1930] A.C. 124, 126.

SUBBAYYA
v.
BHUSHANARAO.
—
PATANJALI
SASTRI J.

Another contention was based upon the decision of this Bench in *Santhappa v. Holiappa Bulla*(1) where it was held that the term "decree" in section 19 of Act IV of 1938 must be taken to refer to decrees passed by Courts in this Presidency. It was argued that the Privy Council sitting and functioning in London was a foreign tribunal and section 19 could not therefore apply to decrees passed on appeal thereto. This argument proceeds upon a misapprehension of the effect of that decision. The *ratio decidendi* there was that the procedure provided by section 19 was inapplicable to decrees passed outside this Province as decrees had to be scaled down under that section by Courts which passed them, and the Legislature of this Province could not make laws directing Courts in other Provinces to scale down decrees passed by them. The position however is entirely different in respect of a decree passed on an appeal to the Privy Council taken from this Province, as the application to scale down such decree has to be made to the Court of first instance, i.e., a Court of this Province; see explanation to section 20 of the Act, read with section 37 of the Civil Procedure Code. Nor is it correct to regard the Privy Council as a foreign tribunal in relation to appeals preferred from Courts of this Province. The observations of their Lordships in the Canadian case already referred to, *British Coal Corporation v. The King*(2), are here pertinent :

"It is said that this class of appeal is a matter external to Canada; emphasis is laid particularly on the fact that the Privy Council sits in London . . . But even so the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian Court and reaches its consummation in the Canadian Court. What takes place outside Canada is only ancillary

(1) (1941) 2 M.L.J. 295.

(2) [1935] A.C. 500. 521.

SUBBAYYA
v.
BHUSHANARAO.
—
PATANJALI
SASTRI J.

to practical results which become effective in Canada. And the appeal to the King in Council is an appeal to an Imperial, not a merely British, tribunal."

It only remains to consider Civil Miscellaneous Petition No. 5982 of 1940 and the argument advanced in connexion therewith that the petitioner is, in any case, entitled to payment of the costs claimed out of the deposit of Rs. 4,000 made by the respondent in this Court in Privy Council Appeal No. 99 of 1933. The said deposit was made under Order XLV, rule 7, Civil Procedure Code, which provides that the applicant shall within the time specified "furnish security in cash or in Government securities for the costs of the respondent". It is thus clear that the deposit in question was made merely by way of security for any liability for costs which might arise in case the appeal failed. Such liability having arisen and been discharged by appropriation of amounts already received in respect of the decree as provided for in section 19 of the Act, the petitioner can no longer claim any payment, and the deposit will have to be returned to the respondent.

In the result, all the petitions fail and are dismissed. The petitioner will pay the costs of the first respondent in Civil Revision Petition No. 656 of 1941. Following the Federal Court practice referred to in *Subramanyan Chettiar v. Muthuswami Goundan*(1), we allow no costs to the Advocate-General. We do not think that the case involves any substantial question of law as to the interpretation of the Government of India Act and we decline to certify that it is a fit case for appeal to the Federal Court.

Solicitor for Government: H. M. Small.

N.S.

(1) (1940) 3 F.L.J. 157.

APPELLATE CRIMINAL.

Before Mr. Justice Mockett.

M. S. AYYAR & COMPANY, RAJAH STREET,
COIMBATORE, BY C. R. V. DASS AND OTHERS,
(PETITIONERS), ACCUSED,

1941,
April 24.

v.

G. SRINIVASULU NAIDU (COMPLAINANT), RESPONDENT*.

Madras District Municipalities Act (V of 1920), sec. 306, cl. 28—No provision in the Act to levy licence fees for advertisements—By-laws made by Municipality to levy such fees ultra vires.

In the Madras District Municipalities Act (V of 1920) there is no provision either directly or by implication to enable a District Municipality to levy licence fees for advertisements. Section 306, clause 28, of the Act which empowers a council to make by-laws "for the prohibition and regulation of advertisements in public streets and parks" does not authorize the municipality to levy licence fees in respect of advertisements.

Held accordingly, that the conviction of the petitioner for advertising without a licence in Coimbatore in two ways, (i) in his bullock cart, and (ii) by means of a board hung over his roof, was illegal and should be set aside since the by-law made by the municipality to levy licence fees for advertisements is *ultra vires*.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Senior Bench of Magistrates, Coimbatore, in Bench Cases Nos. 5329, 5335, 5333 of 1939 and Bench Case No. 3868 of 1940 respectively.

K. Bhashyam Ayyangar for R. Desikan for petitioners.

* Criminal Revision Case No. 1100 of 1940
(Criminal Revision Petition No. 1045 of 1940).

AYYAR & Co. *Public Prosecutor (V. L. Ethiraj) for the Crown.*
 v.
 SRINIVASULU. Respondent was not represented.

ORDER.

MOCKETT J. MOCKETT J.—The petitioner has been convicted and fined by the Senior Bench Court of Coimbatore for advertising without a licence in Coimbatore in two manners, (i) in his bullock cart and (ii) by means of a board hung over his roof. Mr. Bhashyam Ayyangar argues that the conviction is without jurisdiction because no offence has been committed. That depends on a consideration of the District Municipalities Act. There is an express provision in the Madras City Municipal Act, section 129-A, which was introduced by the amending Act X of 1936 making special provision for taxing advertisements; but the only provision with regard to advertisements to be found in the District Municipalities Act is section 306, clause 28. Section 306 says,

“The council may make by-laws not inconsistent with this Act or with any other law to provide—

“(28) for the prohibition and regulation of advertisements in public streets and parks.”

This section is in the same words as section 349 (28) of the Madras City Municipal Act No. IV of 1919. There will be found in section 306 several provisions relating to licences, for example, clause 10 (c) for licensing of builders and surveyors, 18 (c) for licensing and controlling of brokers, etc., and 22 (b) for the levy of fees for the use of certain burial and burning grounds. “Licences and fees” are comprehensively dealt with in Chapter XII which is so headed. Therein are specified a number of acts for which licences are required and for which fees may be levied. But there is no provision there for the granting of any

licence or levying of fees in relation to advertisements. The learned Public Prosecutor has rested his case entirely on section 321 which reads as follows :

“(1) Every licence and permission granted under this Act or any rule or by-law made under this Act shall specify the period, if any, for which, and the restrictions, limitations, and the conditions, subject to which the same is granted, and shall be signed by the executive authority.

(2) Save as otherwise expressly provided in or may be prescribed under this Act, for every such licence or permission, fees may be charged on such units and at such rates as may be fixed by the municipal council.”

There is a distinction in the Act between “licence” and “permission” and “regulating” as an examination of the chapter shows: for example, under section 255 a licence to use a slaughter house is required, but under section 250 permission is required to establish a factory. I observe too that, although private markets can be regulated by by-laws under Chapter XIV, section 306 (18) (b), licence fees are leviable on them under Chapter XII. Chapter XIV is headed, “Rules, By-laws and Regulations” and Chapter XII, as I have already stated, “Licence and Fees.” The Public Prosecutor contends that under section 306, clause 28, the “regulation of advertisements” would include giving permission to advertise and therefore, by further implication, a power to levy licence fees. But, although in the Act advertisements may be prohibited, I can find nowhere that they are prohibited or permitted only by licence as in the case of all the other numerous subjects mentioned. Licensing, permitting and regulating are, in my view distinct matters and are dealt with distinctly and differently under the Act. The intention of section 306, clause 28, seems to me to empower the Municipality to prohibit altogether advertisements in public streets or parks or to regulate their exhibition, for

AYYAR & Co.
 v.
 SRINIVASULU.
 MOCKETT J.

AYYAR & Co. example, as to size and position—no doubt a necessary provision in the interests of the appearance of the streets and parks. I do not think—indeed I think it is contrary to a general reading of the Act—that it can be implied that a further power to levy licence fees in respect of the advertisements is given. But under the by-laws which are attached to the record it is expressly provided that fees shall be levied. “Regulate” according to the Oxford Dictionary means “to control by rule, subject to restrictions, moderate, adapt to requirements.” It does not seem possible to stretch this meaning to include levying fees, especially when such elaborate provision is made in other parts of the Act for this purpose with regard to other specified matters. What the true meaning and sense of “regulate” in this Act is can be derived from its use in section 306 (2), (3 B), (9) (10 A), (11), (12), (18 B) and (22 A). It is a general principle that any provision by which a member of the public may be taxed should be clearly stated; so should, in my view, an analogous provision by which any payment can be compelled from them.

My conclusion is therefore that neither directly nor by implication is there any provision in this Act to enable a District Municipality to levy licence fees for advertisements any more than in the City Municipal Act before the introduction of the amending Act of 1936 which provided especially for taxation for advertisements. It is for the Legislature to deal with this omission if it thinks fit. The by-law therefore appears to be *ultra vires* and in consequence this revision petition will be allowed, the conviction set aside and the fine, if paid, refunded.

V.V.C.

APPELLATE CRIMINAL.

Before Mr. Justice Wadsworth and Mr. Justice Somayya.

IN RE PERIA GURUSWAMI GOUNDER AND ANOTHER
(ACCUSED NOS. 1 & 2), PRISONERS.*

1941,
June 2.

Criminal Trial—Prosecution eye-witness—Evidence hostile to prosecution in lower Court—Not examined in Sessions Court—Proper procedure to be adopted in such cases—Report by police constable—Summary of a joint statement by two accused implicating them to some extent in crime—Admissibility of—Indian Evidence Act (I of 1872), sec. 27.

In a case of murder where one of the three eye-witnesses was not examined in the Sessions Court on the ground that he had been treated as hostile by the prosecution in the Committing Magistrate's Court,

held: that the eye-witness should have been examined as a Court witness. A Public Prosecutor cannot be compelled to put forward as his own witness a man who has in his opinion committed perjury by giving evidence hostile to the prosecution in the lower Court. At the same time it does seem to be the duty of the Court, when there is an important eye-witness whom the Public Prosecutor does not wish to examine because he has been treated as hostile in the committal enquiry, to record the evidence of this witness and that the accused should not be forced to examine him as a defence witness. The proper course to take in such circumstances seems to be for the Public Prosecutor to see that the witness is present in Court and for the Court, if the witness is really important, to examine him as a Court witness and allow both sides to cross-examine him.

Where for the purpose of throwing light on the motive for the crime, the lower Court had relied on a document purporting to be a report by the constable on duty at the outpost at which the two accused were alleged to have presented themselves shortly after the occurrence and handed over two weapons,

* Referred Trial No. 55 of 1941 and Criminal Appeal No. 324 of 1941.

GURUSWAMI,
In re. and the report contained what was alleged to be a summary of a joint statement made by both the accused implicating them to some extent in the crime,

held: that the document should have been excluded from the evidence. Section 27 of the Indian Evidence Act has no application to a confessional statement made to a police officer before the deponent had come into the custody of that police officer. It was improper to treat as the individual statements of two different persons a composite statement of that kind which appeared to have been made up of information gathered from the two persons, it being impossible to say how much of the statement was made by one of them and how much was made by the other. The document could properly have been used by the constable only to refresh his memory as to the date and time when the two accused appeared before him and handed over the two weapons.

TRIAL referred by the Court of Session of the Tinnevely Division for confirmation of the sentences of death passed upon the said prisoners in Case No. 156 of the Calendar for 1940 on 8th March 1941 and Appeal by the prisoners against the said sentences.

K. S. Jayarama Ayyar for accused.

Public Prosecutor (V. L. Ethiraj) for the Crown.

THE JUDGMENT of the Court was delivered by WADSWORTH J.—The accused in this case have been convicted by the learned Sessions Judge of Tinnevely of an offence under section 302 of the Indian Penal Code. It is alleged that they on 23rd March 1940 at Ottudanpatti, a village in the Koilpatti taluk, murdered one Sangili Thevar. Prosecution evidence is that the deceased was attacked in the street at about 3 p.m. by the two accused, the first accused holding him while the second accused cut him, and that this was done in the presence of three eye-witnesses, P.W. 3 a man of the village, one Sanga Reddiar who has not been examined by the Sessions Judge and is

also a man of the village, and P.W. 4 a man who lives some four miles away and happened to be present. The deceased received a large number of injuries and died before the arrival of the village munsif. The village munsif heard of the occurrence when in a hamlet a mile and a half away and he is said to have been there by 4 p.m. and hearing that P.W. 3 was a witness he sent for him and took a complaint from him which is alleged to have been despatched at 6 p.m. and to have reached the police station, which we are told is eight miles away, at 9-30 p.m. The two accused are alleged to have appeared before a constable at a police outpost a mile away at 4-30 p.m. and to have handed over two weapons, an aruval and a knife, neither of which were found by the Chemical Examiner to be stained with blood. As we think it desirable to send this case back for retrial we do not propose to say anything which will affect the merits of the case. We will deal only with the two main criticisms of the trial by the learned Sessions Judge.

Firstly, there is the fact that Sanga Reddiar, who was undoubtedly one of the three eye-witnesses, was not examined in the Sessions Court on the ground that he was treated as hostile by the prosecution with the permission of the Committing Magistrate. It is undoubtedly difficult to lay down any rule of universal application in such cases. It may be said that the Public Prosecutor should not be compelled to put forward as his own witness a man who has in the opinion of the Public Prosecutor committed perjury by giving evidence hostile to the prosecution in the lower Court. At the same time it does seem to us to be the duty of the Court, when there is an important eye-witness whom the Public Prosecutor does not wish to examine because he has been treated as hostile

GURUSWAMI,
In re.
WADSWORTH J.

GURUSWAMI,
In re.
WADSWORTH J.

in the committal enquiry, to record the evidence of this witness and that the accused should not be forced to examine him as a defence witness. The proper course to take in such circumstances seems to us to be for the Public Prosecutor to see that the witness is present in Court and for the Court, if the witness is really important, to examine that witness as a Court witness and allow both sides to cross-examine the witness. We do feel in the present case, which depends on the evidence of the three eye-witnesses, that those three eye-witnesses should have been examined in the Sessions Court and, if the Public Prosecutor is reluctant in the circumstances of the case to put forward Sanga Reddiar as a witness on behalf of the prosecution, there seems to be no reason why he should not have been examined as a Court witness.

The other criticism relates to Exhibit E. Exhibit E purports to be a report by the constable on duty at the outpost at which the accused are alleged to have presented themselves shortly after the occurrence and handed over two weapons. This report contains what is alleged to be a summary of a joint statement made by both the accused to some extent implicating them in the crime. A portion of this statement has been treated as admissible by the Sub-Magistrate apparently under the impression that it falls under section 27 of the Indian Evidence Act. So far as one can gather, the Sessions Judge has marked the whole of the report including this joint statement. It appears to us that section 27 of the Indian Evidence Act has no application to a confessional statement made to a police officer before the deponent has come into the custody of that police officer. Moreover, it seems to us improper to treat as the individual

statements of two different persons a composite statement of this kind, which appears to have been made up of information gathered from the two persons, it being impossible to say how much of the statement was made by one of them and how much was made by the other. No doubt Exhibit E could properly have been used by the constable to refresh his memory as to the date and time when the two accused appeared before him and handed over the two weapons. We do not consider that it should have been used for any other purpose. In fact it has been mainly used by the learned Sessions Judge to throw light on the motive for this crime. In our opinion, it should have been excluded from evidence.

In view of these two defects in the trial, namely, the failure to examine Sanga Reddiar and the inclusion of this inadmissible document, Exhibit E, we think it desirable to order a fresh trial. The convictions and sentences are therefore set aside and the case will be remanded for retrial by the Additional Sessions Judge, Tinnevely.

V.V.C.

GURUSWAMI,
In re.
WADSWORTH J.

PRIVY COUNCIL.

P. T. KRISHNASWAMI AYYANGAR, APPELLANT,

v.

CHEVULA KAMALAMMA AND OTHERS, RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS]

J. C.*
1941,
June 23.

Mortgage—Equitable mortgage—Deposit of title deeds—Unregistered “collateral security bond”—Equitable mortgage invalid—Subsequent mortgage—Suit on equitable mortgage—Subsequent mortgagee not proper party—Proper decree—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Transfer of Property Act (IV of 1882), sec. 59.

V borrowed Rs. 18,000 from R on a promissory note and at the same time deposited the title deeds of his house and executed an unregistered bond as “collateral security” for the loan. After V's death his executors mortgaged the house to K. In a suit against V's executors and K to enforce the equitable mortgage,

held, that the equitable mortgage in favour of R being invalid for want of registration, it was invalid not only against K, but for all purposes and the only decree that could properly be made was a money decree for the amount of the loan with interest, that K was not a proper party to the suit and it would be wrong to direct a sale of the property or to make any pronouncement on the validity or otherwise of K's mortgage or to give K any relief against either the property or the executors.

APPEAL (No. 28 of 1939) from a decree of the High Court in its Appellate Jurisdiction (26th July 1935), which varied a decree of the same Court in its Ordinary Original Jurisdiction (6th September 1932).

The material facts are stated in the judgment of the Board.

* Present: LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD ROMER, SIR GEORGE RANKIN AND LORD JUSTICE CLAUSON.

J. P. Eddy K. C. and *S. Khambatta* for appellants. KRISHNASWAMI v.
J. M. Parikh and *P. V. Subba Row* for respondents. KAMALAMMA.

The JUDGMENT of the Judicial Committee was delivered by LORD ROMER.—Chevula Venkatasub- LORD ROMER.
baya Chetti now deceased was the owner of two houses in Madras. For the sake of brevity they may be referred to as Nos. 60 and 68 respectively, and their owner as the testator.

On 2nd June 1919 the testator executed a promissory note for Rs. 12,000 bearing interest at 9 per cent per annum in favour of one Rangayya Chetti and deposited with him the title deeds of No. 60 as security. At the same time the testator executed a document headed “Collateral Security Bond” which recorded the fact of the deposit of the title deeds as collateral security in respect of the promissory note and then proceeded as follows:

“I shall therefore pay you the principal and interest accruing due on the said promissory note from this date in full, and redeem the said title deeds. To this effect is the collateral security bond executed by me with consent.”

This document was never registered.

The testator died in the year 1920 having by his will appointed four executors of whom the respondents 1 and 2 and one Chevula Subrahmanyam Chetti appear to be alone surviving. It should be mentioned that the will contained an express provision that the two houses should not be sold.

Rangayya Chetti died in the year 1921, and on 13th October 1930 his junior widow Gouriamma who was his sole legal personal representative instituted the present proceedings for the purpose of enforcing the equitable mortgage purporting to have been created in favour of Rangayya by the deposit of the title deeds of No. 60.

KRISHNASWAMI
v.
KAMALAMMA.
—
LORD ROMER.

The first three defendants to the suit were the surviving executors of the testator. The fourth defendant was the present appellant. The reason for adding him as a party was this. On 26th June 1924 the first three defendants and on 24th November of the same year the first two defendants as executors of the testator had executed mortgages in favour of the appellant of both the houses to secure various sums of money that they had borrowed from him or that he had paid at their request. He was therefore, assuming these mortgages to have been valid, a necessary party to the proceedings. The relief that Gouriamma asked for by her plaint was the usual relief sought in a suit by a mortgagee to enforce his security.

The first two defendants (being the present respondents 1 and 2) by their written statement impeached the validity of the equitable mortgage in suit on the ground that it was created by the collateral security bond and that the document had never been registered. The third defendant Subrahmanyam neither filed a written statement nor took part in any of the subsequent proceedings in the suit. The appellant by his written statement put the plaintiff to proof of the equitable mortgage but did not in terms impeach its validity.

In due course issues were directed to be tried of which the only ones now material were to the following effect :—

2. Is the mortgage sued upon invalid ?
5. Are the mortgages in favour of the fourth defendant binding on the estate of the testator ?
6. What is the amount due upon those mortgages ?

On 6th September 1932 the case came on for trial before BEASLEY C.J. After a consideration of the

relevant authorities he came to the conclusion that the collateral security bond did not require registration and that a valid equitable mortgage upon No. 60 had been created by the deposit of the title deeds. He accordingly pronounced the usual mortgage decree in favour of the plaintiff. The appellant did not at the trial adduce any evidence to prove his mortgages. The learned Chief Justice in those circumstances made no findings upon the fifth or sixth issue. The decree merely provided that the appellant should be at liberty to enforce his claim as a second mortgagee of the suit property by a separate suit. With this decision upholding the validity of the plaintiff's mortgage defendants 1 and 2 appeared to be content. The appellant, however, took the matter to the appellate side of the High Court where it came on for hearing on 11th May 1933 before RAMESAM and CORNISH JJ. Those learned judges took the view that unless the appellant's mortgages were valid and there was something remaining due upon them the appellant had no right to be heard on the appeal. They accordingly remanded the case to the judge sitting on the original side to submit his findings upon the fifth and sixth issues. They ordered however that the costs entailed by the additional hearing, that is to say, the hearing-fee and the fee payable to Counsel should be paid by the appellant in any event.

The trial of these two issues took place before ANANTAKRISHNA AYYAR J. in August 1933, and on the 25th of that month he gave judgment recording his findings upon them. It is unnecessary to deal with them in any detail. It is sufficient to say that on the sixth issue he found that, assuming the appellant's mortgages to be valid, there was a substantial sum due to him thereunder which would be properly

KRISHNASWAMI
v.
KAMALAMMA.
—
LORD ROMER.

KRISHNASWAMI
v.
KAMALAMMA.
LORD ROMER. payable out of the testator's estate. He made no finding upon the fifth issue which raised a question of law rather than one of fact. It was the question whether in view of the provisions of section 307 of the Indian Succession Act the executors had power to mortgage the houses of their testator. He thought that this question could not properly be answered until the question of the validity of the plaintiff's own mortgage had been settled.

The hearing of the appeal before RAMESAM and CORNISH JJ. was resumed on 26th July 1935. They evidently thought that the findings of ANANTAKRISHNA AYYAR J. were sufficient to establish the right of the appellant to be heard upon the appeal, for they proceeded to consider the question of whether the collateral security bond of 2nd June 1919 required registration. Differing from the Chief Justice upon the point they decided that it did, and that the plaintiff's suit so far as it sought to enforce a charge upon No. 60 was not maintainable. The plaintiff, however, was by virtue of the promissory note an unsecured creditor of the testator's estate for so much of the Rs. 12,000 as still remained owing together with arrears of interest and was entitled to a simple money decree against the executors for that amount. But the appellant was not a proper party to a suit for such a decree. The suit against him should therefore have been dismissed with costs. When once it had been decided that the plaintiff was merely an unsecured creditor of the testator, the question of the validity or otherwise of the appellant's mortgages could not by any possibility be an issue in the suit. It would only arise for determination if and when the plaintiff should seek to enforce her decree in execution against No. 60. (It should be mentioned here that No. 68 had long since been

sold in proceedings instituted by a person who held a mortgage on that house granted by the testator.)

The learned judges nevertheless proceeded to discuss the question at some length, and eventually arrived at the conclusion that the mortgages were beyond the competence of the executors and were accordingly invalid as between the appellant on the one hand and the plaintiff and the rest of the unsecured creditors of the testator on the other; but that the mortgages were valid as between the appellant and the executors, by which the learned judges meant, as will presently appear, that it was valid as between the appellant and the persons interested in the testator's estate other than the creditors. They also held that the appellant was entitled to stand in the shoes of the unsecured creditors whose debts had been paid off out of the moneys advanced by him on the security of his two mortgages. Having arrived at these conclusions and having ascertained that the amount remaining due to the appellant on the footing just mentioned was Rs. Y, and that of the total amount advanced by him under his mortgages there still remained due for principal and interest the sum of Rs. X, and that the sum due to the plaintiff on the promissory note for principal and interest was Rs. 18,985-6-4, the learned judges gave effect to their several findings in a decree dated 26th July 1935. Stated shortly it was to this effect: The appeal was allowed, the decree of 6th September 1932 was set aside and declarations were made substantially as follows:—(i) that the equitable mortgage of 2nd June 1919 was not valid as a mortgage as between the plaintiff and the appellant as it was not registered; (ii) that the mortgage by the executors of No. 60 in favour of the appellant was not valid as a mortgage as between the plaintiff and the

KRISHNASWAMI
v.
KAMALAMMA.
LORD ROMER.

KRISHNASWAMI
v.
KAMALAMMA.
LORD ROMER.

appellant ; and (iii) that the plaintiff and the appellant were respectively entitled to money decrees for the debts due to them, viz., Rs. 18,985-6 4 to the plaintiff and Rs. X to the appellant. The decree then went on to order a sale of No. 60 and directed in effect that out of the net sale proceeds Rs. 18,985-6-4 should be paid to the plaintiff and Rs. Y to the appellant, but that if any balance should be left after making such payments it should be applied in payment to the appellant of Rs. X—Y. In case of deficiency the plaintiff and the appellant were to be at liberty to apply to the Court for payment of the same by the defendant executors. Finally, it was ordered that each party should pay his or their own costs of the appeal and in the Court below. From this decree the appellant now appeals to His Majesty in Council.

It will be observed that the decree treats the plaintiff and the appellant as being the only creditors of the testator, the only creditors at any rate who were entitled to be paid out of the proceeds of sale of the property in suit. As to this RAMESAM J. made the following observations :—

It is necessary to mention one matter. After the whole argument was closed it was represented to us that there are other creditors who up to now have not taken any action. They are not parties to this suit. We do not think that we can adjourn this suit to enable them to be made parties at this stage. It is possible that the claims of some of them are barred. So far as the plaintiff and the fourth defendant are concerned, the form of the relief we have given practically takes the form of relief in an administration action as between them only and as if there are no other creditors. But when there are other creditors, our adjudication does not bind them. They can take separate action impleading these parties and get appropriate relief.

If it had been necessary to consider the position of the other creditors at all, and it was not, their

Lordships cannot think that this was a satisfactory way of dealing with them. Nor can their Lordships think that it was proper to qualify the declaration as to the invalidity of the plaintiff's mortgage by the insertion of the words "as between the plaintiff and the fourth defendant." If the mortgage security be invalid by reason of the failure to have it registered, it is invalid for all purposes. That it required registration must be taken to have been finally determined, there being no cross appeal by respondents 3 to 6 who now represent the estate of Rangayya Chetti in lieu of the plaintiff who has died since the decree was pronounced. It necessarily follows that the only decree that could properly have been made after a declaration of the invalidity of the mortgage was a simple money decree against the executors in favour of the plaintiff for Rs. 18,985-6-4. With all respect to the learned judges, it was wrong to direct a sale of the property in suit, or to make any pronouncement as to the validity or otherwise of the appellant's mortgages, or to give the appellant any relief whether as against the property or as against the executors. Whether or not the appellant will eventually obtain anything better than was given him by the decree is a question upon which it is not for their Lordships to express any opinion. He is entitled to appeal from it if he thinks fit, and to have the decree put into the proper form.

In their Lordships' opinion the appeal should be allowed, and the decree of 26th July 1935 should be varied as follows: there should be omitted from the first declaration the words "as between the plaintiff and the fourth defendant"; the whole of the decree subsequent to such declaration should be omitted with the exception of the order as to costs, and there should

KRISHNASWAMI
v.
KAMALAMMA.
LORD ROMER.

KRISHNASWAMI
v.
KAMALANMA.
LORD ROMER. be substituted a simple money decree for payment to the plaintiff out of the property of the testator of Rs. 18,985-6-4 with interest at 6 per cent per annum from 26th July 1935; the order for costs should be varied by inserting after the words "each party" the words "other than the fourth defendant" and by ordering the plaintiff to pay the costs of the fourth defendant of the appeal and of the suit on the original side of the High Court, other than the costs directed by the order of 11th May 1933 to be paid by the fourth defendant in any event, which order is to remain unaffected.

Their Lordships will humbly advise His Majesty accordingly.

The respondents Nos. 3 to 6 will pay to the appellant such costs of this appeal as he is entitled to, having regard to the fact that he is appealing *in forma pauperis*.

Solicitors for appellant: *Lambert & White*.

Solicitor for respondents: *Harold Shephard*.

C.S.S.

INCOME-TAX REFERENCE.

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

COMMISSIONER OF INCOME TAX, MADRAS,
PETITIONER,

1941,
September 15.

v.

THE MAHARAJA OF PITHAPURAM, DEFENDANT.*

Indian Income-tax Act (XI of 1922), sec. 16 (1) (c)—Revocable settlement—Income arising from, in 1938-39—Assessment year, 1939-40—Amending Act coming into force on 1st April 1939—Inclusion of such income as part of income of assessee—Valid.

On 5th April 1933 an assessee executed in favour of his daughters certain "deeds of trusts and settlements" in which he reserved to himself powers to revoke the settlements or to make fresh dispositions as he deemed fit. In making the assessment for the year 1939-40, the Income-tax authorities included, as part of the income of the assessee, the income received by the daughters in the year of account 1938-39 from the properties so settled.

On objection by the assessee,

held: The inclusion of the above-mentioned income from the settled properties was proper, as the law in force at the time of the assessment, viz., the provisions contained in section 16 (1) (c) of the Income-tax (Amending) Act, 1939, governed the assessment in this case and not the law as it was during the year in which the income was earned.

As a result of the amending Act that income, though it had actually been received by the daughters, must from 1st April 1939 be deemed to be the income of their father, the assessee. In the matter of the Indian Income-tax Act (XI of 1922).

* Original Petition No. 31 of 1941.

COMMISSIONER
OF INCOME-TAX
v.
MAHARAJA OF
PITHAPURAM.

ON THE REFERENCE.

Ch. Raghava Rao for assessee.—The reference relates to the construction of section 16 (1) (c) of the Indian Income-tax Act which came into force on 1st April 1939 by an amendment of the original Act. The assessee executed revocable trusts in favour of his daughters. The case of the assessee comes under the second part of the clause. There is a distinction between the first and second parts of the clause, the distinction being between “transfer of assets” and “transfer of income of assets.” The income is earned in 1938–39 and the assessment is for 1939–40. The income that is sought to be taxed did not arise after 1st April 1939 when the Amending Act came into force nor did it arise out of assets which remained the property of settlor (assessee) but out of assets transferred to settlees under the deeds of settlement. The assessee will have no case if his case comes under the first part. In the second part the words “whether effected before or after the commencement of the Act” are absent. The word “arising” in the second part can only mean arising after the commencement of the Act.

K. V. Sesha Ayyangar for petitioner.—In *H. P. Banerjee v. Commissioner of Income-tax, Bihar and Orissa*(1) the Patna High Court had to consider a similar question and it held that the assessee was liable.

LEACH C. J.—The JUDGMENT of the Court was delivered by LEACH C. J.—By four deeds, all dated 5th April 1933 and referred to in these proceedings as “deeds of trust and settlement”, the assessee settled immovable properties on each of his four daughters. The properties were to be held by the assessee as trustee during his lifetime. The deeds also provided that after his death his eldest son was to be the trustee. The assessee reserved to himself powers to revoke the settlements or to make fresh dispositions just as he deemed fit. In view of the provisions of section 16 (1) (c) of the Indian Income-tax Act, a clause which was

(1) (1940) 9 I.T.R. 137.

inserted by the Amendment Act of 1939, the Income-tax Officer held that the assessee was liable to be taxed in respect of the income received by his daughters from the settled properties during the year of account (1938–39). The assessee objected. He contended that the Income-tax Officer was wrong in giving what he called retrospective effect to the latter part of section 16 (1) (c). Accordingly he appealed to the Assistant Commissioner who concurred in the order of the Income-tax Officer. On the application of the assessee the Commissioner of Income-tax has referred to this Court under the provisions of section 66 (2) the following question :

“Whether the income of the year 1938–39 derived from the assets comprised in the revocable instruments of Trust and Settlement executed by the petitioner in favour of his four daughters on 5th April 1933, i.e., before the commencement of the Indian Income-tax Act (VII of 1939) can be deemed to be income of the petitioner under revocable transfers of assets as contemplated by clause (c) of sub-section 1 of section 16 of the Indian Income-tax Act (XI of 1922) as amended by the Indian Income-tax Amendment Act (VII of 1939).”

In referring this question the Commissioner has given reasons for supporting the order of the Income-tax Officer and we agree with him.

Section 16 (1) (c) says :

“All income arising to any person by virtue of a settlement or disposition whether revocable or not and whether effected before or after the commencement of the Indian Income-tax (Amendment) Act, 1939, from assets remaining the property of the settlor or disposer, shall be deemed to be income of the settlor or disposer and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor.”

It is admitted, as it must be, that the deeds executed by the assessee operate to transfer the assets, and being revocable the income arising from the lands

COMMISSIONER
OF INCOME-TAX
v.
MAHARAJA OF
PITHAPURAM.
LEACH C.J.

COMMISSIONER
OF INCOME-TAX
v.
MAHARAJA OF
PITHAPURAM.
LEACH C.J.

transferred must from 1st April 1939 be deemed to be the income of the assessee. But it is said that the income which the Income-tax Officer proposed to tax in respect of the year 1939-40 was income which had accrued before the passing of the Amendment Act and that this makes all the difference. The learned Advocate for the assessee has laid stress on the fact that, with regard to the deeds falling within the first part of the clause quoted, the Legislature has been careful to state that the provision shall have effect whether the deed was executed before or after the commencement of the Amendment Act. The fact that there are no words to this effect in the latter part of the clause indicates, he says, that the Legislature did not intend income arising from properties which are comprised in revocable transfers to be taxed until the Amending Act had been in force sufficiently long to cover the year of account.

This argument ignores the plain wording of the clause and the scheme of the Income-tax Act. When there is income accruing to a person by virtue of a revocable transfer of assets, that income is to be deemed the income of the transferor. When the Income-tax Officer made the assessment in this case the Amending Act had come into force. The Income-tax Act says that an assessee shall pay the tax in respect of the assessment year based on the income received by him in the previous year. The assessee's income which the Income-tax Officer had to assess for the year 1939-40 included the income received from the properties which were covered by these revocable deeds of transfer. The income had actually been received by the daughters, but as the result of the Amending Act that income must be deemed to be the income of their father. Therefore we agree with

COMMISSIONER
OF INCOME-TAX
v.
MAHARAJA OF
PITHAPURAM.
LEACH C.J.

the Commissioner of Income-tax in his opinion that it is the law in force at the time of assessment which governs the assessment in this case and not the law as it was during the year in which the income was earned. The same opinion has been expressed by the Patna High Court; see *H. P. Banerjee v. Commissioner of Income-tax, Bihar and Orissa* (1).

For the reasons given we answer the reference in the affirmative. The Commissioner of Income-tax is entitled to his costs which we fix at Rs. 250.

G.R.

APPELLATE CIVIL—FULL BENCH.

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

THADI MURALI MOHANA REDDI, MINOR BY
GUARDIAN SABELLA RAMI REDDI AND ANOTHER
(DEFENDANTS 2 AND 3), APPELLANTS,

1941,
April 30
and July 31.

v.

MEDAPATI GANGARAJU AND THREE OTHERS
(PLAINTIFFS 1 AND 2 AND DEFENDANTS 1 AND 4),
RESPONDENTS.*

Hindu law—Debt—Acknowledgment made by father of pre-partition debt, subsequent to partition, in schedule filed by him in insolvency proceedings against him—Debt barred by limitation but for such acknowledgment—Acknowledgment operating to extend limitation against father—Debt therefore enforceable against him—Consequently enforceable against his sons also—Indian Limitation Act (IX of 1908), sec. 19.

Held by the Full Bench (KRISHNASWAMI AYYANGAR J. dissenting): A Hindu father, who has been adjudicated an

(1) (1940) 9 I.T.R. 137.

* Appeals Nos. 76 & 77 of 1938.

MOHANA
v.
GANGARAJU.

insolvent subsequent to a partition with his sons, can, by reason of an acknowledgment of indebtedness, embodied in a schedule filed by him in the insolvency proceedings, in regard to debts incurred by him before partition, extend the period of limitation against himself regarding those debts and if, at the date of suit, such pre-partition debts are still enforceable against him or his estate, his divided sons are, by reason of the pious obligation rule in Hindu law, also liable therefor.

Per KRISHNASWAMI AYYANGAR J. A Hindu father cannot after partition keep alive a pre-partition debt against his divided sons by an acknowledgment of liability made by himself alone.

APPEALS against the decrees of the Court of the Subordinate Judge of Cocanada in Original Suits Nos. 2 and 3 of 1935 respectively.

These appeals came on for hearing at first before VENKATARAMANA RAO and ABDUR RAHMAN JJ. who made the following

ORDER OF REFERENCE TO THE FULL BENCH:—

One of the main questions argued by Mr. Raghava Rao in this appeal was the question of limitation. The suit out of which this appeal arises was instituted to recover certain sums of money due in respect of four promissory notes, dated 10th May 1929, 12th June 1929, 18th August 1929, and 31st May 1930, executed by the father of defendants 2 and 3 in favour of the plaintiffs and the fourth defendant for Rs. 2,000, Rs. 3,000, Rs. 1,800 and Rs. 3,000 respectively, repayable with compound interest at twelve per cent per annum. At a partition between the plaintiffs and the fourth defendant, the promissory notes fell to the share of the plaintiffs. On the date of the promissory notes, the third defendant was not in existence as he was born subsequently. On a creditor's petition, dated 13th March 1931, the father was adjudicated insolvent on 13th November 1931. A few days prior to the date of the order of adjudication, a suit for partition was brought by defendants 2 and 3 against their father and on 16th November 1931 a preliminary decree for partition was passed. On 21st December 1931 the father filed a schedule

MOHANA
v.
GANGARAJU.

Exhibit D before the Official Receiver wherein he acknowledged his indebtedness in respect of the said promissory notes. It is also in evidence that in respect of the three promissory notes, dated 10th May 1929, 12th June 1929 and 18th August 1929, the plaintiffs obtained a renewal thereof on 19th April 1932. In spite of the renewals the suit was not based on the renewed promissory notes on the ground of their having been executed by the insolvent who was yet undischarged. The plaintiffs based their cause of action on the original promissory notes and the suit was instituted on 21st December 1934 against defendants 2 and 3, their father having died on 17th January 1934.

Two main contentions were urged in the lower Court; (i) the suit was barred by limitation, and (ii) the suit on the promissory notes was not maintainable. Both the contentions were overruled by the learned Subordinate Judge. On the question of limitation, the learned Subordinate Judge relied on the acknowledgment in the schedule filed by the insolvent (Exhibit D) and also on Exhibits E series being the renewals of the three original promissory notes. Mr. Rajah Ayyar, Counsel for the respondents, did not seek to support the finding of the learned Judge based on Exhibits E series but relied upon the acknowledgment in Exhibit D. The contention of Mr. Raghava Rao for the appellants is that Exhibit D would not save limitation as it was furnished by the insolvent in pursuance of his duty enjoined under the Provincial Insolvency Act. He relied on *Kissendoss v. Khatau Makanjee Spinning & Weaving Co., Ltd.* (1) where it was decided that an acknowledgment by an insolvent of a debt in the schedule of assets filed by him could only be treated as one made on behalf of himself and not on behalf of any other. In that case the father and his five sons were members of a joint Hindu family. The first defendant was the father and defendants 2 to 6 were the sons, the sixth defendant being a minor. The father with the aid of the family funds started a business. From the facts as found by the trial Judge it appears that defendants 2 to 4 were taking active part in the father's business and the fifth defendant, though he did not take any active part in it, seemed to have acquiesced in the carrying on of the business. The learned trial Judge, BAKEWELL J., took the following view of the business:—"It is clear that the business was carried

(1) (1916) 36 I.C. 389.

MOHANA
v.
GANGARAJU.

on for the benefit of all these defendants, that they shared the profits as a joint family, that they were all aware of and acquiesced in the carrying on of the business as a joint family concern, and they are therefore partners therein. . . . All the defendants therefore except the minor sixth defendant are personally liable for the debts of the firm; and since it has not been shown that there is any family property other than the capital employed in the firm, the sixth defendant will be liable to the extent of the assets of his family." It will thus be seen that it was not a case of contractual partnership but a joint family concern. Defendants 2 to 5 were deemed to be partners on the ground of their having taken part or having acquiesced in the carrying on of the business in order to fix personal liability against them. The sixth defendant could in no sense be a partner; he could only be made liable on the ground of his being the son of his father and a member of a joint Hindu family. The question arose in that case whether the inclusion of the debt by the first defendant, who was adjudicated an insolvent, in the schedule to his petition in insolvency, would amount to an acknowledgment so as to be binding also on the sons. The learned trial Judge dealt with the question of liability thus:

"Before an acknowledgment signed by one partner can be held binding on the other members of the firm, there must be evidence that in the course of business that partner had authority to sign the acknowledgment. . . . In the present case I think that such evidence is afforded by the fact that the first defendant was not only a partner, but also the manager of all the property of the persons constituting the firm, since in that capacity he had full power to make contracts, to settle accounts and make admissions as to the contractual liabilities of the family." (The italics are ours.)

It will be seen that the learned Judge did not rest his decision merely on the fact that the adult members were partners but also on the ground that the father was the managing member of the family and the decree against the sixth defendant could only be sustained on that basis. In appeal the decision of the learned trial Judge was reversed. Dealing with the question of implied agency of the managing member, WALLIS C.J. observed as follows:—

"With regard to acknowledgments by the managing member of a joint Hindu family, it is well settled that a

MOHANA
v.
GANGARAJU.

managing member has implied authority to make acknowledgments within the statute, and it has been contended before us that the fact that he has been adjudicated insolvent does not determine his position as managing member, or that at any rate he may still be allowed to go on acting as managing member as, it is suggested, the evidence shows that he did in two cases and if so the implication of authority continued. Even supposing, however, that he could retain the position of managing member and the implied authority to make acknowledgments in the ordinary course of the joint family business, I do not think that he can be considered to have been acting or authorised to act under that implied authority in signing his schedule in the insolvency proceedings. *Prima facie*, as I have said, in so signing he is acting for himself and for himself only under the statutory duty."

The decree was set aside against all the defendants. With great respect to the learned Chief Justice, we are unable to agree with the reason that, because the schedule was filed under the statute, the acknowledgment must be deemed to have been made for the purpose of the statute alone and could not be therefore held to bind the sons. It seems to us that the purpose for which the acknowledgment was made is immaterial; the question is whether there was an acknowledgment and not why an acknowledgment was made. If the manager in spite of the insolvency had not lost his status as a manager and continued to be a member of an undivided Hindu family and if the debt when contracted was one binding on the family, we do not see why his insolvency should prevent him from acknowledging the debt so as to save limitation against the other members of the family. Mr. Rajah Ayyar contended that the principle of the decision in *Kissendoss v. Khatau Makanjee Spinning & Weaving Co., Ltd.*(1) would not apply to the case of a father and a son with regard to the son's liability for debts contracted by the father. His contention is that the son would be liable for a debt contracted by the father even though not for a family purpose on account of the pious obligation which the Hindu law imposed on him and that, even if the father could in such a case be said to have acknowledged the debt on his behalf alone, that would be enough to make the son's share liable. He therefore urged

(1) (1916) 36 I.C. 389.

MOHANA
v.
GANGARAJU.

that if the inclusion of the debt in the schedule by the father would amount to an acknowledgment as against him, it must be equally taken to have that effect as against his sons as well. We are inclined to think that the contention of Mr. Rajah Ayyar is well founded and the decision in *Kissendoss v. Khatau Makanjee Spinning & Weaving Co., Ltd.*(1) may be distinguished on the ground that it did not deal with the liability of the son for the father's debt on the basis of the father's acknowledgment.

Mr. Raghava Rao contends that, even assuming Mr. Rajah Ayyar to be correct in his contention, the father's acknowledgment would not save limitation against his sons if subsequent to his insolvency he happened to become divided in status from them. Mr. Rajah Ayyar in answer referred us to the decision in *Muniswami v. Kutti*(2). Mr. Raghava Rao contends that the decision in *Muniswami v. Kutti*(2) is not correct. He outlined his contention thus : the creditor's right to proceed against the sons' share is derived from the right of the father to subject and alienate the sons' share for his debts by virtue of the pious obligation on the sons, but the power ceases the moment the sons become divided in status from him, and with it his right to acknowledge the debt so as to save limitation against his sons ceases. It seems to us that there is considerable force in this contention. The father of an undivided family consisting of himself and his sons has got certain rights by virtue of his position as such. One such right is to alienate his sons' share for a personal debt of his. This is derived from the pious liability which the Hindu law imposes on undivided sons. Both the right and liability are dependent on the continuance of the joint family and the consequent undivided status. The mere paternal relation of a father and sons would not entitle a father to incur a personal debt which would have the effect of subjecting his sons' property for that liability. It is undoubted law that a divided son is not liable for debts contracted by the father after partition both in respect of the separate property of the son as well as the property which he got at the partition. In an undivided family the father not only is the head and manager of that family but if the family consists besides his sons, also of his brothers, he will be the head of his own branch if he does not

(1) (1916) 36 I.C. 389.

(2) (1933) I.L.R. 56 Mad. 833.

occupy the position of an elder brother. Therefore as such head and manager of his own branch he has got certain rights. In addition to his right as ordinary manager of incurring debts on behalf of the joint family and alienating the family property for purposes connected with the family, the father has got right to incur debts on his own account and alienate his property which his branch is entitled to including the sons' shares. RAMESAM J. in the Full Bench decision in *In re Balusami Ayyar*(1) is of the view that the right of a father to sell the joint family property for his personal debts is dependent upon his occupying the position of the manager of his own branch of the family. At page 430 he explained the power of the father thus : " It seems to me that the basis of a Hindu father's right to sell his son's share in the joint family property for antecedent debts is two-fold : (i) there must be an antecedent debt of the father which is not illegal or immoral involving a pious obligation on the part of the son to pay it, and (ii) the property must be joint family property of which the father was the manager. If either of these conditions is wanting, the father has no right to sell." The learned Judge elaborates this position at page 436 thus :

" That he is a manager is clear from the fact that he could be sued by creditors for debts whether incurred by himself only, not illegal or immoral, or for the benefit of his branch so as to bind his own branch. He can sue for a division of the share of his branch and he can sell the share of his branch for antecedent debts not illegal or immoral. All these are acts of managership and where he expressly abandons managership he cannot do these things. It is because he is the manager he can represent his son in the various acts just enumerated." It would seem to follow that, in acknowledging a debt contracted when he was undivided, he would represent his sons so long as he is undivided with them but when he becomes divided he would not. Apparently this seems to be the view also of ANANTAKRISHNA AYYAR J. in *Subramania Ayyar v. Sabapathy Aiyar*(2) where the majority of the learned Judges took the view that for pre-partition debts of the father the sons' shares could be made liable after partition provided the sons were sued along with the father. At page 415 he observed thus : " On the question as to what is the proper

(1) (1928) I.L.R. 51 Mad. 417 (F.B.). (2) (1927) I.L.R. 51 Mad. 361 (F.B.).

MOHANA
v.
GANGARAJU.

procedure to be followed by the creditor in such cases, cases have laid down that the effect of partition is to take away from the father the right to represent the sons, whether in Court or outside. Though by reason of his position at the time of incurring the debt he had the right to make the debt binding on the sons' shares also of the family property, he loses the right to represent the sons after partition." Whether in incurring the debt on his own account and not for the benefit of his family a father is said to represent his sons may be a question; but the right to acknowledge a debt which would save limitation against his sons while the family continues undivided can be supported on the ground that the father has got a right, so long as the family continues undivided, to impose liability on the sons' share for his debt and that would carry with it the right to extend the time for enforcement of such debts and thus the period of liability. But once that right is lost in consequence of a partition, it seems to us that he would not have the right to acknowledge and prolong the period of liability which would have the effect of adversely affecting the sons' shares, the right to dispose of which is no longer in the father. In *Muniswami v. Kutti*(1) the learned Judges distinguished *Peda Venkanna v. Sreenivasa Deekshatulu*(2) where the son was held not to be liable on a promissory note executed by the father after partition, though in renewal of a note executed by the father before partition, on the ground that the renewal would amount to an incurring of a fresh obligation, and remarked as follows: "If, as *Subramania Ayyar v. Sabapathy Aiyar*(3) decides, sons are liable after partition for the original debt of the father incurred before partition, then the fact that the debt has been acknowledged by the father, in my view, does not alter the position." With great respect to the learned Judges the latter proposition does not follow from the earlier. It would be seen that even *Subramania Ayyar v. Sabapathy Aiyar*(3) decides that if the sons were not sued along with the father, even for a pre-partition debt, the son's share could not be made liable, whereas before partition even though they were not sued their property could be rendered liable. KUMARASWAMI SASTRI J. in *Peda*

(1) (1933) I.L.R. 56 Mad. 833.

(2) (1917) I.L.R. 41 Mad. 136.

(3) (1927) I.L.R. 51 Mad. 361 (F.B.).

MOHANA
v.
GANGARAJU.

Venkanna v. Sreenivasa Deekshatulu(1) dealing with the case of a renewal observed as follows:

"....I can see no equity in allowing a Hindu father to renew and keep alive a debt (increased by the addition of interest and principal at each renewal) so as to throw upon the son the duty of paying it out of properties that fall to his share. The renewed note must in my opinion be treated as a new obligation incurred after partition. . . . The pious duty creates no charge on the son's share prior to partition, the presumed agency of the father ceases on partition and as the creditor can only work out the father's rights at the date of the suit he can have no right if that right is lost owing to a *bona fide* partition."

The learned Judge uses the language "presumed agency". It may be a matter for argument whether the learned Judge was right in presuming that the father would be acting as the agent of the son when he acknowledges or renews a debt when he continues undivided. We think he was using it in the sense in which RAMESAM and ANANTAKRISHNA AYYAR JJ. explained the father's right, i.e., the right of representation. As we have pointed out already, it may be difficult to apply the theory of representation because in contracting a debt on his own account the father could not be said to be acting as the representative of his sons. The view we are inclined to take is that the right to acknowledge is derived from the father's right to impose liability on the son's shares, which continues to subsist until the family is divided but, when that right ceases with division, the right to acknowledge also ceases. However, as the matter is one of some importance and as we doubt the correctness of the decision in *Muniswami v. Kutti*(2) we think it desirable that both the matters which we have discussed should be referred to a Full Bench. We accordingly refer to the Full Bench the following questions:—

(i) Whether an acknowledgment by a Hindu father who is adjudicated insolvent of a debt made in the schedule of debts filed by him in insolvency would save limitation against his undivided sons?

(ii) Would it make any difference if the acknowledgment was made after the insolvent had become divided in status from his sons subsequent to the insolvency?

(1) (1917) I.L.R. 41 Mad. 136.

(2) (1933) I.L.R. 56 Mad. 833.

MOHANA
v.
GANGARAJU.

In pursuance of the above order of reference the appeals came on for hearing before the Full Bench constituted as above.

The ORDER of the Court was delivered by LEACH C.J. —The following questions have been referred to a Full Bench :—

- “(i) Whether an acknowledgment by a Hindu father who is adjudicated insolvent of a debt made in the schedule of debts filed by him in insolvency would save limitation against his undivided sons ?
- (ii) Would it make any difference if the acknowledgment was made after the insolvent had become divided in status from his sons subsequent to the insolvency ? ”

On the admitted facts it is clear that the word “undivided” in the first question should have been “divided”, because the appeal has reference to an allegation of liability on the part of sons who were divided from their father before the filing of the schedule and the second question cannot arise in this case.

Before the first question, as amended, arises it is for the Division Bench to decide whether the suit is confined to liability on the promissory notes, or whether the claim has been framed in the alternative, namely, whether the sons are also liable on the debts apart from the promissory notes. We have perused a copy of the plaint and it is obvious that this question calls for a decision. If the Division Bench decides that the suit is merely on the promissory notes the sons cannot be made liable because they were not parties to the instruments, and there will be no need for a reference. In these circumstances the present

MOHANA
v.
GANGARAJU.

reference will be returned to the learned Judges and will be re-submitted, if in the light of what is said here, they consider that there is need for a reference.

In pursuance of the directions contained in the above order, the appeals came on for hearing again before VENKATARAMANA RAO and ABDUR RAHMAN JJ. who made the following further

ORDER OF REFERENCE :—

The question now for our decision is whether the suit is maintainable. Mr. Raghava Rao's contention is that the suit is not maintainable and he urges two grounds in support of it. The first is that the suit is laid on the promissory notes and defendants 2 and 3 are not parties to them, and secondly, that the suit cannot be laid on the promissory notes, dated 10th May 1929, 12th June 1929 and 18th August 1929, as the plaintiffs obtained renewals of them on 19th April 1932.

We shall now deal with the first ground. So far as our High Court is concerned, after the decision of the Privy Council in *Sadasuk Janki Das v. Sir Kishan Pershad*(1), the prevalent view has been that, if during the lifetime of a Hindu father a suit is laid on a promissory note executed by him alone, his sons cannot be made parties to it. It is well settled that a suit can also be laid on the debt impleading the sons as parties thereto so as to render their shares in the joint family property liable. It is enough to refer to the decision in *Maruthamuthu Naicker v. Kadir Badsha Rowther*(2) in support of the above propositions ; *vide* the observations at pages 573 and 574. Therefore the question in each case would be whether the allegations in the plaint are sufficiently wide to cover a claim on the debt as well as on the promissory note. In considering this question a distinction has to be kept in mind between the case of a father and the case of a manager. In the case of a manager, there should be an allegation that the debt was incurred for a necessary purpose if the other members of the family are sought to be made liable, and from the recitals as to necessity the Courts could infer that the suit could be treated as one having been brought on the debt as

(1) (1918) I.L.R. 46 Cal. 663 (P.C.). (2) I.L.R. [1938] Mad. 568 (F.B.).

MOHANA
v.
GANGARAJU.

well. In the case of a father, however, the allegation as to necessity is immaterial and all that one need allege is that the debt was incurred by the father and the sons are sued as their shares in the joint family property are to be rendered liable for the debt evidenced by the promissory note.

Before considering the allegations in the plaint in the present case, the important fact that has to be remembered is that the suit was instituted after the death of the father. The plaint is in Telugu and we have gone through it. In paragraph 4 it is alleged that the father of defendants 2 and 3 borrowed several sums of money on several dates referred to therein and that the father executed promissory notes for those amounts on those dates. The incurring of the debts and the execution of the notes are both referred to. Lower down in the same paragraph after referring to the insolvency of the father and to the order of adjudication and to his subsequent death, the following allegation is made :

“ The first defendant (the Official Receiver) is representing the late Bulli Gangireddi lawfully. Defendants 2 and 3 are his heirs under Hindu law.”

It is thus clear that defendants 2 and 3 were impleaded as the father's heirs under the Hindu law, the object being to render their shares in the joint family property liable. This is made clear in the concluding portion of the said paragraph wherein occurs the following :—

“ At any rate, since debts due to the plaintiffs were all pre-partition debts, they are not in any way concerned with the partition decree, and the plaintiffs are therefore entitled to recover the same from the whole of the family properties of defendants 2 and 3.”

It is thus clear from these allegations that the reason why the sons were made parties is that the debts due to the plaintiffs being pre-partition debts, defendants 2 and 3 should be made liable for the debts in spite of the partition by virtue of their being the sons of their father. The debts apart from the promissory notes were referred to separately and were alleged to be debts due to the plaintiffs. It seems to us that the plaint in this case should be considered to have been laid not merely on the promissory notes but on the debts as well. Though the decision on the basis of a plaint in one suit cannot be treated as an authority for construing the plaint in another

MOHANA
v.
GANGARAJU.

suit, yet we think it useful to refer to the plaint in *Krishna Ayyar v. Krishnasami Ayyar*(1) which was construed by the majority of the learned Judges in that case and by the learned Judges of the Full Bench in *Maruthamuthu Naicker v. Kadir Badsha Rowther*(2) as one covering a claim on the debt as well. There were only two paragraphs therein on which the said construction was adopted. Just as in this case the first paragraph was to the effect : “ for a sum of Rs. 1,000 borrowed, a promissory note was executed.” The second paragraph was to the following effect :—

“ As the plaint debt has been incurred by the defendants for the expenses of their own family and as all the defendants are bound to discharge that amount, I instituted this suit against all the defendants who are concerned in it.”

These were the only allegations there. This paragraph regarding necessity had to be made because certain persons were sought to be made liable as members of a joint family. Though the debt was simply referred to as the “ plaint debt,” still it was considered to be a suit on the debt apart from the note by reason of the fact that the members other than the executant were sought to be made liable by virtue of their obligations under the Hindu law. Similarly in this case paragraph 4 refers first to the borrowing and then to the execution of the notes. Again, there are the necessary allegations to show why defendants 2 and 3 were sued. Defendants 2 and 3 are stated to be the heirs under the Hindu law. The reason why they are sought to be made liable is referred to by alleging that the debts referred to as debts due to the plaintiffs are pre-partition debts of the father.

Even assuming that our view is not correct and the suit can still be said to be laid only on the notes, the suit having been filed after the death of the father against defendants 2 and 3 who are his legal representatives under the Hindu law, it is maintainable. Where a person executes a promissory note, it cannot be denied that his legal representatives can be sued on it and it is not denied in this case that defendants 2 and 3 are the heirs and therefore the legal representatives of the executant of the promissory notes. If a suit is laid on the note against legal representatives, the decree that will be

(1) (1900) I.L.R. 23 Mad. 597.

(2) I.L.R. [1938] Mad. 568 (F.B.)

MOHANA
v.
GANGARAJU.

passed will be a decree against the property of the deceased in the hands of the legal representatives. Where a suit was instituted against the sons or grandsons of an executant, their Lordships of the Privy Council in *Raja Ram v. Raja Bakhsh Singh*(1) pointed out that the proper form of the decree would be a decree against the defendants as representatives of the executant for a sum to be realised out of any property of the executant coming to their hands. Their Lordships stated the effect of such a decree thus :

"Such a decree passed in accordance with section 52 of the Code of Civil Procedure would have attracted the operation of section 53 and the respondents' interests in the joint property would have been liable to attachment under the decree notwithstanding that such interests were not 'property of the deceased' in the strict meaning of those words."

It is well settled that under the Hindu law in the case of a pre-partition debt the entire joint family property is liable whether there was division or non-division. In this case the first defendant was sued because the share of the deceased vested in him and defendants 2 and 3 were impleaded because they were the heirs under the Hindu law and were also in possession of the property which would be liable in spite of their having become divided from their father, i.e., their share in the joint family property which would be "property of the deceased" in their hands. We therefore think that the first ground raised by Mr. Raghava Rao is not tenable.

In regard to the second ground it will be seen that the renewals were executed after the father was adjudicated insolvent and before he was discharged. The debts due under the promissory notes were proveable in Insolvency and it was a fraud on the insolvency law for the insolvent to execute fresh promissory notes in respect of those debts. Compare *Jamshedji v. Maganlal*(2). Therefore the fact that there were renewals would not prevent a creditor from suing on the original promissory notes.

We are therefore of opinion that the suit as laid is maintainable. In view of this conclusion of ours, we refer the case to the Full Bench for an answer on the questions already referred as amended by the Full Bench.

(1) (1937) I.L.R. 13 Luck. 61 (P.C.). (2) (1925) 27 Bom. L.R. 514, 519.

These appeals came on for final hearing, after the second reference, before the Full Bench constituted as above.

MOHANA
v.
GANGARAJU.

ON THE REFERENCE :—

Ch. Raghava Rao for appellants.—The acknowledgment of debt made by the father in the schedule filed by him in his insolvency does not bind his sons. The acknowledgment was made by him subsequent to a valid partition with the sons and after such partition a Hindu father has no power to bind his divided sons by an acknowledgment made by himself only. The majority of the Full Bench in *Subramania Ayyar v. Subapathy Aiyar*(1) hold that under the pious obligation rule in Hindu law a son is liable even after partition for a debt of his father incurred before partition. But even in that decision the limits of the rule of pious obligation are well recognized. That decision leaves unaffected the decision in *Peda Venkanna v. Sreenivasa Deekshatulu*(2) which holds that a renewal by a Hindu father subsequent to partition with his sons of a debt incurred by him before partition does not bind the sons. If a father cannot make after partition a renewal of debt so as to bind the sons, equally he cannot make an acknowledgment of debt and keep the debt alive as against the sons also. There is little difference between an acknowledgment and a renewal. Nothing in the doctrine of pious obligation in Hindu law enables a father, after partition, to extend the period of limitation as regards his sons in respect of his debts. *In re Balusami Ayyar*(3) which is cited with approval in *Sat Narain v. Sri Kishen Das. Same v. Bank of Upper India*(4) decides that the right of a father to sell his sons' interests in the joint family properties for discharging his antecedent debts ceases after partition. The power to sell the sons' shares, the power to renew a debt and the power to acknowledge a debt—all equally depend for their validity against the sons on the continued existence of the joint family and the undivided status of the father and sons. It is submitted that the distinction made between a renewal and an acknowledgment of debt in *Muniswami v. Kutti*(5) is not well founded and that decision requires reconsideration.

(1) (1927) I.L.R. 51 Mad. 361 (F.B.). (2) (1917) I.L.R. 41 Mad. 136.
(3) (1928) I.L.R. 51 Mad. 417 (F.B.). (4) (1936) I.L.R. 17 Lah. 644 (P.C.).
(5) (1933) I.L.R. 56 Mad. 833.

MOHANA
v.
GANGARAJU.

The cause of action in respect of the father's debt is the same both against the father and the sons and there is only one cause of action in regard to it; see *Mallesam Naidu v. Jugala Panda*(1). Time commences to run against them both simultaneously and if it is to be extended it could be only in accordance with one or other of the modes recognised by the Limitation Act. An acknowledgment under section 19 of that Act must be made either by the person liable or his authorized agent or by the person from whom the person sued derives his title. A father after partition loses his representative capacity and ceases to be an agent of his sons. The liability of the sons, though arising under the personal law, is subject to the law of limitation and an acknowledgment to be valid and binding on the sons must satisfy the requirements of section 19. In *Kissendoss v. Khatau Makanjee Spinning & Weaving Co., Ltd.*(2) an acknowledgment of debt made by a father in the schedule filed by him in his insolvency was held not to affect his sons' liability. Such an acknowledgment cannot be treated as one made on behalf of the sons also.

Advocate-General (Sir A. Krishnaswami Ayyar) for D. Narasaraju for respondents 1 and 2.—A Hindu son is liable even after partition for the debts of his father incurred before partition. This liability has no relation whatever to the father being the manager of the family. In fact the manager may be a different person from the father and the debt incurred by the father may not be for purposes of the family or for its benefit. The liability is based on the personal law arising purely out of the personal relationship between the father and the son. There is no scope for the application of the theory of agency in such a case. An acknowledgment of debt by a Hindu father, whether made before or after partition, is binding on his sons. In either case the binding nature of the acknowledgment is not based on the father being the manager or being the presumed agent of the sons. The true principle is that, so long as a pre-partition debt of a father is subsisting, his sons are liable therefor to the extent of the joint family assets in their hands; see *Mayne's Hindu Law*, Tenth Edition, paragraphs 327 and 378 and *Mulla's Principles of Hindu Law*, 1940 Edition, section

(1) (1899) I.L.R. 23 Mad. 292 (F.B.).

(2) (1916) 36 I.C. 389.

MOHANA
v.
GANGARAJU.

290, sub-section 3. The decision in *Muniswami v. Kutti*(1) is cited with approval by these authors. The scope of the pious obligation rule is explained in *Shanmukam v. Nachu Ammal*(2) and *Virayya v. Pardhasarathi Appa Rao*(3). In applying the rule of pious obligation, the law of limitation is relevant only for the purpose of finding out whether the father's liability is subsisting or barred. If the liability of the father is subsisting the sons are liable. *Beck v. Pierce*(4) cited by BASHYAM AYYANGAR J. in *Periasami Mudaliar v. Seetharama Chettiar* (5) fully supports the above view.

Ch. Raghava Rao in reply.—The decision in *Periasami Mudaliar v. Seetharama Chettiar*(5) relates to a case of an undivided family. The observations of BASHYAM AYYANGAR J. in that case based upon *Beck v. Pierce*(4) go no further than this, that the liability of the sons exists only so long as the father's liability subsists. The question whether after marriage a wife can make an acknowledgment so as to bind her husband is answered in the negative in *Beck v. Pierce*(4). The rule of pious obligation in Hindu law implies that the father and his sons belong to an undivided family and that he is the head at any rate of his branch of the family. That there is in fact a manager for the wider family does not prevent the father being considered in law to be the manager of his branch. RAMESAM J. recognises this in *In re Balusami Ayyar*(6).

Other respondents were not represented.

Cur. adv. vult.

OPINION.

LEACH C.J.—The question which the Court is called upon to answer in this case is whether a Hindu father, who has been adjudicated an insolvent, can, by reason of the acknowledgment of indebtedness embodied in the schedule filed by him in the insolvency proceedings, extend the period of limitation against his sons who have separated from him since the debts were

LEACH C.J.

(1) (1933) I.L.R. 56 Mad. 833.

(2) (1937) 1 M.L.J. 278.

(3) (1933) I.L.R. 57 Mad. 190.

(4) (1889) 23 Q.B.D. 316.

(5) (1903) I.L.R. 27 Mad. 243 (F.B.).

(6) (1928) I.L.R. 51 Mad. 417 (F.B.).

MOHANA
v.
GANGARAJU.
LEACH C.J. incurred, the debts not having been incurred for any illegal or immoral purpose.

The first and second respondents filed a suit in the Court of the Subordinate Judge of Cocanada to recover a sum of Rs. 17,909-7-9 claimed to be due on four promissory notes executed by the father of the appellants. The promissory notes are dated 10th May, 12th June, 18th August 1929 and 31st May 1930 respectively. When they were executed the first appellant was joint with his father. The second appellant had not then been born. On 2nd November 1931 the first appellant brought a suit for the partition of the family estate. On 16th November 1931 a preliminary decree for partition was passed, but a final decree did not follow until 6th April 1935. The father had died on 17th January 1934. A copy of the final decree has not been printed, but it is common ground that its effect was to divide the appellants from their father and from one another.

On 13th March 1931 a creditor applied to the Court to adjudicate the father an insolvent and on 13th November 1931 an order of adjudication was passed. On 21st December 1931 the father filed his schedule and thereby acknowledged his indebtedness on the promissory notes now in suit. The plaintiff was filed on 21st December 1934. The appellants pleaded that the suit was barred by the law of limitation, having been filed more than three years after the execution of the promissory notes. The plaintiffs-respondents, however, relied on the acknowledgment of indebtedness made by the father of the appellants in his schedule. The Subordinate Judge of Cocanada in whose Court the suit was instituted held that it was in time and passed a decree for the amount claimed. The appellants appealed to this Court and the appeal

was called for hearing before VENKATARAMANA RAO and ABDUR RAHMAN JJ. who have made this reference.

In *Muniswami v. Kutti*(1) a Division Bench of this Court (BEASLEY C.J. and BARDSWELL J.) held that a Hindu son is liable on a promissory note executed by his father before partition and kept alive by an acknowledgment made by the father after partition. If this decision is to stand the appellants are out of Court. The learned Judges who have made this reference, however, formed the opinion that this decision requires reconsideration and consequently have referred to a Full Bench the question stated at the outset of this judgment. I may mention that the learned Judges have found that the plaintiffs-respondents have based their claim on the debts as well as on the actual promissory notes.

It is a well established rule of Hindu law that a son is under a pious obligation to pay his father's debts, provided that they have not been incurred for any illegal or immoral purpose, but it has been held that the rule does not apply to a debt incurred subsequent to partition; see *Subramania Ayyar v. Sabapathy Aiyar*(2), *In re Balusami Ayyar*(3) and *Sat Narain v. Sri Kishen Das. Same v. Bank of Upper India*(4). As already indicated, the debts in the present case were incurred before partition and, at the time of the institution of the suit, were lawfully enforceable against the father's estate, because of the acknowledgment made by him when he signed his schedule in the insolvency proceedings. The signing of the schedule constituted an acknowledgment within the meaning of section 19 of the Limitation Act. The acknowledgment was, however, a purely personal matter, and the

MOHANA
v.
GANGARAJU.
LEACH C.J.

(1) (1933) I.L.R. 56 Mad. 833. (2) (1927) I.L.R. 51 Mad. 361 (F.B.).
(3) (1928) I.L.R. 51 Mad. 417 (F.B.). (4) (1936) I.L.R. 17 Lah. 644 (P.C.).

MOHANA
v.
GANGARAJU.
LEACH C.J.

father cannot here be treated as being the agent of his sons; see *Kissendoss v. Khatau Makanjee Spinning & Weaving Co., Ltd.*(1). In that case the Court (WALLIS C.J. and PHILLIPS J.) was not, however, called upon to consider the question under reference. What the Court has now to decide is whether the sons remain liable under the pious obligation rule of their personal law when the father has extended the period of limitation against himself.

It must be borne in mind that by signing the schedule the appellants' father did not create new debts. He merely acknowledged debts which had been incurred by him before partition. I agree with BEASLEY C.J., who delivered the judgment in *Muniswami v. Kutti*(2), that the position is not analogous to that created when the father, after partition, executes a fresh promissory note in renewal of a promissory note executed by him before partition. In that event there is a fresh cause of action, the cause of action on the new instrument. It follows that I agree with the learned Chief Justice in the distinction which he made between *Muniswami v. Kutti*(2) and *Peda Venkanna v. Sreenivasa Deckshatulu*(3).

It is manifest that, unless the Court is to impose a new restriction on the application of the pious obligation rule, an acknowledgment by a father which extends the period of his own liability must affect his son. As the law stands at present, a debt lawfully incurred by the father before partition must be paid by the son, if the father fails to do so. The son is, of course, only liable to the extent of the family property in his hands. The only restriction which has been placed so far on the application of the rule is that

(1) (1916) 36 I.C. 389.

(2) (1933) I.L.R. 56 Mad. 833.

(3) (1917) I.L.R. 41 Mad. 136.

MOHANA
v.
GANGARAJU.
LEACH C.J.

which has been imposed with regard to post-partition debts, but the appellants are asking the Court to place a further restriction on the rule, a restriction by way of limitation. In *Subramania Ayyar v. Sabapathy Aiyar*(1) COUTTS TROTTER C.J. expressed the opinion that the doctrine of pious obligation should not be extended beyond the point to which the cases had carried it. He regarded the doctrine as being an illogical relic of antiquity, unsuited to any but a primitive and patriarchal society. It may be unsuited to modern conditions, but that is the concern of the Hindu community. The doctrine remains and the Court is bound to apply it until the Legislature steps in and changes the law. I consider that *Muniswami v. Kutti*(2) was rightly decided. To overrule it the Court must go to the length of adding something to the rule which is foreign to it, and this would in my judgment amount to the usurpation of power which is vested only in the Legislature. The rule is a simple one and there is no difficulty in its application. All that the Court has to do is to inquire whether the debt was lawfully incurred before partition and whether it is still enforceable against the father. If it was lawfully incurred and is still enforceable against the father, the son is liable to the extent of the family property in his hands.

I find support for what I have said in the judgment of RASHYAM AYYANGAR J. in *Periasami Mudaliar v. Seetharama Chettiar*(3). In that case a Full Bench held that, independently of the debt arising from an original transaction, a decree against the father by its own force creates a debt as against him which his sons, according to the Hindu law, are under an obligation to discharge, unless they show that the debt is illegal or

(1) (1927) I.L.R. 51 Mad. 361 (F.B.). (2) (1933) I.L.R. 56 Mad. 833.

(3) (1903) I.L.R. 27 Mad. 243 (F.R.).

MOHANA
v.
GANGARAJU.
LEACH C.J.

immoral. In the course of his judgment BASHYAM AYYANGAR J. said :

“ Where the creditor sues the son on the original cause of action the law of limitation—including the article in the second schedule to the limitation Act—applicable to such suit will be just the same as that which would be applicable to it if it had been brought against the father himself. This is conclusively established by the principle of the decision of the Court of Appeal in *Beck v. Pierce*(1). It was there held that the cause of action in respect of which a husband is liable for his wife's ante-nuptial debts is his wife's contract, not his own, and the statute of limitations had always been regarded as beginning to run in his favour as well as in his wife's from the time when the cause of action accrued against her and any acknowledgment or part payment by her before marriage kept her debt alive both against her and her after-taken husband. In the case of a contract, no doubt, the only person who can under the general law be ordinarily sued on it is the contracting party or his legal representative or in some cases his assign. But if a son is under the Hindu law under an obligation to fulfil the father's contract of debt, as a husband is under the English law to fulfil his wife's ante-nuptial contract of debt, the suit against the son or the husband is a suit on the contract just as much as a suit against the legal representative of a contracting party. It may be that the liability of the contracting party himself is unlimited but that of the son or the husband or the legal representative on the same contract is limited, in the case of the son to the extent of the joint family property in his hands, in the case of the husband to the extent of his wife's property which he may have acquired, and in the case of the legal representative to the extent of the assets of the deceased which may have come to his hands. But in all these cases the cause of action on which the son, husband or legal representative is liable to be sued is that against the father, wife or person represented respectively, and the law of limitation applicable is therefore the same ”.

BASHYAM AYYANGAR J. was, of course, referring to the position in England before the passing of the

(1) (1889) 23 Q.B.D. 316.

MOHANA
v.
GANGARAJU.
LEACH C.J.

Married Women's Property Act, 1882. Before then, ordinarily a married woman had no capacity in law to contract during coverture. The decision in *Beck v. Pierce*(1) was that an unmarried woman could by her own acknowledgment of a debt create a fresh period of limitation which would be binding on her spouse when she married. After marriage she could not give any valid acknowledgment because of her inability to contract, but before marriage the position was different and her future husband was affected by her action. Here the father has always the power to give an acknowledgment within the meaning of section 19 of the Limitation Act and, if he gives one in respect of a pre-partition debt, that debt continues to be enforceable for another three years which, in my judgment, means that it can within the further period be enforced against the family property in the hands of his son.

I would answer the reference in this way. The acknowledgment by the father in his schedule extends the period of limitation against himself and, if at the date of the suit pre-partition debts are still enforceable against him or his estate, his divided sons are by reason of the pious obligation rule in Hindu law also liable.

I would make the costs of this reference costs in the appeal.

MOCKETT J.—The point that arises for decision is whether the divided son of a Hindu father can be made liable, so far as his own share is concerned, for a pre-partition debt of the father which would have been time-barred had it not been for an acknowledgment made by the father after the partition. The referring Judges, VENKATARAMANA RAO and ABDUR RAHMAN JJ.,

MOCKETT J.

(1) (1889) 23 Q.B.D. 316.

MOHANA
v.
GANGARAJU.
MOCKETT J.

doubt the correctness of the decision of a Bench of this Court (BEASLEY C.J. and BARDSWELL J.) in *Muniswami v. Kutti*(1). At the outset it is worthy of note that *Muniswami v. Kutti*(1) which was decided in 1933 does not appear till now to have been the subject of doubt in any High Court; at least no cases have been cited to us suggesting that. In the Tenth Edition of Mayne on Hindu Law (published in 1938) in paragraph 328 (page 421) the position is stated as follows :—

“ A son is not under Hindu law liable to pay a debt of the father which is time-barred as against the father. But he continues to be liable for a debt of the father kept alive by the latter's acknowledgment whether before or after partition ”.

Similarly in Mulla's Principles of Hindu Law, Ninth Edition, 1940, at page 336, the same proposition is stated as follows :—

“ If the debts are saved from limitation by the father's acknowledgment, the son is bound to pay even though the acknowledgment by the father is after a partition between the father and the son ”,

and as authority the decision of BEASLEY C.J. and BARDSWELL J., *Muniswami v. Kutti*(1), is cited. Judgment in that case was delivered by BEASLEY C.J., BARDSWELL J. expressing agreement, and during the course of that judgment certain authorities which have been cited to us are examined. The first was *Peda Venkanna v. Sreenivasa Deekshatulu*(2) in which it was held that a Hindu son was not liable during his father's lifetime on a promissory note executed by his father after partition in renewal of a note executed by the father before partition. BEASLEY C.J. points out that that decision is not an authority on the question

(1) (1933) I.L.R. 56 Mad. 833.

(2) (1917) I.L.R. 41 Mad. 136.

which we now have to consider. The suit was not based, as is evident from the facts, on the original debt of the father but on a new cause of action created by him after partition by the execution of a second promissory note. In *Peda Venkanna v. Sreenivasa Deekshatulu*(1) KUMARASWAMI SASTRI J. observes :

In the case of renewal by the father alone after partition of a note executed before partition the case is much stronger as I can see no equity in allowing a Hindu father to renew and keep alive a debt (increased by the addition of interest and principal at each renewal) so as to throw upon the son the duty of paying it out of the properties that fall to his share. The renewed note must in my opinion be treated as a new obligation incurred after partition.”

If those observations are examined closely they are referable only to a new obligation and not in any way to an acknowledgment within the statute of a pre-partition debt. In *Subramania Ayyar v. Sabapathy Aiyar*(2) the following question was referred to a Full Bench of five Judges :

“ Whether a simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a *bona fide* partition has taken place between the father and the sons ? ”

A majority of the Bench (WALLER, JACKSON and ANANTAKRISHNA AYYAR JJ.) held that the answer was in the affirmative, and the learned Judges approved the decision in *Jagannatha Rao v. Viswesam*(3). COUTTS TROTTER C.J. and SRINIVASA AYYANGAR J. differed. It is evident from a perusal of the learned Chief Justice's judgment that he considered the whole doctrine of the pious obligation to be out of tune with modern requirements. It is described by him as “ an illogical relic of antiquity unsuited to any but a

MOHANA
v.
GANGARAJU.
MOCKETT J.

(1) (1917) I.L.R. 41 Mad. 136. (2) (1927) I.L.R. 51 Mad. 361 (F.B.).
(3) (1924) I.L.R. 47 Mad. 621.

MOHANA
v.
GANGARAJU.
MOCKETT J.

primitive and patriarchal society". With great respect I think that we are concerned with administering the Hindu law as we find it, leaving it to the Legislature to make such changes as public opinion demands. In *Muniswami v. Kutti*(1) these decisions were considered and, at page 835, BEASLEY C.J. emphasises that in both *Peda Venkanna v. Sreenivasa Deekshatulu*(2) and *Subramania Ayyar v. Sabapathy Aiyar*(3) the Courts were concerned not with a suit based on a renewed promissory note but a suit on the original debt and observes :

"The two positions, in my opinion, are quite distinct. If, as *Subramania Ayyar v. Sabapathy Aiyar*(3) decides, sons are liable after partition for the original debt of the father incurred before partition, then the fact that the debt has been acknowledged by the father, in my view, does not alter the position. The suit in such a case is on the original debt for which the sons are liable".

The position thus stated seems to me, with respect, to be a correct statement of the law.

It has been argued by the appellants that section 19 of the Limitation Act is applicable and that here we have an acknowledgment "by an agent duly authorized in this behalf". This view is, I think, without real foundation. The consideration of managership or agency should, as contended by the learned Advocate-General on behalf of the respondents, find no place in deciding the question before us. The appellants' argument appears to be founded on an observation of KUMARASWAMI SASTRI J. in *Peda Venkanna v. Sreenivasa Deekshatulu*(2) :

"The pious duty creates no charge on the son's share prior to partition, the presumed agency of the father ceases on partition and, as the creditor can only work out the father's

(1) (1933) I.L.R. 56 Mad. 833. (2) (1917) I.L.R. 41 Mad. 136, 144.
(3) (1927) I.L.R. 51 Mad. 361 (F.B.).

MOHANA
v.
GANGARAJU.
MOCKETT J.

rights at the date of the suit, he can have no right if that right is lost owing to a *bona fide* partition".

With respect I cannot suppose that the suit against a son claiming payment of his father's debts is based on the debt in the strict sense that it is pleaded that the father and the son are jointly liable or that the father contracted the debt on behalf of his son, which logically eliminates the father's own liability. In my view, the learned Judge was using a convenient phrase and no more. His observations on page 143 suggest to me that in any case it was only referable to the acts of a father-manager of a joint family. The son's liability is based on a doctrine peculiar to Hindu law by which there is an obligation on him to pay another's debt, namely his father's, provided that the debt is not immoral and is incurred before partition. This appears to be the present position as held in modern decisions, e.g., *Subramania Ayyar v. Sabapathy Aiyar*(1), *In re Balusami Ayyar*(2) and *Sat Narain v. Sri Kishen Das. Same v. Bank of Upper India*(3). There is therefore, in my opinion, no question of agency as between the father and the son. To emphasize the position, let us take a case of a debt incurred by the father for his own, not family, purposes, not being illegal or immoral. In such a case it could not be suggested that the father was the son's agent. Equally, if the father acknowledges it, no question of agency could arise. Limitation finds no place in Hindu law. It is true that the Legislature has made irrecoverable certain debts for which a suit is not brought within a certain time; but no statute has attempted to touch the realms of piety. It seems to me that unless piety, as certain observations in *Subramania Ayyar v. Sabapathy Aiyar*(1) suggest, is to be regarded as an

(1) (1927) I.L.R. 51 Mad. 361 (F.B.). (2) (1928) I.L.R. 51 Mad. 417 (F.B.).
(3) (1936) I.L.R. 17 Lah. 644 (P.C.).

MOHANA
v.
GANGARAJU.
MOCKETT J.

anachronism today, which I have no doubt would offend Hindu opinion as a whole, the pious obligation to pay still exists, whether the debt is legally recoverable or not. A consideration of these matters makes the decision in *Muniswami v. Kutti*(1) readily acceptable not only as representing good law but as representing the spirit of the Hindu law as well. The acid test is : is there a debt owed by and recoverable from the father ? The fact that the father has, instead of sheltering himself behind the machinery of a modern statute, acknowledged the debt seems to me irrelevant. The relationship of a Hindu father and son is dealt with by CURGENVEN and SUNDARAM CHETTY JJ. in *Virayya v. Pardhasarathi Appa Rao*(2) and the learned Judges emphasize the comprehensive nature of the pious obligation and that it exists

“irrespective of the fact whether the father is or is not the manager of the joint family or whether the joint family is or is not composed of persons other than the father and the sons”.

This is a quotation from the remarks of IQBAL AHMAD J. in *Lalta Prasad v. Gajadhar Shukul*(3) with which the learned Judges express their assent. In *Periasami Mudaliar v. Seetharama Chettiar*(4) BASHYAM AYYANGAR J. remarks at page 252 :

“Where the creditor sues the son on the original cause of action the law of limitation including the article in the second schedule to the Limitation Act applicable to such suit will be just the same as that which would be applicable to it if it had been brought against the father himself.”

BASHYAM AYYANGAR J. considers that the position is conclusively established by the principle of the decision in *Beck v. Pierce*(5) where it was held that the cause of action in respect of which a husband is

MOHANA
v.
GANGARAJU.
MOCKETT J.

liable for his wife's ante-nuptial debts is his wife's contract, not his own, and that the statute of limitations has always been regarded as beginning to run in the husband's favour as well as in his wife's from the time when the cause of action accrued against her and any acknowledgment or part payment by her before marriage kept her debt alive both against her and her after-taken husband. This decision is instructive, but I consider that the position of a Hindu father and son is far simpler than was that of an English wife and husband although the principle may be of assistance.

I would answer the reference in the manner proposed by my Lord the CHIEF JUSTICE, whose judgment I have had the advantage of reading and with which I respectfully agree. I also concur with the order as to costs.

KRISHNASWAMI AYYANGAR J.—The substantial question which arises for decision in this reference is whether a Hindu father can after partition keep alive a pre-partition debt against his divided sons by an acknowledgment of liability made by himself alone. In *Muniswami v. Kutti*(1) a Division Bench of this Court consisting of BEASLEY C.J. and BARDSWELL J. have answered the question in the affirmative. The learned Judges who heard the appeal from which the present reference has arisen have doubted the correctness of this decision, and hence it was that they felt obliged to refer the question to a Full Bench. The judgment in that case was pronounced after a consideration of the effect of *Peda Venkanna v. Sreenivasa Deekshatulu*(2) and *Subramania Ayyar v. Sabapathy Aiyar*(3). In the first of these cases it was held that the father had no authority to bind his divided sons by

(1) (1933) I.L.R. 56 Mad. 833.

(2) (1917) I.L.R. 41 Mad. 136.

(3) (1927) I.L.R. 51 Mad. 361 (F.B.).

(1) (1933) I.L.R. 56 Mad. 833.

(2) (1933) I.L.R. 57 Mad. 190.

(3) (1932) I.L.R. 55 All. 283.

(4) (1903) I.L.R. 27 Mad. 243 (F.B.).

(5) (1889) 23 Q.B.D. 316.

MOHANA
v.
GANGARAJU.
—
KRISHNASWAMI
AYYANGAR J.

a promissory note executed after partition in renewal of one executed before. The grounds of the decision are found more fully expressed in the judgment of KUMARASWAMI SASTRI J. than in that of WALLIS C.J. They are two in number. The first is that, if a *bona fide* partition had been arrived at between the father and the sons, the creditor must seek his remedy against the father alone as, in the absence of a term to the contrary expressly agreed to, the share received by the sons at the partition would be wholly exempt from the liability. The learned Judge observed :

“ So far as the creditor of the father is concerned all that he can do is to avail himself of any remedy that may be open to the father and work it out either by suit or in execution proceedings and, if the father has lost his power of dealing with the son's interests owing to a *bona fide* partition between them, the creditor can be in no better position. The effect of a *bona fide* partition is *prima facie* to secure to each of the parties absolute control over the properties that fall to his share unfettered by any liabilities which at the date are not charged upon them. There is nothing in Hindu law to prevent a father from taking certain properties absolutely or receiving certain benefits and releasing the son from the duty cast upon him by Hindu law to pay his debts and so long as the transaction is *bona fide* a simple creditor can have no right to object to a transaction which both the father and son were competent to enter into.”

The second ground is contained in the following sentence occurring in the judgment :—

“ In the case of renewal by the father alone after partition of a note executed before partition the case is much stronger as I can see no equity in allowing a Hindu father to *renew and keep alive* a debt (increased by the addition of interest and principal at each renewal) so as to throw upon the son the duty of paying it out of properties that fall to his share. The renewed note must in my opinion be treated as a new obligation incurred after partition.” (The italics are mine).

So far as the first of these two grounds is concerned, it had definitely been rejected by the Full Bench in *Subramania Ayyar v. Sabapathy Aiyar*(1) the decision in which case has finally established the proposition that notwithstanding a *bona fide* partition the sons continue to be liable for a pre-partition debt in so far as the creditor's remedies are concerned. It is the second ground which may be said to approach the question on hand, but it does not in fact touch it. The learned Judge was dealing with the case of a renewed, and not a merely acknowledged, promissory note, and he was content to rest his judgment on the fact that the renewal gave rise to a fresh cause of action which of course stands on a different footing from an acknowledgment which only operates to keep the old cause of action alive. But it is to be observed that the learned Judge did not, and was not called upon to, decide whether the father had the right after partition to make an acknowledgment so as to bind the sons. This case was, if I may say so with respect, rightly distinguished by the learned Chief Justice in *Muniswami v. Kutti*(2) on the ground that it only dealt with a case of a renewed promissory note giving rise to a fresh cause of action. The Full Bench decision in the second of the cases referred to above did not go beyond establishing the liability of a divided son for a pre-partition debt. The question therefore fell to be decided as a matter which was *res integra* and was apparently decided on that footing. The ground of the decision is to be found from the following passage in the judgment of BEASLEY C.J. concurred in by BARDSWELL J. :

“ If, as *Subramania Ayyar v. Sabapathy Aiyar*(1) decides, sons are liable after partition for the original debt of the father incurred before partition, then the fact that the debt has been

MOHANA
v.
GANGARAJU.
—
KRISHNASWAMI
AYYANGAR J.

(1) (1927) I.L.R. 51 Mad. 361 (F.B.). (2) (1933) I.L.R. 56 Mad. 833.

MOHANA
v.
GANGARAJU.
—
KRISHNASWAMI
Ayyangar J.

acknowledged by the father, in my view, does not alter the position. The suit in such a case is on the original debt for which the sons are liable. But in the case of a renewed promissory note the suit is not upon the original debt at all but upon the renewed promissory note and I can see nothing which can take away from a father his authority from his sons to make a payment during the period of limitation in respect of a debt incurred by him. It is another matter altogether to wipe out the original debt and substitute therefor another debt."

If I may say so with the utmost respect, this statement of the law involves the proposition that a father continues to possess even after partition an authority from the sons to make a part payment or acknowledgment so as to keep alive against them a pre-partition debt. It is with this proposition that the referring Judges in the present case are in disagreement and it therefore becomes necessary to examine the Hindu law in order to find out which is the correct view to be taken.

The general principles governing the liability of the son under Hindu law to pay the debt of the father, and the limitations to which his interest in the ancestral estate is subject, are now so well settled that it is unnecessary at this time of day to enter upon a detailed examination of the case law, much less to trace its development. In origin, the obligation was legal as well as personal; it was capable of being enforced in a Court of law, and prevailed both against the person and property of the son, irrespective of whether that property was ancestral or self-acquired. Since the advent of the British Courts, the liability has become circumscribed and is now limited to the ancestral estate received by the son. In other words, the obligation has ceased to be personal, as it can no longer be enforced by arrest of the person or by attachment of the son's separate or self-acquired property.

The decisions of the Privy Council in *Girdharee Lall v. Kantoo Lall*(1) and *Suraj Bunsu Koer v. Sheo Persad Singh*(2) tended to introduce a remarkable change in the law as theretofore understood. Under the law of the Smrithi writers, the son's liability arose not during the lifetime of the father, but only after his death, natural or civil. The effect of the change was to sustain the liability of the son even during the lifetime of the father, as an incident of the heritage from the very inception of the son's interest, on the apparent ground that, if it is the pious duty of the son to save the father from sin after his death, it must be equally meritorious to him to permit the father to anticipate it by an alienation made by him during his own life. It stands to reason that the son could not validly object to a sale of the family property by the father to save himself from the very sin from which after his death the son is himself legally bound to purge him. The next step is easy; if the father has the power to alienate the family property inclusive of the son's interest in order to discharge his own debt, it is a necessary corollary that the interest of the son, along with that of the father, in the ancestral estate may be attached and sold, the Court merely stepping in to execute the father's power by doing what the father can himself do for the benefit of a creditor whose debt is neither immoral nor illegal. The son's equal ownership with the father in the heritage thus came to be burdened with a liability which may result in its partial or total destruction owing to the pious duty of the son to provide for the discharge of the debt of the father. The Privy Council have made it clear that the liability is one that is annexed to the estate though it does not amount to a

MOHANA
v.
GANGARAJU.
—
KRISHNASWAMI
Ayyangar J.

(1) (1874) L.R. 1 I.A. 321. (2) (1879) I.L.R. 5 Cal. 148 (P.C.).

MOHANA
v.
GANGARAJU.
KRISHNASWAMI
AYYANGAR J.

hypothecation or charge. The overriding power of the father is thus founded entirely on the pious obligation of the son and is inseparable from it in the sense that it begins when the obligation begins and ceases when it ceases. The pious obligation is, so to say, the touchstone of the father's power over the son's share.

But the situation materially changes once a partition takes place between the father and the son. The obligations so far incurred, even those arising out of the individual acts of the father done for his personal benefit, still bind the son's interests in the joint estate. But his pious obligation in respect of all future acts of the father is extinguished for ever and with it the power of the father to affect the share of the divided son. After partition the community of interest entirely ceases; the father and the son thenceforth hold their respective shares as if they are independent owners; they become in fact strangers so far as property rights are concerned. But this, of course, is without prejudice to the rights of the creditor, which remain unaffected notwithstanding the partition, in respect of the pre-partition debts of the father. In respect of such debts, their rights had already become crystallized. It is the power of the father to affect the son's interest in future, which is eliminated simultaneously with the disappearance of the pious obligation on a disruption of the joint status in consequence of a partition.

It is important in this connexion to remember that there is no distinction recognized in Hindu law between a debt incurred by a manager for the necessary purposes of the family and a debt of the father incurred for his personal purposes if they are neither illegal nor immoral, in so far as the creditor's remedies are concerned. In the origin and in the matter of the

proof to be adduced there is undoubtedly a difference, but none in the nature or quality of the resulting liability once it is validly incurred. Both classes of debts rank *pari passu*, and the family property is equally liable for both.

The pious obligation is then the only source of the son's liability and its subsistence is the very foundation on which the superior power of the father as such is based. In its absence, the position of the father is indistinguishable from that of a mere manager. After a severance in status is established, the father, no less than the manager, sinks to the level of any other divided parcener of the family. If a manager cannot after the cessation of his managership acknowledge a debt so as to extend the period of limitation as against his divided kinsmen, it is difficult to see how the father can, after the extinction of the pious obligation, as against his divided son. The decisions of this Court in *Peda Venkanna v. Sreenivasa Deekshatulu*(1), and *In re Balusami Ayyar*(2) should in my opinion be regarded as being merely illustrative of a wider principle, which is that the father after partition is as incompetent to affect or extend an existing liability of the son as he is to impose on him a fresh one. To acknowledge a debt is certainly to affect the liability of the son to his possible prejudice, by giving it a new term of life and holding his share bound for a longer period. If the father has the power, it would lead to the startling result that he could by successive acknowledgments prolong the period of limitation for an indefinite length of time, without the consent and against the will of the son. It would be illogical to recognize the existence

MOHANA
v.
GANGARAJU.
KRISHNASWAMI
AYYANGAR J.

(1) (1917) I.L.R. 41 Mad. 136. (2) (1928) I.L.R. 51 Mad. 417 (F.B.).

MOHANA
v.
GANGARAJU.
KRISHNASWAMI
ATTYANGAR J.

of such a power after the destruction of the son's pious obligation from which alone the father's power is derived. In the Full Bench decision of this Court in *In re Balusami Ayyar*(1) the learned Judges who formed the majority held that the power of the father to sell, though derived from the theory of the pious obligation, existed only so long as the family remained joint. In substance and effect there is no difference between the two theories, as a partition puts an end to both the joint status and the pious obligation and takes away the power of the father to deal with the son's interest thereafter. But existing obligations in favour of the creditor are saved, though the father has lost his right of disposal over the son's share. It would be more in consonance with principle, to hold that the loss of the father's power is the necessary resultant of the cessation of the pious obligation rather than of the joint status.

One other aspect of the question also deserves notice. The Hindu law as such contains no rules of limitation such as are known to modern jurisprudence. There were perhaps rules of prescription affecting property rights, but the sanctity of the obligation to pay a debt properly incurred knew no limit of time. The idea of keeping a debt alive by an acknowledgment or part payment is foreign to the ancient law and it is purely the creation of statute in this country. It would therefore be an anachronism to speak of a power to acknowledge as based on a rule of Hindu law. It is the Limitation Act which has fixed periods of limitation for all kinds of suits without exception and it has been held that on a personal debt of the father there is but one cause of action enforceable

(1) (1928) I.L.R. 51 Mad. 417 (F.B.).

MOHANA
v.
GANGARAJU.
KRISHNASWAMI
ATTYANGAR J.

both against the father and the son to the extent of their interests in the joint family property but within the time fixed by the article appropriate for the cause of action against the father; *Periasami Mudaliar v. Seetharama Chettiar*(1). *Prima facie* it would seem then, if the Limitation Act applies, as it undoubtedly does, section 19 must be held to govern the suit against the son as much as a suit against the father. An acknowledgment of liability to come within the section must be in writing signed by the party against whom the property or the right in suit is claimed or by some person through whom he derives his liability to be sued. The signature may be that of the defendant or of his agent duly authorized in that behalf. The explanation contained in section 21 (3) (b), while recognizing in the manager a right to make an acknowledgment binding on the other members, confers no similar power on the father. So long as he is joint with his sons, the pious obligation would subsist enabling him to incur fresh debts and acknowledge old ones already incurred. But, after a severance of status, the power ceases under Hindu law, and section 21 does not help to re-create it. The principle involved is not very different from that laid down by the Full Bench decision of this Court in *Pavayi v. Palanivela*(2) where a mortgagor who had lost all interest in the mortgaged property was held not entitled to bind by his acknowledgment the person on whom his interest had devolved. That principle, in the words of Lord WESTBURY quoted *in extenso* in the above decision, is that an acknowledgment by one person cannot bind another on the ground that the latter derived his liability from the former unless the

(1) (1903) I.L.R. 27 Mad. 243 (F.B.). (2) I.L.R. [1940] Mad. 872 (F.B.).

MOHANA
v.
GANGARAJU.
KRISHNASWAMI
ATTYANGAR J.

derivation of title or liability takes place after the acknowledgment has been given. I find it difficult to hold that an acknowledgment by a person who has ceased to have any interest in the property or right claimed, could still be efficacious to bind the party against whom such property or right is claimed in the absence of a writing signed by him. This appears to be a condition of the acknowledgment operating against him, expressly so enacted by section 19 of the Indian Limitation Act.

I regret therefore that I feel obliged with great respect to differ from my Lord the CHIEF JUSTICE and my learned brother, MOCKETT J. I may add that I have refrained from considering the applicability of the decision in *Beck v. Pierce*(1) to the question before us in view of the fact the two systems of law differ materially, though there may be analogies here and there. With respect, it seems to me that it is safer to try and gather the limits of a rule so peculiar to Hindu law as the doctrine of pious obligation, by resort to the principles of that law than by resort to analogies derivable from another system.

My answer to the question referred is in the negative.

[The appeals came on for further hearing after the expression of the above opinion of the Full Bench before VENKATARAMANA RAO and ABDUR RAHMAN JJ. who dismissed them with costs in accordance with that opinion.]

N.S.

(1) (1889) 23 Q.B.D. 316.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Chandrasekhara Ayyar.

NARIKKAL CHATHAN OF MUTHUVANNACHA
AMSOM AND DESOM (DEFENDANT), APPELLANT,

v.

VEETHIYOTTILLATH KESAVAN NAMBOODRI,
KARNAVAN AND MANAGER OF HIS ILLAM OF MUTHUVANNACHA
AMSOM AND DESOM (PLAINTIFF), RESPONDENT.*

Malabar Tenancy Act, 1929 (XIV of 1930), sec. 20, cl. (5)—
"Requires the holding bona fide"—Meaning of.

The words "requires the holding *bona fide*" in clause (5) of section 20 of the Malabar Tenancy Act, 1929, mean that a jenmi may, when the period of verumpattam, kanam or kuzhikanam has expired and there has been no renewal, resume occupation of the land if he genuinely intends to cultivate it, and it is not necessary that he should show a real need to do so. The fact that he has sufficient land under cultivation elsewhere to provide for the needs of himself and his family does not matter.

Eerayi Achuthan v. Poochakkandi Panakkat Katheeja Bi † approved.

Rekhabchand Doogar v. J. R. D'Cruz(1) distinguished.

Raman Nayar v. Kesavan Embrandiri ‡ overruled.

APPEAL against the decree of the District Court of North Malabar, dated 13th November 1937, and made in Appeal Suit No. 103 of 1937, preferred against the decree of the Court of the District Munsif of Payyoli in Original Suit No. 704 of 1936.

P. Govinda Menon for appellant.

D. H. Nambudripad for respondent.

* Second Appeal No. 580 of 1938.

† Second Appeal No. 538 of 1939.

‡ Second Appeal No. 42 of 1938.

(1) (1922) 26 C.W.N. 499.

1941,
July 31.

NARIKKAL
CHATHAN
v.
KESAVAN
NAMBOODRI.
—
LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—This second appeal has been placed before a Bench because there are conflicting decisions of Judges sitting alone with regard to the interpretation of section 20, clause 5, of the Malabar Tenancy Act, 1929. Section 20 opens with these words :

“ No suit for eviction of a customary verumpattamdar, kuzhikanamdar or kanamdar shall lie at the instance of his landlord except on the following grounds.”

There are six clauses in which the grounds are set out and clause 5 is in these terms :—

“ That the period of the verumpattam, kanam or kuzhikanam, as the case may be, has expired and there has been no renewal and the landlord requires the holding *bona fide* for his own cultivation or for that of any member of his family or tarward or tavazhi who has a proprietary and beneficial interest therein.”

The question which falls for decision is whether the words “ requires the holding *bona fide* ” mean that the jenmi may, in the circumstances stated at the beginning of the clause, resume occupation if there is a genuine intention to cultivate or whether he must show a real need to do so.

In *Raman Nayar v. Kesavan Embrandiri**, an unreported case, VENKATARAMANA RAO J. held that a mere desire on the part of the landlord to have the land for his own cultivation, even if *bona fide*, is not enough. The learned Judge said that, in coming to a conclusion on the question of the landlord's need being *bona fide*, the Court should in each case consider whether the circumstances are such that the land must be restored to the landlord for his own cultivation or cultivation by any member of the family or tarwad, the test being the need of the landlord. In forming

* Second Appeal No. 42 of 1938.

NARIKKAL
CHATHAN
v.
KESAVAN
NAMBOODRI.
—
LEACH C.J.

this opinion the learned Judge placed reliance on the decision of the Calcutta High Court in *Rekhabchand Doogar v. J. R. D'Cruz*(1). That was a case under the Calcutta Rent Act, section 11 of which prohibited a landlord from recovering possession from a tenant so long as the tenant paid the rent to the full extent allowable by the Act and performed the conditions of the tenancy. The section incorporated a proviso giving the landlord the right to resume possession if the premises were required by him *bona fide* for purposes of building or re-building or for his own occupation or the occupation of any person for whose benefit the premises were held. A landlord wished to get possession of the premises from his tenant. The evidence disclosed that the landlord had let out the premises in which he was living to tenants and that the reason which he gave for requiring possession of the premises in suit, namely his wife's health, was not the real reason. We do not regard that decision as being really applicable. The Calcutta Rent Act was a measure designed to prevent profiteering in houses, the war of 1914–1918 having resulted in a shortage of residential accommodation. The measure was merely intended to meet a position which was of a temporary nature. It is true that the Malabar Tenancy Act has the object of creating permanent tenancies, but the circumstances are in no way analogous and we are unable to read the Malabar Tenancy Act in the same way as the Calcutta Rent Act was read in the case just referred to.

The same question arose in this Court in the case, *Eerayi Achuthan v. Poochakkandi Panakkat Katheeja Bi**, which was decided by KING J. This judgment is

(1) (1922) 26 C.W.N. 499.

* Second Appeal No. 538 of 1939

NARAYAN
CHATHAN
v.
KESAVAN
NAMBOODRI.
LEACH C.J.

also unreported. KING J. in discussing the meaning to be attached to "*bona fide*" said :

"The expression '*bona fide*' cannot apply to a state of circumstances but only to the statements or intentions or actions of a human being. All therefore that is necessary in my opinion is for the Court to decide whether, when the landlord demands or asks for or sues for any land on the ground that he wishes to cultivate it himself, his statement that he wishes to cultivate it himself is a statement made *bona fide*."

We consider that this interpretation is the correct one. If the Court is convinced that the jenmi has really the intention of cultivating the land he is entitled to be put into possession of it. The fact that he has sufficient land under cultivation elsewhere to provide for the needs of himself and his family matters not. It is his land and, if he really wants to cultivate it, he is entitled to regain possession when the kanam has expired and there has been no renewal.

In the present case both the Courts below have held that the jenmi had the *bona fide* intention of cultivating the land. That being so, the decree which has been granted to him cannot in our opinion be disturbed and the appeal will have to be dismissed with costs.

G.R.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Chandrasekhara Ayyar.

T. M. VENUGOPALA MUDALIAR AND ANOTHER
(DEFENDANTS 1 AND 2), APPELLANTS,

1941,
July 18.

v.

T. K. EMBARU NAIDU AND THREE OTHERS
(PLAINTIFFS), RESPONDENTS.*

Original Side Rules, High Court, Madras, O. XLV, r. 1, cl. (d)—
Interpretation of—Originating summons under, for an
order directing payment into Court of money actually in
the hands of executors, administrators or trustees—Compe-
tency of—Originating summons for similar order in respect
of moneys which ought to be in their hands—Incompetency of.

An originating summons can be taken out under Order XLV, rule 1, clause (d), of the Rules of the Original Side, High Court, Madras, for an order directing payment into Court of moneys actually in the hands of executors, administrators or trustees, but not with respect to moneys which ought to be in their hands.

Nutter v. Holland(1) followed.

APPEAL against the order and judgment of GENTLE J., dated 10th January 1941 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 236 of 1939.

N. Panchanatha Ayyar for appellants.

T. S. Venkatesa Ayyar for *V. Sundararajan* for respondents.

The JUDGMENT of the Court was delivered by LEACH C. J.—This appeal is concerned with the interpretation of Order XLV, rule 1, clause (d), of the

LEACH C.J.

* Original Side Appeal No. 4 of 1941.

(1) [1894] 3 Ch. 408.

VENUGOPALA
v.
EMBARU.
LEACH C.J.

Rules of the Original Side of this Court. Order XLV states when an originating summons may issue. Rule 1, clause (d), provides for the issue of an originating summons to compel executors, administrators or trustees to pay into Court moneys in their hands. The appellants say that before an order can be passed under this clause it must be admitted by the defendant that he has money actually in his hands. The respondents say that this interpretation is too narrow and the Court can on the issue of an originating summons investigate the accounts of an executor, administrator or trustee and order him to pay into Court what is found to be due by him.

The relevant facts of this case are these. On 7th December 1926 one Chellammal died leaving a will, dated 19th August 1926. She appointed three executors, two of whom are the present appellants. On 4th May 1927, the executors applied to this Court for probate of the will and probate was granted. The will directed that a sum of Rs. 6,000 should be paid to Balammal, a granddaughter of the testatrix, for the purchase of a house. The will also directed that the house should be enjoyed by Balammal during her lifetime and that after her death the property should be divided equally among her children when the youngest had attained majority. The respondents are the children of Balammal and on 20th October 1939 they took out the originating summons which has given rise to this appeal. They asked that the appellants should be directed (i) to pay into Court a sum of Rs. 3,717 alleged to be in their hands as executors, (ii) to exhibit a true and proper account of receipts and disbursements in connection with the administration of the estate, and (iii) to bring into Court such further sums as might be found to be due on the taking of the

account. The allegation that the appellants had in their hands the sum of Rs. 3,717 was based on a statement of account filed in Court by the executors on 3rd November 1927 in accordance with the provision of section 317 of the Indian Succession Act requiring a statement to be filed within one year of the grant of probate. It is common ground that until the present proceedings were instituted no final statement of account was filed by the executors. The defence was that the appellants had not got in their possession this sum of Rs. 3,717. They averred that they had lawfully disposed of it in connection with the administration of the estate.

Without considering whether in these circumstances the respondents were entitled to ask for an order against the appellants under Order XLV, rule 1, clause (d), the Assistant Registrar embarked upon an investigation into the accounts and his conclusion was that the appellants were liable to the estate in the sum of Rs. 716-15-0. The Assistant Registrar did not hold that the appellants had this money in their hands. His order indicates that he accepted the appellants' statement that the money had been expended, but he found that they were liable for the Rs. 716-15-0 because the disbursements which they pleaded were wholly or partially unwarranted. For instance, the appellants said that they paid an Advocate Rs. 300 for obtaining probate. The Assistant Registrar apparently did not doubt that the Advocate had been paid, but he considered that a reasonable fee was Rs. 75, which was all that he allowed. Another sum of Rs. 300 was disallowed because the Assistant Registrar was not satisfied that this disbursement had been authorized by Balammal. The appellants had debited the estate with the sum of Rs. 560 as

VENUGOPALA
v.
EMBARU.
LEACH C.J.

VENUGOPALA
v.
EMBARU.
LEACH C.J.

being costs incurred in a certain suit. The Assistant Registrar disallowed Rs. 130 out of this amount. There is no suggestion in the Assistant Registrar's report from beginning to end that the appellants had the Rs. 716-15-0 in their hands.

The Assistant Registrar's report was considered by GENTLE J., who accepted it and directed that the appellants should pay into Court the sum of Rs. 716-15-0. The learned Judge's order proceeds on the basis that the appellants had the money in their hands. He did not consider whether the respondents were entitled to an order in the circumstances. The failure to consider this question was no doubt due to the fact that the case was not put before him as it has been put before us.

The wording of clause (d) of rule 1 of Order XLV is free from any ambiguity. An originating summons may be taken out under its provisions for an order directing payment into Court of moneys *in the hands* of executors, administrators or trustees. The clause does not refer to moneys which ought to be in their hands. This rule corresponds to Order LV, rule 3, clause (d), of the Rules of the Supreme Court in England. The wording is almost identical. The meaning to be attached to Order LV, rule 3, clause (d), was considered by the Court of Appeal in *Nutter v. Holland*(1). There LINDLEY, LOPES and DAVEY L.JJ. had no hesitation in holding that money cannot be ordered to be paid into Court by executors, administrators or trustees under Order LV, rule 3, clause (d), unless the money is actually in their hands. It is not sufficient that it has been in their hands and they are responsible for it.

(1) [1894] 3 Ch. 408.

VENUGOPALA
v.
EMBARU.
LEACH C.J.

LINDLEY L. J. said :

"I think that rule means what it says. It applies only to money actually in the hands of the trustee, executor or administrator, and if it is not in his hands, although he is responsible for it and ought to have it, that rule does not apply."

LOPES L.J. said :

"I agree that the rule means what it says, and that it is confined to money which is actually in the hands of the executors, administrators or trustees."

DAVEY L.J. said that, before an order is made under it for payment into Court, it must be shown that the trustee has money belonging to the trust actually in his hands; it does not apply to money which may or may not be found due from him on the result of an investigation.

Mr. T. S. Venkatesa Iyer has drawn our attention to a passage in Williams on Executors, Twelfth edition, Volume II, page 1286, where it is said that

"when there is a sufficient admission by the executor of assets once come to his hands, he cannot relieve himself from paying them into Court by showing any unauthorised application of them, or any investment or disposition of them which in substance amounts to a breach of his duty as executor".

The learned authors are here referring to the position before the passing of the Judicature Act when there was no Order LV, rule 3, clause (d). This statement is based on decisions arising out of administration actions. There can be no doubt whatever that the appellants can be made to refund to the estate all moneys which they have improperly expended; but that is not what the Court is now concerned with. The Court is concerned with the question whether there can be an investigation into accounts and a consequential order passed on an originating summons taken out

VENUGOPALA
v.
EMBARU.
LEACH C.J. under the provisions of Order XLV, rule 1, clause (d), of the Rules of the Original Side of this Court. It seems to me that the only conclusion which can legitimately be arrived at is that the respondents misconceived their remedy. In the circumstances the remedy is by suit and not by an originating summons under Order XLV. The Court is not considering a case where an executor has denied possession of funds and it is clear that his denial is false. Moreover it must be remembered that Order XLV is intended to provide a summary remedy in specified circumstances and not an alternative remedy to an administration action.

In *Nutter v. Holland*(1) the Court was able to deal with the matter without relegating the plaintiffs to a regular suit, but that was because clause (c) of rule 4 of the English Order LV provides that any of the persons named in rule 3 may in like manner apply for and obtain an order for the administration of the trust. There is no corresponding rule in Order XLV of our rules. It is unfortunate that the matter has been allowed to go so far, but the respondents are mainly to blame for this. They applied for the issue of an originating summons in respect of an account which had been filed twelve years before and much could have happened in the meantime. It has been impressed upon us that the respondents are minors, but that fact does not preclude them from bringing a suit nor does it in any way alter the position. If they have not the means to pay the necessary court-fee there is procedure by which they could be allowed to sue *in forma pauperis*. It may be that the matter of the court-fee was the factor which governed the procedure adopted. It

(1) [1894] 3 Ch. 408.

has not been suggested that the allowing of the appeal will adversely affect the respondents but, even if it should, we have no option but to hold that Order XLV, rule 1, clause (d), does not apply to a case like this. The appeal will be allowed but we will make no order as to costs.

It is said that the appellants have paid into Court Rs. 1,235. The respondents state that they will file a suit within a fortnight and by consent this money will remain in Court to the credit of the suit to be filed. If the suit is not in fact filed within that time, the appellants will be entitled to withdraw the money from Court.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Burn.

SYED ISMAIL SAHIB *alias* SYED THASILDAR
SAHIB AND ANOTHER (PLAINTIFFS), PETITIONERS.

1941,
August 13.

v.

ETHIKASHA SARGURU *alias* SYED CHANDU
SAHIB AND ANOTHER (DEFENDANTS), RESPONDENTS.*

The Mussalman Wakf Act (XLII of 1923), sec. 10—Proper Court to try an offence under—Sec. 4 (a), Code of Criminal Procedure (Act V of 1898).

Section 10 of the Mussalman Wakf Act (XLII of 1923) creates an offence as defined in section 4 (a) of the Code of Criminal Procedure and as there is no Court mentioned in that behalf in the Wakf Act, the Court that can try such an offence is the Court indicated in the Criminal Procedure Code.

* Civil Revision Petition No. 1804 of 1939.

SYED ISMAIL
SAHIB
v.
ETHIKASHA
SARGURU.

Shia Youngmen's Association, Punjab, Lahore v. Fateh Ali Shah(1) followed.

Nasrullah v. Wajid Ali(2), *Kalekhan v. Karim*(3) and *Abdul Hadi v. Abdul Latif*(4) dissented from.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Madura, dated 4th April 1939 and made in Original Petition No. 60 of 1938.

K. Bhashyam for petitioners.

S. Panchapakesa Sastri and *G. Srinivasa Ayyangar* for respondents.

JUDGMENT.

BURN J.

BURN J.—This is an application to revise the order passed by the learned District Judge of Madura in Original Petition No. 60 of 1938. That original petition was filed under section 10 of the Mussalman Wakf Act XLII of 1923, desiring the lower Court to punish the respondents by way of fine for failure to discharge their duties under the Wakf Act in connection with a darga called Hazrat Mohaiat Shaw Darga at Anuppanady village, near Madura. The respondents denied that any such wakf existed, and pleaded that it was only a criminal Court that could impose the fine indicated under section 10 of the Act. The learned District Judge thought that it was the District Court that had the jurisdiction to impose the fine, but held that since the wakf itself was denied, it was not competent for him to hold an enquiry into that matter.

With regard to the first point, I am of opinion that the learned District Judge has not come to the correct conclusion. He relied upon the decisions in *Nasrullah v. Wajid Ali*(2), *Kalekhan v. Karim*(3) and *Abdul Hadi*

(1) I.L.R. [1941] Lah. 395 (F.B.).

(3) (1934) 37 Bom. L.R. 207.

(2) (1932) I.L.R. 54 All. 475.

(4) A.I.R. 1937 Nag 135.

v. Abdul Latif(1). But in all these decisions it is noticeable that the learned Judges have pronounced their decisions rather with reference to what they consider to be “the scheme of the Act” than with reference to the wording of its provisions. In section 2 of the Mussalman Wakf Act XLII of 1923 “Court” is defined as

“the Court of the District Judge or, within the limits of the ordinary original civil jurisdiction of a High Court, such Court, subordinate to the High Court, as the Provincial Government may, by notification in the Official Gazette, designate in this behalf.”

The arguments which weighed with the learned Judges in the cases referred to was that the District Court is burdened with all the duties under this Act, and therefore the District Court must be the Court which can impose the fine provided in section 10. This, however, with all respect, is in my opinion not sound. Section 10 of the Act simply says that any person who is required to perform certain duties shall, if without reasonable cause he fails to perform those duties, be punishable with fine which may extend to Rs. 500 or in the case of a second or a subsequent offence with fine which may extend to Rs. 2,000.

Now under section 4 of the Code of Criminal Procedure “offence” means any act or omission made punishable by any law for the time being in force. It is clear therefore that section 10 of the Wakf Act creates an offence, and indeed it says in so many words that the omission described is an offence. Section 29 of the Code of Criminal Procedure runs as follows :—

“(1) Subject to the other provisions of this Code any offence under any other law (that is any law other than the Indian Penal Code) shall, when any Court is mentioned in this behalf in such law, be tried by such Court.

(1) A.I.R. 1937 Nag. 135.

SYED ISMAIL
SAHIB
v.
ETHIKASHA
SARGURU.
BURN J.

SYED ISMAIL
SAHIB
v.
ETHIKASHA
SARGURU.
—
BURN J.

(2) When no Court is so mentioned, it may be tried by the High Court or subject as aforesaid by any Court constituted under this Code by which such offence is shown in the eighth column of the second schedule to be triable."

There is no mention in the Wakf Act of any Court as a Court which shall impose the punishment provided in section 10. In other words there is no Court mentioned as the Court which shall try offences under section 10. It follows therefore that the Court which can try those offences is the Court indicated in the Criminal Procedure Code.

I may say that, in my opinion, it would be contrary to all principle that the Court of the District Judge should have the power to punish offences under section 10 of the Wakf Act with fine. In any such case the Court of the District Judge would be virtually in the position of prosecutor and Judge at the same time. I find myself therefore, with all respect, unable to agree with the learned Judges who decided the cases already quoted. I would prefer to follow, with respect, the decision of a Full Bench of the Lahore High Court in *Shia Youngmen's Association, Punjab, Lahore v. Fateh Ali Shah*(1). The Full Bench there answered in the negative the question whether, in case the mutwalli has not complied with the provisions of the Act, the District Judge is empowered himself to impose a fine on him.

In the same judgment the Full Bench of the Lahore High Court decided that in proceedings under section 10 of Act XLII of 1923, the District Judge has no jurisdiction to hold an enquiry into the nature of the property where the alleged mutwalli denies the existence of the wakf. This is important support for the view taken by the learned District Judge in the

(1) I.L.R. [1941] Lah. 395 (F.B.).

order which I am asked to revise. But it is not necessary for me to discuss that question at length since learned Counsel for the petitioners agrees that if a decision on the other point is against the petitioners, the application to the District Court must be considered to have been rightly dismissed.

This application to revise the order of the learned District Judge therefore fails and is dismissed with costs.

V.V.C.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Happell.

MUNDLA GANGI REDDI (PETITIONER-CREDITOR),
APPELLANT,

1941,
July 17.

v.

GOLLA NARASIMHA REDDI (RESPONDENT-DEBTOR),
RESPONDENT.*

*Provincial Insolvency Act (V of 1920), ss. 4, 9, 24 and 25—
Petition by creditor to adjudicate debtor insolvent—Relation-
ship of creditor and debtor denied by latter—Question com-
plicated—Power of insolvency Court to dismiss petition
for adjudication and refer parties to suit—No such power.*

Under the Provincial Insolvency Act (V of 1920) an insolvency Court cannot dismiss an insolvency petition by a creditor and refer him to a suit on the ground that the questions raised in it are too difficult or complicated for the insolvency Court to decide.

The question whether the relation of creditor and debtor still exists between an adjudicating creditor and an alleged debtor is a question expressly and explicitly for the decision of the insolvency Court and the insolvency Court has no right

* Appeal Against Order No. 179 of 1939.

GANGI REDDI v. NARASIMHA. to say that it will not decide this question merely because difficult questions of fact and law arise.

Gopikabai Mahadev v. Chapsi Purshottam(1) doubted.

APPEAL against the order of the District Judge of Cuddapah, dated 20th September 1938, in Insolvency Petition No. 90 of 1936.

Kasturi Seshagiri Rao for appellant.

V. Govindarajachari for *R. Ramalinga Reddi* for respondent.

JUDGMENT.

BURN J.—This appeal is from the order passed by the learned District Judge of Cuddapah dismissing Insolvency Petition No. 90 of 1936. This petition was filed by a creditor named Alladu Nagiah, against one Golla Narasimha Reddi. The present appellant Mundla Gangi Reddi was substituted as the petitioning creditor in 1937.

The learned District Judge has dismissed the petition on the ground that the case involves the decision of complicated questions of law and fact before it can be held that a subsisting relationship of creditor and debtor has been satisfactorily established. The debtor objected to adjudication at the instance of the present appellant, alleging that this creditor had agreed to a composition scheme which had been accepted by other creditors also. The appellant, as appears from the order of the learned Judge, did not file any counter-affidavit to this statement and the agreement set up by the debtor was sent for examination to the Government Examiner of Questioned Documents. After that official expressed the opinion that the signature on the alleged agreement was the signature of the

(1) (1934) I.L.R. 59 Bom. 161.

appellant, the appellant put in a statement in which he alleged that the signatures of the creditors in the alleged agreement had been obtained by fraud and that he, even if his signature also were found to be genuine, would not be bound by it. It is the raising of these pleas that has caused the learned Judge to say that complicated questions of law and fact have to be gone into before it can be decided that the petitioner and the respondent stand to each other in the relation of creditor and debtor. The learned Judge has said that these questions ought to be decided in a regular suit and he has referred the petitioner to a regular suit and dismissed his petition.

Mr. Seshagiri Rao for the appellant has contended that in so doing the learned District Judge has acted wrongly. Mr. Seshagiri Rao argues that the sole question of importance to be decided by the insolvency Court in this case was whether the relation of creditor and debtor still existed between the petitioner and the respondent or not. He says that the insolvency Court has no right to say that it will not decide this question merely because difficult questions of law and fact arise. The learned District Judge has relied upon a decision of a single Judge of the Bombay High Court, *Gopikabai Mahadev v. Chapsi Purshottam*(1). That was a case somewhat similar to this. The petitioning creditor was confronted with a receipt signed by herself. She was obliged to admit that she had passed a receipt to the debtor, but she alleged that it had been obtained from her by means of fraud and misrepresentation. The insolvency Court which was hearing the petition thought that these allegations on the part of the petitioning creditor ought to be inquired

(1) (1934) I.L.R. 59 Bom. 161, 169.

GANGI REDDI
v.
NARASIMHA.
BURN J.

into, but the District Court on appeal held that it was not necessary for the insolvency Court to inquire into these questions and said that the receipt passed by the petitioner could not be impeached in insolvency proceedings. It was on second appeal that the matter came before the Bombay High Court. The learned Judge held that a second appeal did not, properly speaking, lie; but he observed that it was competent for the insolvency Court to refer the petitioning creditor to a regular suit on the facts of that case. At page 169, the learned Judge is reported to have said:

"Therefore, *prima facie*, not only is she not a creditor for an amount of Rs. 500 but she is no creditor at all of the opponents on the date of the petition and, if she replies in answer to the opponents' petition that the receipt was fraudulently obtained, it is for her to establish that allegation and, if the insolvency Court thinks that the question is of such a nature as can be properly adjudicated upon by a civil Court in a regular suit, I do not think that the discretion of the insolvency Court to refer parties to a regular suit is taken away by any of the provisions cited above."

"The provisions cited above" were sections 4, 9 and 24 of the Act. The learned Judge does not state the source of the discretion, which in his opinion the insolvency Court has, to refer parties to a regular suit. It is clear that no such discretion can be derived from section 4 of the Provincial Insolvency Act. Section 4 (3) authorises the Court in certain circumstances, after the insolvency proceedings have been set on foot, to order the sale of the debtor's interest in property without deciding the precise nature or extent of that interest. But there is nothing in this provision to warrant the statement that the insolvency Court can dismiss an insolvency petition on the ground that the questions raised in it are too difficult or complicated for the insolvency Court to decide.

GANGI REDDI
v.
NARASIMHA.
BURN J.

Mr. Govindarajachari for the respondent has referred us to section 25 of the Provincial Insolvency Act. In sub-section 1 it is provided that, in the case of a petition presented by a creditor, where the Court is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition or of the alleged act of insolvency or is satisfied by the debtor that he is able to pay his debts or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition. Mr. Govindarajachari contends that the present case can be brought within the clause "for any other sufficient cause no order ought to be made". This contention I find myself unable to accept. It is provided in section 13 (6) of the Presidency-towns Insolvency Act that, when the debtor appears in response to a creditor's petition and denies that he is indebted to the petitioner, the Court on taking security may, instead of dismissing the petition, stay the proceedings for such time as may be required for trial of the question relating to the debt. This means that the insolvency Court in the Presidency towns is not obliged to go into disputed questions of debt but can refer the creditor to the ordinary civil Court to get a decree for the amount which he claims, postponing insolvency proceedings meanwhile. But this is a very different thing from saying that the insolvency Court, if it considers the question of the debt between the petitioner and the respondent to be difficult, can dismiss the creditor's petition. There is no provision in section 13 (6) of the Presidency-towns Insolvency Act for dismissal of the petition. The only provision is for adjournment of the insolvency petition until the civil suit is tried. Moreover, in the present case the decision of the learned District Judge is not a decision

GANGI REDDI
v.
NARASIMHA.
BURN J.

that for some sufficient cause no order ought to be made; but it is a decision that the petitioning creditor must go to the civil Court to establish his case. It is obvious that the dismissal of the insolvency petition outright is wrong; because, even if the petitioning creditor goes to the civil Court and gets a decree against the respondent for the amount claimed, it will be by that time too late for him to bring any insolvency petition. The act of insolvency in this case is alleged to have been committed in 1936; and any insolvency petition based upon that act of insolvency must be summarily rejected if filed hereafter.

I regret therefore I am unable to agree with the decision of the Bombay High Court referred to above. I find myself in agreement with the contention of Mr. Seshagiri Rao that the question which has arisen in this case between the petitioner and the respondent is a question expressly and explicitly for the decision of the insolvency Court. I do not see how the insolvency Court can have a discretion to refuse to decide this question and to refer the parties for the decision of it to a different tribunal. I would therefore allow this appeal and set aside the order of the District Court and direct that the insolvency petition be restored to file and disposed of according to law.

The appellant, I think, should have the costs of the appeal from the respondent.

HAPPELL J.—I agree.

N.S.

APPELLATE CRIMINAL.

Before Mr. Justice Horwill.

IN RE PERIYA YELUMALAI CHETTI AND SEVENTEEN
OTHERS (APPELLANTS—ACCUSED 1 AND 4 TO 19), PETI-
TIONERS.*

1941,
July 16.

Madras Gaming Act (III of 1930), ss. 3 and 6—House in which betting on horse race took place—"Common gaming-house" as defined in sec. 3 of the Act—Paraphernalia of betting found in it—Evidence under sec. 6 of the Act.

Notwithstanding the wording in sections 4 (i) and 4 (ii) of the Madras Gaming Act (III of 1930), a house in which wagering or betting on a horse race takes place is a "common gaming-house" within the meaning of the definition in section 3 of the Act, and, under section 6 of the Act, the mere fact that papers relating to horse racing are found inside the house would in itself be evidence that the house is being used as a common gaming-house and that all the persons found therein are present for the purpose of gaming.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Subdivisional Magistrate of Trivellore, dated 31st December 1940 and passed in Criminal Appeal No. 57 of 1940 (Calendar Cases Nos. 1461 to 1479 on the file of the Court of the Stationary Sub-Magistrate, Ponneri).

T. R. Venkatarama Sastri, F. S. Vaz, K. Seshagiri Rao Naidu and N. Krishnamurthi for appellants.
Public Prosecutor (V.L. Ethiraj) for the Crown.

ORDER.

HORWILL J.—The Inspector of Police, Ponneri, who was examined as P.W. 1 in this case, obtained a warrant from the Deputy Superintendent of Police

HORWILL J.

* Criminal Revision Case No. 1 of 1941 (Criminal Revision Petition No. 1 of 1941).

YELUMALAI,
In re.
HORWILL J.

under section 5 (1) of the Madras Gaming Act (III of 1930) to search the house belonging to the first and the second accused. He went to that house and saw two persons lying inside the door and others busy writing something. He posted a constable and a bus conductor to see that nobody ran away and went to the front of the house. There he found the first and the third accused keeping watch. He knocked on the door, and it was opened by the second accused after the first and the third accused had called to those inside. The Inspector entered the house and found accused 6 and 9 lying down on the pial while others were busy writing slips of paper. He made a search and amongst other things found a large number of papers of various kinds relating to the business of betting on horse racing. He made out a charge-sheet, and on his evidence the Stationary Sub-Magistrate of Ponneri has found the first and the second accused guilty under section 4 (i) and accused 4 to 19 guilty under section 9 of Madras Act III of 1930. All the convicted accused have filed this revision petition.

The principal point argued in this petition is whether the house that was searched and raided was a "common gaming-house" within the meaning of the definition found in section 3 of that Act. The main part of the section no doubt reads as if it did not apply to horse racing, because it refers to a "room or place in which cards, dice, tables or other instruments of gaming are kept or used"; such expressions being hardly applicable to the slips drawn up in connection with betting on horse racing. But the second paragraph of that section which is found only in this Act of 1930, says that

"gaming . . . includes wagering or betting on a horse race . . ."

That being so, one must conclude that a house in which wagering or betting on horse race takes place is a common gaming-house.

The objection to the above conclusion is the wording of sections 4 (i) and 4 (ii), which undoubtedly does suggest that section 4 was intended to deal with gaming on a horse race alone thus suggesting that the rest of the Act applied to gaming other than gaming on horse races. The learned Public Prosecutor has however pointed out that it is not necessary to draw this conclusion. Section 4 (ii) makes liable to punishment any person found gaming on a horse race, the wording of this sub-section being entirely different from that of any other provision of the Act dealing with gaming in general. Section 4 (i) is worded very much the same as section 8, and it has therefore been argued that if section 8 applied to horse racing also, section 4 (i) would be redundant: but, for some reason not very clear, the punishment awarded in section 4 (i) is different from that for gaming in general under section 8. It cannot be said, therefore, that the wording of sections 4 (i) and 4 (ii) makes it impossible to apply the definition of a common gaming-house to a house in which wagering or betting on a horse race takes place. The apparent reason for this difficulty in construing the Act as a whole arises from the fact that Act III of 1930 is based on an older Act of 1890, the wording of which has to a great extent been embodied in Act III of 1930, insufficient care having been taken in the grafting of the new provisions on to the old Act.

The importance of the point whether a "common gaming-house" can be applied to a house in which betting on horse racing takes place relates to section 6, for under that section "cards, dice, gaming table or

YELUMALAI,
In re.
HORWILL J.

YELUMALAI,
In re.
HORWILL J.

cloth, board or other instruments of gaming" are evidence that such place is used as a common gaming-house; so that, if the house in question was a common gaming-house, the mere fact that papers relating to horse racing were found inside would in itself be evidence that the house was being used as a common gaming-house and that all the persons found therein were present for the purpose of gaming.

It is argued on the authority of *Benoy Krishna Roy v. Emperor*(1) that the mere fact that certain papers relating to horse racing were found inside the house in question is not sufficient, even if we make use of section 6 of Act III of 1930, to warrant a conclusion that the house was used as a common gaming-house. In the present case a large variety of papers were found in the house relating to horse racing and, above that, a number of persons were found actually making betting calculations. It is possible to conceive of cases where a person may have a common gaming-house in one place and then take to his private house certain books when the day's proceedings are over. In such a case his private house would not be a common gaming-house; but in the present case all the circumstances point to the fact that this house was used as a common gaming-house. It is of course possible, as has been argued, that the betting actually took place somewhere else and that the slips and other papers were taken away to the house searched after the business was over and that the only purpose for which the house itself was used was for calculating the results of the bets and determining to whom money was due. I think it however more reasonable to draw the conclusion the learned Magistrate did, especially

in view of the provisions of section 6, which enables a Court to take as evidence of a building being a common gaming-house the mere fact that the paraphernalia of betting were found in it. There is no evidence which points to or suggests a contrary conclusion.

The facts found by the lower Court were that the first and the second accused were keeping a common gaming-house and that the petitioners were in that house for the purpose of gaming. So far as the first and the second accused are concerned, there can be no doubt that this finding was correct. The fact that the other accused were in this house calculating what was due by or to various persons as a result of the betting on horse races only shows that these persons were present in that house for the purpose of assisting the persons who were conducting the betting, but not that they themselves were actually gaming. Despite the fact that the presence of the other accused is evidence under section 6 of the fact that they were there for the purpose, if I were trying the case myself, I would be inclined to find the other accused guilty under section 8 rather than under section 9; but I do not consider that this is a sufficient reason for interfering with the conviction or the sentences imposed by the trial Magistrate. The appellants, who have been fined only Rs. 75 in the case of accused 1 and 2, and Rs. 50 in the case of others, may be considered to have got off lightly. The petition is accordingly dismissed.

V.V.C.

YELUMALAI,
In re.
HORWILL J.

(1) A.I.R. 1941 Cal. 32.

APPELLATE CRIMINAL

*Before Sir Lionel Leach, Chief Justice and Mr. Justice
Chandrasekhara Ayyar.*

NALLAPPA GOUNDAN (ACCUSED), PETITIONER,

v.

CHINNAMMAL (COMPLAINANT), RESPONDENT.*

Code of Criminal Procedure (Act V of 1898), sec. 195—Defamation—Person defamed by witness in the witness box—Private complaint—Sanction of Court not necessary—Court itself need not complain.

The petitioner was convicted under section 500, Indian Penal Code, for the defamation of his wife in uttering words, accusing his wife of unchastity, when giving evidence in support of a complaint filed by him to the effect that his wife had been guilty of theft. It was contended for the petitioner that a complaint of defamation based on a statement in Court could only be filed by the Court in which the statement was made and therefore the conviction was illegal.

Held: The provisions of section 195 of the Code of Criminal Procedure do not apply to defamation and a person who is defamed by a witness when in the witness box is at liberty to file a complaint against his defamer under the provisions of the Indian Penal Code.

It is not necessary in such a case that the Court should itself complain or that the sanction of the Court should be obtained.

Venkataramanjulu Chetty v. Kanniah Chetty(1) considered and approved.

Appadurai Nainar, In re(2) distinguished and explained.

Shanmugasundaram Pillai v. Manicka Mudaliar(3), *Ganapathi Asari v. Kuppuswamy Asari*(4) and *Ramaswami Konar v. Nachiar Ammal*(5) overruled.

* Criminal Revision Case No. 163 of 1941 (Criminal Revision Petition No. 156 of 1941).

(1) 1933 M.W.N. 1263.

(2) (1935) I.L.R. 59 Mad. 165.

(3) 1939 M.W.N. 192 (1).

(4) 1939 M.W.N. 320.

(5) 1940 M.W.N. 867.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Trichinopoly Division, dated 18th September 1940 and passed in Criminal Appeal No. 66 of 1940 preferred against the judgment of the Court of the Joint Magistrate, Karur, in Calendar Case No. 64 of 1940.

G. Gopalaswamy for petitioner.

Public Prosecutor (V. L. Ethiraj) for the Crown.

The JUDGMENT of the Court was delivered by LEACH C.J.—The petitioner was convicted by the Joint Magistrate of Karur under section 500 of the Indian Penal Code for the defamation of his wife. He was ordered to pay a fine of Rs. 100 and in default of payment to undergo simple imprisonment for three months. The defamatory words had been uttered by the petitioner when giving evidence in support of a complaint filed by him to the effect that his wife had been guilty of theft. In the course of his evidence in support of the complaint he accused his wife of unchastity. They had quarrelled and she was living separately but in the same building. The conviction of the petitioner was confirmed by the Sessions Judge of Trichinopoly on appeal. The petitioner now asks this Court to set aside the conviction on the ground that a complaint of defamation which is based on a statement in Court can only be filed by the Court in which the statement was made. There are conflicting decisions of this Court on the question. In three cases LAKSHMANA RAO J. has expressed the opinion that the complaint must be filed by the Court, while BURN J. has expressed an opinion to the contrary.

The first of the decisions by LAKSHMANA RAO J. was given in *Shanmugasundaram Pillai v. Manicka*

NALLAPPA
GOUNDAN
v.
CHINNAMMAL.

LEACH C.J.

NALLAPPA
GOUNDAN
v.
CHINNAMMAL.
LEACH C.J.

Mudaliar(1). In that case the petitioner charged the son-in-law of the respondent with theft of certain documents and records and in an affidavit filed in support of an application for a search warrant stated that some of the articles had been secreted in the house of the respondent. A search warrant was issued and in accordance with this authority the respondent's house was searched. Nothing was, however, found there and the son-in-law was ultimately discharged. The learned Judge considered that, as the complaint of defamation was founded on false evidence, the offence would fall within section 193 of the Penal Code and was only cognizable on a complaint by the Court. In support of his order LAKSHMANA RAO J. relied on the decision of this Court in *In re Appadurai Nainar*(2), to which reference will be made presently. The learned Judge expressed a similar opinion in *Ganapathi Asari v. Kuppuswamy Asari*(3) and in *Ramaswami Konar v. Nachiar Ammal* (4).

The opinion of BURN J. was stated in *Venkataramanjulu Chetty v. Kanniah Chetty*(5) and is to be gathered from the following extract from his judgment:—

“The mere fact that the defamation is committed in, or in relation to, criminal proceedings in a Court is not a reason for requiring the sanction of that Court or for requiring that Court to prefer a complaint . . . The petitioner in this case has complained of the acts which have, according to him, caused harm to his reputation; he has no concern with the same acts in so far as they may have constituted an offence against public justice.”

(1) 1939 M.W.N. 192 (1).

(2) (1935) I.L.R. 59 Mad. 165.

(3) 1939 M.W.N. 320.

(4) 1940 M.W.N. 867.

(5) 1933 M.W.N. 1263.

The provisions of section 195 of the Code of Criminal Procedure do not apply to defamation. This Court has held in *Tiruvengada Mudali v. Tripurasundari Ammal*(1) that a person who is defamed by a witness when in the witness box is at liberty to file a complaint against his defamer under the provisions of the Indian Penal Code. When such a right exists it can only be taken away by an express statutory provision to that effect. There is nothing in section 195 of the Code of Criminal Procedure, or in any other part of that Code, or in any other enactment which takes away this right.

We consider that an examination of the judgment in *In re Appadurai Nainar*(2) does not render real support for the opinion that when a person is defamed in evidence given in support of an offence which falls within the purview of section 195 of the Code of Criminal Procedure, the Court in which the defamation takes place must lay the complaint charging the witness with defamation. In *In re Appadurai Nainar*(2) the facts were these. A civil Court had held that a promissory note had been fabricated and had dismissed the suit. Thereupon the defendant, without asking the aid of the civil Court, filed a complaint charging the maker, the writer and the attestors of the instrument with forgery, an offence falling in the circumstances within the mischief of section 195 of the Code of Criminal Procedure. On a preliminary objection being taken to the effect that the maker of the instrument could not, in view of the provisions of section 195 (1) (c) of the Code of Criminal Procedure, be charged, except on the complaint of the Court, the complaint so far as the maker was concerned was

NALLAPPA
GOUNDAN
v.
CHINNAMMAL.
LEACH C.J.

(1) (1926) I.L.R. 49 Mad. 728 (F.B.). (2) (1935) I.L.R. 59 Mad. 165.

NALLAPPA
GOUNDAN
v.
CHINNAMMAL.
LEACH C.J.

dismissed, but the Magistrate proceeded with the charge against the attesting witnesses. MADHAVAN NAIR and BURN JJ. held this to be wrong, and stated that parties should not be allowed to evade the provisions of section 195 (1) (b) of the Code of Criminal Procedure by filing a complaint under another provision of the Penal Code if an offence under section 193 of that Code or of any other of its sections mentioned in section 195 (1) (b) of the Code of Criminal Procedure had been committed. In that case the complaint was based on a forged instrument which had been given in evidence, and we do not read the judgment as placing in the same category a charge of defamation which is an entirely personal matter. That question was not under consideration.

We consider that the opinion expressed by BURN J. in *Venkataramanjulu Chetty v. Kanniah Chetty*(1) is preferable and it is to be remembered that BURN J. was a member of the Bench which decided *In re Appadurai Nainar*(2). It is also in point to mention that the opinion of BURN J. in *Venkataramanjulu Chetty v. Kanniah Chetty*(1) accords with a much earlier decision of this Court and one given by a Bench. See *Krishna Row v. Appasawmi Aiyar*(3). There a Magistrate had held that the sanction of the Court was required to a proceeding for defamation in respect of a statement made in Court and, as sanction had not been accorded, dismissed the complaint filed by the person alleged to have been defamed. The complainant applied to this Court to correct the order in revision and this was done. In fact no attempt was made to support the Magistrate's order which was described by this Court as being untenable.

(1) 1933 M.W.N. 1263.

(2) (1935) I.L.R. 59 Mad. 165.

(3) (1891) 1 Weir 585.

NALLAPPA
GOUNDAN
v.
CHINNAMMAL

It may be mentioned that opinions which have been expressed by other High Courts support the opinion of BURN J. See *Satish Chandra Chakravarti v. Ram Doyal De*(1), *Muhammad Isa v. Nazim Husain*(2), *Mst. Binia v. Crown and another*(3) and *Chotelal v. Phulchand*(4).

The petition will be dismissed.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

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

VASIREDDI VENKAYYA (SECOND PLAINTIFF),
APPELLANT,

v.

1941,
September 1.

GOPU SREERAMULU AND TWENTY-EIGHT OTHERS
(DEFENDANTS 2 TO 7, 9 TO 23 AND NIL), RESPONDENTS.*

Hindu law—Adoption—Consent of sapindas—General authority—Authority given to adopt any boy at any time—Widow making adoption within reasonable time in pursuance of such authority—No change of circumstances between date of authority and date of adoption—Adoption valid.

Where an adoption was made by a Hindu widow to her husband in pursuance of a consent in writing given by the nearest sapinda in the following general terms :—

“you shall therefore, whenever you like, bring and adopt duly a boy whom you like according to Sastras. This is the deed of authority to adopt executed and delivered by me wholeheartedly”,

* Second Appeal No. 803 of 1938.

(1) (1920) I.L.R. 48 Cal. 388 (S.B.).
(3) I.L.R. [1937] Nag. 338.

(2) I.L.R. [1940] All. 314.
(4) I.L.R. [1937] Nag. 425.

VENKATYA
v.
SREERAMULU.

held: The authority to adopt given to the widow was valid authority and the adoption made in pursuance thereof within five months after it was given was valid.

The authority of the nearest sapinda need not be for the adoption of a particular person in order to make it valid. The authority may be given and expressed in general terms and, if it is exercised by the widow within a reasonable period and before circumstances change materially, the adoption is valid.

The question as to the effect of change of circumstances and of lapse of years between the date of authority and the date of adoption left open.

Nagarampalli Kamesam v. Butchamma(1) approved.

Observations in *Suryanarayana v. Venkataramana*(2), *Veera Basavaraju v. Balasurya Prosadarao*(3) and *Anne Brahmayya v. Chelasami Rattayya*(4) dissented from and overruled.

APPEAL against the decree of the Court of the Subordinate Judge of Bezwada in Appeal Suit No. 108 of 1935 preferred against the decree of the Court of the District Munsif of Bezwada in Original Suit No. 79 of 1930.

V. Govindarajachari for *Y. G. Krishnamurti* for appellant.—The appellant, second plaintiff, claims title to certain properties under an adopted son, the first plaintiff. The validity of the first plaintiff's adoption under Hindu law is challenged and it is contended that the consent of the nearest sapinda given for adoption is too general in terms to support a valid adoption. A distinction is sought to be made between a husband's authority to his widow for adoption and a sapinda's consent to adoption by a widow. It is argued that, while the authority conferred by a husband may be general in terms, the assent of a sapinda must be specific and that a general authorisation given by the nearest sapinda to a widow for adopting any boy at any time is invalid. Reliance is placed on certain observations in *Suryanarayana v. Venkataramana*(2). These observations are *obiter* and are not necessary for the decision in the

(1) (1914) 1 L.W. 511.
(3) 1914 M.W.N. 502.

(2) (1903) I.L.R. 26 Mad. 681.
(4) (1924) 20 L.W. 503.

VENKATYA
v.
SREERAMULU.

case. The case went on appeal to the Privy Council in *Suryanarayana v. Venkataramana*(1) and the Judicial Committee do not discuss this question relating to the sapinda's consent. The decision of the High Court in *Suryanarayana v. Venkataramana*(2) is explained and distinguished in *Nagarampalli Kamesam v. Butchamma*(3) which is a direct authority in support of the view that even a sapinda's consent may be general in terms and that an adoption made in pursuance of such a consent is valid provided the consent is acted upon by the widow within a reasonable time before there is a material alteration of circumstances. In the present case the adoption is made within five months after the consent is given by the sapinda and it is not suggested that there has been any material change of circumstances between the date of consent and the date of adoption.

The observations in *Suryanarayana v. Venkataramana*(2) are, however, purported to be followed in *Veera Basavaraju v. Balasurya Prosadarao*(4) where again the point now under discussion does not arise for consideration directly. The observations in that case also must be deemed to be purely *obiter*. Certain statements of the Privy Council in *Veera-basavaraju v. Balasurya Prasada Rao*(5) are sought to be construed as supporting the view that a sapinda's consent given in general terms is not valid. But a careful reading of these statements does not bear out such a construction. They contain only a narration of facts and not any pronouncement of opinion. The decision in *Kristnayya v. Lakshmi pathi*(6) shows that the question is still left open for consideration by the Judicial Committee. In *Anne Brahmayya v. Chelasami Rattayya*(7) the decision in *Nagarampalli Kamesam v. Butchamma*(3) is not followed by RAMESAM J., but no sufficient reasons are given therefor, while JACKSON J. does not consider the point at all. In *Annapurnamma v. Appayya Sastri*(8) an adoption made in pursuance of a consent given by a son to his mother in a will is upheld by the Full Bench as valid, notwithstanding that the consent is couched in general terms, and no point is raised in that case that the consent is

(1) (1903) I.L.R. 26 Mad. 681.

(2) (1906) I.L.R. 29 Mad. 382 (P.C.).

(3) (1914) I.L.W. 511.

(4) 1914 M.W.N. 502.

(5) (1918) I.L.R. 41 Mad. 998 (P.C.).

(6) (1920) I.L.R. 43 Mad. 650 (P.C.).

(7) (1924) 20 L.W. 503.

(8) (1928) I.L.R. 52 Mad. 620 (F.B.).

VENKAYYA
v.
SREERAMULU.

invalid because of its general terms. The terms of the consent are referred to in the judgment of KUMARASWAMI SASTRI J. The decision in *Nagarampalli Kamesam v. Butchamma*(1) is followed by PATANJALI SASTRI J. in *Tiyyagura Challamma v. Bommu Pullareddi*.*

K. Kameswara Rao for *P. Satyanarayana Rao* for some respondents.—The consent of the sapinda given in this case is not valid. Such a consent authorising in general terms an adoption without reference to the time and place of adoption and to the identity of the boy intended to be adopted cannot by any means be considered to be a judgment of the family council on the propriety of the adoption as contemplated by the observations of the Privy Council in *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi*(2) and *Kristnayya v. Lakshmipathi*(3). The consent asked for must have regard to the particular adoption proposed. The Privy Council refer with approval in *Veerabasavaraju v. Balasurya Prasada Rao*(4), at page 1007, to the statements in the judgment of WHITE C.J. in *Veera Basavaraju v. Balasurya Prosadarao*(5) at page 503.

S. Kothandarama Nainar for *Ch. Raghava Rao* for respondents 5 and 6.

Other respondents were not represented.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The only question involved in this appeal is whether an adoption by a Hindu widow of a son to her deceased husband is valid when the authority to adopt has been given by the nearest sapinda and expressed in general terms. In other words, must the sapinda consent to the adoption of a particular person in order to make the adoption valid? The first plaintiff in the suit out of which this appeal arises was adopted on 7th May 1920 by Venkamma, the widow of one Sivaramayya. No authority had been given

(1) (1914) 1 L.W. 511.

(2) (1876) I.L.R. 1 Mad. 174 (P.C.).

(3) (1920) I.L.R. 43 Mad. 650 (P.C.).

(4) (1918) I.L.R. 41 Mad. 998, 1007 (P.C.).

(5) 1914 M.W.N. 502.

* Second Appeal No. 150 of 1936 (unreported).

VENKAYYA
v.
SREERAMULU.
—
LEACH C.J.

by Sivaramayya to his widow, but she informed the nearest sapinda of her intention to adopt and sought his consent. The sapinda gave his consent in writing, the operative portion of the document being in these words:

“You shall therefore, whenever you like, bring and adopt duly a boy whom you like according to Sastras. This is the deed of authority to adopt executed and delivered by me wholeheartedly.”

The first plaintiff sued as the adopted son and asked for a declaration that certain alienations were not binding on him. The second plaintiff, who is the appellant, claimed a half share in the properties in suit by reason of a deed of assignment executed in his favour by the first plaintiff. The defendants challenged the validity of the first plaintiff's adoption on the ground that the sapinda's consent was invalid because it was couched in general terms, and this plea was accepted by the trial Judge, the District Munsif of Bezwada, and by the Subordinate Judge of Bezwada on appeal. The result was that the suit was dismissed. The appellant then appealed to this Court and the appeal has been placed before a Full Bench because certain judgments of this Court which have bearing are in conflict.

In *Nagarampalli Kamesam v. Butchamma*(1) WALLIS and SADASIVA AYYAR JJ. held that an authority to adopt given by sapindas was not invalid because it was expressed generally and empowered the widow “to adopt any boy at any time she liked”. The words in quotation marks are from the judgment. The exact words of the authority given in that case are not quoted in the report, but we have examined the

(1) (1914) 1 L.W. 511.

VENKAYYA
v.
SREERAMULU.
LEACH C.J.

deed authorising the adoption and find that the second paragraph reads as follows :—

“As your son Jogi Ramachandrudu died unmarried, and as you have asked me that permission should be granted for adopting for the increase and perpetuity of the family, permission is granted through this approving your request. Therefore, this is the deed of permission executed heartily that adopting the boy you like whenever you like, the increase and perpetuity of the family should be accomplished.”

The Court had no hesitation in holding that a document so expressed conferred a valid authority on the widow. In disputing the correctness of this decision, the contesting respondents rely on observations made in the judgments in *Suryanarayana v. Venkataramana*(1), *Veera Basavaraju v. Balasurya Prosadarao*(2) and *Anne Brahmayya v. Chelasami Rattayya*(3).

The first of these cases was decided by SUBRAMANIA AYYAR and DAVIES JJ. There the sapindas had signed a document assenting to the adoption by the widow of any boy at any time, but she did not make an adoption until nine years later and during the interval the circumstances had materially changed. It was not necessary for the purpose of deciding that case for the Court to express an opinion on whether a general power given to a widow to adopt was valid or whether the fact that the circumstances had materially changed in the course of the nine years made any difference, because the Court found that the widow had received authority from her deceased husband. The judgment in *Suryanarayana v. Venkataramana*(1) was considered by WALLIS and SADASIVA AYYAR JJ. in *Nagarampalli Kamesam v. Butchamma*(4). They did not think that SUBRAMANIA AYYAR and DAVIES JJ. intended to say

(1) (1903) I.L.R. 28 Mad. 681.
(3) (1924) 20 L.W. 503.

(2) 1914 M.W.N. 502.
(4) (1914) 1 L.W. 511.

that a general authority cannot be availed of by the widow when she adopts almost immediately after the authority has been given. The learned Judges who decided *Suryanarayana v. Venkataramana*(1) may not have intended to say that a general authority to adopt is void in all cases, but their remarks were considered to amount to this by WHITE C.J. and OLDFIELD J. in *Veera Basavaraju v. Balasurya Prosadarao*(2). In that case WHITE C.J. and OLDFIELD J. said :

“But on the evidence available and the terms of Exhibit R-1 we must hold that it, at the highest, authorised the adoption of any boy at any time and therefore was useless, vide *Suryanarayana v. Venkataramana*(1), and that, as the learned District Judge opines, it expresses only a general willingness to consider the making of an adoption favourably, the necessary final consent to a specific adoption being reserved until details are available.”

It was not necessary for the decision of *Veera Basavaraju v. Balasurya Prosadarao*(2) for the learned Judges to make these observations and therefore they must also be regarded as *obiter*, but at the same time they are in direct conflict with the decision in *Nagarampalli Kamesam v. Butchamma*(3). *Anne Brahmayya v. Chelasami Rattayya*(4) was decided by RAMESAM J. who held that the sapinda must indicate the person to be adopted and the authority to adopt must be used within a short period.

We are of the opinion that the law was correctly stated in *Nagarampalli Kamesam v. Butchamma*(3) and that the judgments in *Suryanarayana v. Venkataramana*(1), *Veera Basavaraju v. Balasurya Prosadarao*(2) and *Anne Brahmayya v. Chelasami Rattayya*(4) should be disregarded when the authority has been

(1) (1903) I.L.R. 28 Mad. 681.
(3) (1914) 1 L.W. 511.

(2) 1914 M.W.N. 502.
(4) (1924) 20 L.W. 503.

VENKAT
v.
SREERAMU
LEACH C.

VENKATYA
v.
SREERAMULU.
LEACH C.J.

exercised within a reasonable period and the circumstances have not changed materially. We do not wish to be understood to imply that, if the authority is not exercised quickly, it ceases to be valid. That question does not arise here and the effect of the lapse of years and the change of circumstances must be decided when the question does arise. In the present case the adoption took place within five months of the receipt of the sapinda's letter and it is not suggested that the circumstances had changed. It cannot be disputed, nor has any attempt been made to dispute it, that a husband can give to his wife a general authority to adopt. When she has received authority from her husband, the widow is at liberty to adopt whomever she likes as a son to her deceased husband. The sapindas take the place of the husband when he has died without giving authority to his widow. Why should they not also leave the choice entirely to the widow? There is nothing in the ancient texts to indicate that they cannot and we can see no justification whatsoever for the opinion that the sapindas must name the boy to be adopted. Of course, if the sapindas only give their consent conditional on the widow adopting a named person, that will be a different matter. To ignore such a condition would mean acting beyond the scope of the authority.

It has been said in the course of the argument that a passage in the judgment of the Privy Council in *Veerabasavaraju v. Balasurya Prasada Rao*(1) supports the opinion expressed in *Suryanarayana v. Venkataramana*(2). In the case before the Privy Council, the widow had made an adoption with the consent of remote sapindas without having asked for the consent of

(1) (1918) I.L.R. 41 Mad. 998 (P.C.).

(2) (1903) I.L.R. 28 Mad. 681.

VENKATYA
v.
SREERAMULU.
LEACH C.J.

the nearest sapindas and it was held that the adoption in the circumstances was invalid. There were five grades of sapindas and one member of the fourth grade had given his assent in a letter addressed to the widow. In describing this letter Mr. AMEER ALI, who delivered the judgment of the Board, observed :

"This letter contains a general approval of her intention to make an adoption, but does not evince a consent to any specific adoption."

It is this passage which it is said indicates approval of the opinion expressed in *Suryanarayana v. Venkataramana*(1). When the whole of the paragraph from which this statement has been extracted is read, it is obvious that their Lordships were merely describing the letter and were not intending to lay down any principle. If there should be any doubt whether this is so, it can be set at rest by reference to the judgment of the Judicial Committee in *Krishnayya v. Lakshmi-pathi*(2) where VISCOUNT CAVE said at page 659 :

"Apart from the absence of the necessary assent, other objections to the adoption were put forward on behalf of the respondents. It was said (i) that an authority given by sapindas to adopt 'any boy at any time' is invalid [see *Suryanarayana v. Venkataramana*(1)]; (ii) that an authority given by sapindas in 1901 could not validly be executed in 1908 when several of the signatories were dead and the opinion of others might have altered; and (iii) that an authority to adopt asked and given for religious motives and in order to keep up the line of succession to Seshadri was not properly exercised by the adoption of Krishnayya on the terms that he should give up to the adopting widow or to her relatives the greater part of her late husband's estates. These questions, although raised in the Courts below, were not the subject of decision there; and their Lordships accordingly refrain from expressing any opinion upon them."

(1) (1903) I.L.R. 26 Mad. 681.

(2) (1920) I.L.R. 43 Mad. 650 (P.C.).

VENKAYYA
v.
SREERAMULU.
LEACH C.J.

Nothing could be clearer than this and it is not suggested that the question has arisen before the Judicial Committee since.

We hold that the authority given to the widow in this case was valid authority and that the first plaintiff was lawfully adopted by Venkamma to her late husband. It is accepted by all parties that on this finding the appeal must succeed to the extent of a half share in the properties described in entries Nos. 8, 9, 10 and 11 in the schedule to the plaint and that the suit must be remanded to the trial Court to decide the questions, if any, which are consequential on this decision. If any such questions arise the trial Court will pass a final decree when it has decided them. The appellant is entitled to his costs in this Court and before the Subordinate Judge. The costs in the trial Court will be decided by the District Munsif when he passes the final decree.

N.S.

APPELLATE CIVIL—FULL BENCH.

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

KANDULAPATI KANAKARATNAM
(SECOND DEFENDANT), APPELLANT,

1941,
August 28.

v.

KANDULAPATI NARASIMHA RAO, MINOR, BY MOTHER
AND NEXT FRIEND K. NAGARATNAM AND ANOTHER
(PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Hindu law—Adoption—Madras Presidency—Senior widow making adoption with consent of sapindas—Junior widow challenging same on the ground of improper motive of senior widow in making adoption—Motive of widow immaterial—Adoption valid.

A Hindu in the Madras Presidency died leaving two widows. The senior widow made an adoption. The junior widow challenged the same on the ground that, in making the adoption, the senior widow was not actuated by any religious motive and alleged that her real object was to prevent a portion of the estate falling into her (junior widow's) hands. It was found that the senior widow made the adoption with the consent of the nearest sapinda and it was taken, for the purposes of the appeal, that her motive in making the adoption was as suggested by the junior widow.

Held: The adoption was not invalid.

When a widow has received valid authority to adopt, her motive in making the adoption should be ignored. However spiteful her action may be towards others, the benefit conferred on her deceased husband by the adoption is in no way affected.

Kandaswami Goundar v. Chinnammal(1) and *Murahari Brahma Sastri v. Sumitramma*(2) overruled.

The observations of the Full Bench in *Annapurnamma v. Appayya Sastri*(3) referred to.

* Appeal No. 426 of 1938.

(1) (1933) 37 L.W. 729. (2) (1933) I.L.R. 57 Mad. 411.
(3) (1928) I.L.R. 52 Mad. 620 (F.B.).

KANAKARATNAM
v.
NARASIMHA
RAO.

APPEAL against the decree of the Court of the Subordinate Judge of Ellore, dated 9th August 1938, and passed in Original Suit No. 40 of 1937.

ON THE REFERENCE :

P. V. Rajamannar and *C. Sanjeeva Rao* for appellant.—In making the adoption the senior widow was influenced by a corrupt motive, namely, to spite the junior widow. In *The Collector of Madura v. Mootoo Ramalinga Sethupathy*, (The *Ramnad* case)(1) the Privy Council held that an adoption to be valid must not have been made by the widow from corrupt motive. In *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo* (The *Berhampur* case)(2) the Privy Council held that adoption should not be made capriciously by the widow. In *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (The *Guntur* case)(3) the Privy Council held that nice questions of the motive of the widow in making the adoption should not be introduced into the question. The widow should not make the adoption to defeat the rights of this person or that. The presumption is in favour of validity unless the contrary is shown. In *Sri Krishnayya Rao v. Surya Rao Bahadur Garu*(4), which is an appeal to the Privy Council from *Krishnayya Rao v. Raja of Pittapur*(5), the Privy Council doubted whether the motive of the widow was relevant, but left the matter open. In *Vijaysingji v. Shivasangji*(6) the Privy Council did not deal with the question of motive. In *Ramachandra v. Mulji Nanabhai*(7) a Full Bench of the Bombay High Court held that the motive of the widow in making the adoption is irrelevant in considering whether an adoption is valid or not. In Bombay a widow can make an adoption unless prohibited by her husband. That is why in Bombay her motive in making an adoption is immaterial. In *Kandaswami Goundar v. Chinnammal*(8) *MADHAVAN NAIR* and *JACKSON JJ.* held that an adoption made by the widow to spite her daughters was invalid. To the same effect is the decision in *Murahari Brahma Sastri v. Sumitramma*(9). In *Annapurnamma v.*

(1) (1868) 12 M.I.A. 397.

(2) (1876) I.L.R. 1 Mad. 69, 83 (P.C.).

(3) (1876) I.L.R. 1 Mad. 174, 190 (P.C.).

(4) (1935) 69 M.L.J. 388 (P.C.).

(5) (1928) I.L.R. 51 Mad. 893.

(6) (1935) I.L.R. 59 Bom. 360, 364 (P.C.).

(7) (1896) I.L.R. 22 Bom. 558 (F.B.).

(8) (1933) 37 L.W. 729.

(9) (1933) I.L.R. 57 Mad. 411.

Appayya Sastri(1) there is an obiter dictum that improper motive of a widow in making an adoption will vitiate the adoption. In *Hari Ramayya v. Venkatachalapati*(2) *VARADACHARIAR J.* observed that the motive of the consenting sapinda may be a material consideration but not the motive of the widow making the adoption.

Advocate-General (*Sir A. Krishnaswami Ayyar*) with *B. V. Subramanyam* for first respondent was not called upon.

Second respondent was not represented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by *LEACH C.J.*—The question which arises for decision in this appeal is whether the adoption by a Hindu widow of a son to her deceased husband is invalid when the widow is actuated, not by a sense of religious duty, but by an improper motive.

On 8th June 1931 one Kandulapati Gopalam died leaving two widows, the second respondent and the appellant. The second respondent was the senior widow. On 20th October 1931 the second respondent purported to adopt the first respondent and it is not suggested that any of the necessary formalities were ignored. On 17th December 1935 the first respondent filed in the Court of the District Judge of West Godavari the suit out of which this appeal arises to recover possession of Gopalam's estate. The suit was subsequently transferred to the Court of the Subordinate Judge of Ellore. The first respondent alleged that Gopalam had by will given authority to the second respondent to adopt a son. He also alleged that, irrespective of the will, the adoption was valid as the nearest sapinda had given his consent. The appellant denied that the will had been executed by the testator and disputed the

(1) (1928) I.L.R. 52 Mad. 620, 637 (F.B.).

(2) (1935) 70 M.L.J. 619, 623.

KANAKARATNAM
v.
NARASIMHA
RAO.
LEACH C.J.

validity of the consent of the nearest sapinda. The will was not produced, but the Subordinate Judge held that the first respondent had been validly adopted because the second respondent had in fact received the consent of the nearest sapinda, and this is not now disputed. It may be taken for the purposes of the appeal that in adopting the first respondent the second respondent was not actuated by any religious motive and that her object was to prevent the estate falling into the hands of the appellant.

Two arguments have been advanced on behalf of the appellant. In the first place it is said that a Hindu widow cannot make a valid adoption when she has been prompted by a corrupt motive. In the second place it is said that here the consent of the nearest sapinda cannot be regarded as being a lawful consent because he gave it under the impression that Gopalam had by will directed the second respondent to adopt a son to him. The second contention was not seriously pressed and calls for little comment. The nearest sapinda was Kandulapati Bullivenkayya, the elder brother of Gopalam. He gave evidence and stated that his consent was given independently of any authority received from Gopalam. His statement was believed by the Subordinate Judge and we see no justification for disbelieving it.

The appellant mainly relies on a passage in the judgment of the Privy Council in *The Collector of Madura v. Mootoo Ramalinga Sethupathy*(1), which is usually referred to as the *Ramnad* case. It was there held that according to the law prevalent in the Madras Presidency a Hindu widow who has not received authority from her husband may nevertheless adopt

(1) (1868) 12 M.I.A. 397.

a son to him if she has received the consent of his kinsmen. Subsequent decisions make it clear that by kinsmen is meant the nearest sapindas. The passage relied upon by the appellant reads as follows :—

“ It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every 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.”

We will assume that where a senior widow adopts a son in order to prevent her husband's estate falling into the hands of a junior widow her motive is “ corrupt ” in the sense that it is improper.

On behalf of the first respondent it is contended that the widow's motive in making the adoption is not really a factor and that weight should not be attached to the words “ and neither capriciously nor from a corrupt motive ” which appear in the judgment in the *Ramnad* case(1). For reasons which we shall state we consider that there is great force in this contention.

The judgment in the *Ramnad* case(1) was delivered in 1868. In 1876 the Privy Council had occasion to consider their observations in that case in *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi*(2) and, in delivering the judgment of the Board, Sir JAMES COLVILE observed :

“ 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

(1) (1868) 12 M.I.A. 397.

(2) (1876) I.L.R. 1 Mad. 174 (P.C.).

KANAKARATNAM
v.
NARASIMHA
RAO.
LEACH C.J.

KANAKARATNAM 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."

V.
NARASIMHA
RAO.
LEACH C.J.

Here the weight is attached to the consent of the nearest sapindas. Their consent is the important factor and this has been emphasized in numerous decisions given by the Judicial Committee since. In quoting from the judgment in the *Ramnad* case(1) Sir JAMES COLVILLE pointed out that the evidence which was required was evidence of the assent of the kinsmen and not evidence of the widow's motives. In 1935 the Privy Council expressly left open the question whether the widow's motive could be disregarded when the consent of the nearest sapinda had been obtained, but in doing so their Lordships did express doubt whether her motive is relevant. This occurred when the Board delivered judgment in *Sri Krishnayya Rao v. Surya Rao Bahadur Garu*(2). In that case their Lordships observed :

"The last objection urged by the respondent is based on the motives of the first defendant. She is said not to have made the adoption for the benefit of her husband or upon religious grounds, but merely in order to get hold of a substantial part of the property. Their Lordships doubt if, where the consent of the sapindas has been obtained, the motive of the adopting widow is relevant. They do not, however, consider it necessary to decide this question in the present case, as assuming it to be so, they think that there is no ground for imputing a corrupt motive to the lady."

At this stage it will be convenient to refer to three decisions of this Court on which the appellant also relies. In *Kandaswami Goundar v. Chinnammal*(3) MADHAVAN NAIR and JACKSON JJ. applied the dictum

(1) (1868) 12 M.I.A. 397. (2) (1935) 69 M.L.J. 388 (P.C.).
(3) (1933) 37 L.W. 729.

in the *Ramnad* case(1) and held that, if the consent of the sapinda was given with the object of benefiting himself or the facts showed that the widow was making the adoption to defeat the interest of a sapinda and not to promote the spiritual welfare of her husband, the adoption was invalid. In *Annapurnamma v. Appayya Sastri*(2), a Full Bench (COUTTS TROTTER C.J., MADHAVAN NAIR and JACKSON JJ.) said that the consent of the son who is the nearest sapinda would be sufficient

"if the circumstances showed that the adoption was made by the widow in the proper and *bona fide* performance of a religious duty and the real motive which actuated her was the conferment of spiritual benefit on her husband."

It was not necessary to say this for the purpose of deciding the question which was raised in the case, and Mr. Rajamannar, on behalf of the appellant, has very properly conceded that these observations must be regarded merely as *obiter*. The question of the widow's motive was also discussed in *Murahari Brahma Sastri v. Sumitramma*(3) where MADHAVAN NAIR and JACKSON JJ. again felt themselves bound by the observations of the Judicial Committee in the *Ramnad* case(1), although JACKSON J. indicated in his judgment that, if he were not bound by what had gone before, he might have decided otherwise. These three decisions were, of course, all given before the judgment of the Privy Council in *Sri Krishnayya Rao v. Surya Rao Bahadur Garu*(4). That judgment was, however, considered by this Court (CORNISH and VARADACHARIAR JJ.) in *Hari Ramayya v. Venkatachalapati*(5). The learned Judges apparently regarded the judgment of the Judicial Committee in

KANAKARATNAM
V.
NARASIMHA
RAO.
LEACH C.J.

(1) (1868) 12 M.I.A. 397. (2) (1928) I.L.R. 52 Mad. 620 (F.B.).
(3) (1933) I.L.R. 57 Mad. 411. (4) (1935) 69 M.L.J. 388 (P.C.).
(5) (1935) 70 M.L.J. 619.

KANAKARATNAM
v.
NARASIMHA
RAO.
LEACH C.J.

Sri Krishnayya Rao v. Surya Rao Bahadur Garu(1) as actually deciding that the only person whose motive requires to be canvassed is the sapinda and not the widow, but the passage which we have just quoted from the judgment of the Board shows that this is going too far.

The question was fully debated by the Bombay High Court in *Ramchandra v. Mulji Nanabhai*(2) which was decided by a Full Bench of five Judges. The Court held, one Judge dissenting, that in the Bombay Presidency any discussion of the widow's motive in making an adoption was irrelevant, because a widow in the Bombay Presidency had the power to adopt without any consent and the adoption resulted in religious benefit to her deceased husband.

As the result of the judgment of the Privy Council in *Sri Krishnayya Rao v. Surya Rao Bahadur Garu*(1) the Court can now decide the question untrammelled by the observations in the *Ramnad* case(3) on which the appellant so much relies. In *Amarendra Mansingh v. Sanatan Singh*(4) the Privy Council emphasized the importance of the spiritual significance of the act of adoption. In the Madras Presidency a widow cannot adopt unless she has received direct authority from her husband, either before his death or at his death by will, or the consent of the nearest sapindas, unless such consent is improperly withheld, in which case she can go to the next nearest sapindas. Bearing in mind that the adoption confers spiritual benefit on the deceased husband and that in the Madras Presidency a widow can only adopt when she has received authority to do so, it seems to us that her motive is entirely irrelevant. However spiteful her

(1) (1935) 69 M.L.J. 388 (P.C.).
(3) (1868) 12 M.I.A. 397.

(2) (1896) I.L.R. 22 Bom. 558 (F.B.).
(4) (1933) I.L.R. 12 Pat. 642 (P.C.).

action may be towards others the benefit conferred upon her deceased husband by her action is in no way affected, and the fact that she cannot act without authority makes the position all the more clear. The English law does not inquire into the motive for the exercise of a power when the power exists and we can see no justification for applying a different rule here. Consequently we hold that, when a widow has received valid authority to adopt, her motive in doing so can be ignored. It follows that we consider that the decisions in *Kandaswami Goundar v. Chinnammal*(1) and *Murahari Brahma Sastri v. Sumitramma*(2) on this question should be overruled and that the observations of the Full Bench in *Annappurnamma v. Appayya Sastri*(3), to which we have referred, should not be given effect to.

In the present case the widow received authority from the nearest sapinda and consequently her adoption of the first respondent should be regarded as valid notwithstanding that her object was to defeat the appellant. We dismiss the appeal with costs in favour of the first respondent.

G.R.

(1) (1933) 37 L.W. 729.

(2) (1933) I.L.R. 57 Mad. 411.

(3) (1928) I.L.R. 52 Mad. 620 (F.B.).

INCOME-TAX REFERENCE.

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

1941,
September 15.

THE COMMISSIONER OF INCOME-TAX,
MADRAS, PETITIONER,

v.

P. RAMASWAMY CHETTIAR, RESPONDENT.*

*Indian Income-tax Act (XI of 1922), sec. 2 (6-A)—Company—
Profits—Issue of bonus shares—Not “dividend” within
the meaning of the section.*

The assessee was a shareholder in the Lakshmi Mills Co., Ltd. In a particular year the company capitalised the profits of the previous years, together with a sum taken from the general resources, in the form of bonus shares and distributed share certificates to the shareholders in proportion to their holdings. It paid income-tax on its profits and was taxed at a higher rate than that of the assessee. Thereupon the assessee sought to recover from the Income-tax authorities the difference between the amount the company had paid on the value of the bonus shares allotted to him and what he would have paid if the tax had been levied according to the rate appropriate to his income.

Held: that the distribution of bonus shares did not amount to a release of assets by the company and that therefore there was no payment of “dividend” within the meaning of section 2 (6-A) of the Indian Income-tax Act, and that consequently the assessee was not entitled to claim a refund. In the matter of the Indian Income-tax Act XI of 1922.

The question referred was :

“Whether the distribution of Rs. 10,000 to the assessee by the Lakshmi Mills Co., Ltd., in accordance with the resolution at the annual general meeting

* Original Petition No. 96 of 1941.

held in 11th July 1939, is dividend income within the meaning of the Act or only capital receipt in the assessee's hands.”

COMMISSIONER
OF INCOME-TAX
v.
RAMASWAMY.

M. Subbaraya Ayyar for respondent.—The company made a distribution of the current as well as the bulk of the accumulated old profits, including those in reserve, amounting in all to six lakhs in the form of bonus shares to the shareholders. The distribution was made with the consent of the shareholders and as a result the respondent got bonus shares of the value of Rs. 10,000 in the accounting year 1939–40. This sum represents the dividend received by him and as it had been paid out of taxed profits of the company, the respondent should be given the appropriate amount of refund due to him. He should get the difference between the maximum rate at which the company was taxed and the minimum rate which he would have paid if the tax had been levied according to the rate appropriate to his income. The bonus shares issued should be taken to be equivalent to cash payment and the report submitted to the Registrar of Joint Stock Companies under the Companies Act indicates that shares were allotted for cash consideration. [*Ooregum Gold Mining Company of India v. Roper*(1) was referred to.]

[LEACH C.J.—That case is only an authority for validating the issue of bonus shares instead of dividends. It cannot support the proposition that the issue of bonus shares represents income in the hands of shareholders within the meaning of section 2 (6-A) of the Indian Income-tax Act.]

The issue of bonus shares in this case amounts to the payment of a dividend for the following reasons : (i) One of the objects of the company in calling for the annual general meeting was for the purpose of declaring a dividend. (ii) The sum has been carried to the dividend account though subsequently it was transferred to the share capital account. (iii) Dividend warrants have been issued. (iv) The issue of shares for cash has been mentioned in the statement submitted to the Registrar of Joint Stock Companies. (v) There are special provisions in the Articles of Association for capitalisation of profits and for declaration of dividend. The capitalisation

(1) [1892] A.C. 125.

COMMISSIONER
OF INCOME-TAX
v.
RAMASWAMY.

of profits had not been lawfully carried out. In the notice of the meeting it was not shown that this would be part of the business of the meeting. The resolution therefore was not validly passed.

[LEACH C.J.—The essence of the transaction has to be looked at in a case like this. The object of the company was to use its accumulated profits to augment its capital by the issue of bonus shares which is clear from the resolution of the directors. The object was not to distribute dividend among the shareholders. There was neither cash payment nor release of assets and so it does not represent “dividend” as defined in section 2 (6-A) of the Income-tax Act.]

[*Inland Revenue Commissioners v. Blott*, *Inland Revenue Commissioners v. Greenwood*(1), *Commissioner of Income-tax, Bengal v. Mercantile Bank of India, Ltd.*(2), *The Commissioner of Income-tax v. Binny & Co.*(3) and *Steel Brothers & Co., Ltd. v. Government*(4) were referred to.]

As Rs. 50 for each share is detached, ear marked and appropriated for each shareholder it could be said that there was a release of the assets of the company. The definition of “dividend” in section 2 (6-A) of the Income-tax Act is not exhaustive.

K. V. Sesha Ayyangar for petitioner was not called upon.

LEACH C.J.—The question referred must be answered against the assessee and in the manner indicated by the Commissioner in his statement of the case. There is overwhelming authority for the opinion expressed by the department.

The assessee is a shareholder in the Lakshmi Mills Company, Limited, which carries on a spinning business at Coimbatore. For the year of assessment (1940–1941) the assessee returned an income of Rs. 11,213–14–0 which included a sum of

COMMISSIONER
OF INCOME-TAX
v.
RAMASWAMY.
—
LEACH C.J.

Rs. 10,000 said to be a dividend received from the Lakshmi Mills Company, Limited. The Income-tax Officer discovered that the Rs. 10,000 had not been paid to the assessee in cash, but represented the nominal value of certain bonus shares which had been allotted to the assessee in accordance with a resolution passed at a general meeting of the company held on 11th July 1939. During the year ending 31st March 1939 the company had made a profit of Rs. 4,51,946–8–1. In the previous year a profit of Rs. 5,320–8–11 had been earned but had not been distributed. The directors proposed that these profits together with a sum of Rs. 1,42,732–15–0 taken from the general reserves of the company, making in all Rs. 6,00,000, should be capitalised in the form of bonus shares and distributed to the shareholders in proportion to their holdings. This resolution was passed and in due course the assessee received bonus shares of the value of Rs. 10,000 which represented the “dividend”. The company had, of course, paid income-tax on its profits and was taxed at a higher rate than the assessee. Consequently he sought to recover from the Income-tax authorities the difference between the amount the company had paid on the Rs. 10,000 and what he would have paid if the tax had been levied according to the rate appropriate to his income. Section 2 (6-A) of the Income-tax Act says that the word “dividend” includes *inter alia* distribution by a company of accumulated profits, whether capitalised or not, if the distribution entails the release by the company to its shareholders of all or any part of the assets of the company. By reason of this section the Income-tax authorities refused to recognize the claim for a refund. They said that the delivery to the

(1) [1921] 2 A.C. 171.

(2) (1936) L.R. 63 I.A. 457; I.L.R. [1937] 1 Cal. 180.

(3) (1924) I.L.R. 47 Mad. 837.

(4) (1924) I.L.R. 2 Ran. 211.

COMMISSIONER
OF INCOME-TAX
v.
RAMASWAMY.
LEACH C.J.

assessee of the bonus shares did not represent the payment of a dividend within the meaning of the Act. This is the question which forms the subject matter of the reference.

Now it is manifest that unless the distribution of bonus shares amounts to a "release" of assets by the company to the shareholders, the assessee cannot claim the Rs. 10,000 to be a dividend within the meaning of the Act. The House of Lords in *Inland Revenue Commissioners v. Blott*. *Inland Revenue Commissioners v. Greenwood*(1) held that a distribution of bonus shares does not represent the payment of a dividend, and the reasoning there was applied by the Privy Council in *Commissioner of Income-tax, Bengal v. Mercantile Bank of India, Ltd.*(2). In the former case VISCOUNT HALDANE said:—

"For the reasons I have given I think that it is, as matter of principle, within the power of an ordinary joint stock company with articles such as those in the case before us to determine conclusively against the whole world whether it will withhold profits it has accumulated from distribution to its shareholders as income, and as an alternative not distribute them at all, but apply them in paying up the capital sums which shareholders electing to take up unissued shares would otherwise have to contribute. If this is done the money so applied is capital and never becomes profits in the hands of the shareholder at all. What the latter gets is no doubt a valuable thing. But it is a thing in the nature of an extra share certificate in the company. His new shares do not give him an immediate right to a larger amount of the existing assets. These remain where they were. The new shares simply confer a title to a larger proportion of the surplus assets, if and when a general distribution takes place as in a winding up."

(1) [1921] 2 A.C. 171.

(2) (1936) L.R. 63 I.A. 457; I.L.R. [1937] 1 Cal. 180.

In the same case VISCOUNT FINLAY said:

"The second contention of the Crown is that the allotment of the preference shares was equivalent to the payment of the bonus. To appreciate this point it is necessary to consider closely what it was that the shareholder got. Did he get anything in the nature of payment of income? It is obvious that he did not. He gave up any claim to the income. What might have been paid as income went to increase the capital of the company. The shareholder got his proportionate share in the business of the company as increased by the additional capital instead of his getting any dividend, or anything in the nature of a dividend, the fund which might have been divided was impounded to increase the capital of the business. How is it possible to treat any advantage accruing from this as a payment of income? The case differs *toto coelo* from a case in which a dividend is paid not in money but in money's worth by the delivery, say, of goods or of securities."

COUTTS TROTTER C.J. and RAMESAM J. applied the decision in *Inland Revenue Commissioners v. Blott*. *Inland Revenue Commissioners v. Greenwood*(1) in deciding *The Commissioner of Income-tax v. Binny & Co.*(2) where it was sought to make the assessee liable to super-tax on the value of bonus shares. It was held that the Indian Income-tax Act contained no such power. After quoting from the judgment of VISCOUNT FINLAY in *Inland Revenue Commissioners v. Blott*. *Inland Revenue Commissioners v. Greenwood*(1) COUTTS TROTTER C.J. observed:

"You cannot say that there is a notional payment of a dividend to a shareholder when the position is that, if he sued for it his action must be dismissed, that is to say, when the whole conception that he is entitled to the dividend is one that the law refuses to countenance."

(1) [1921] 2 A.C. 171.

(2) (1924) I.L.R. 47 Mad. 837.

COMMISSIONER
OF INCOME-TAX
v.
RAMASWAMY.
LEACH C.J.

COMMISSIONER
OF INCOME-TAX
v.
RAMASWAMY.
—
LEACH C.J.

The shareholders of the Lakshmi Mills Company have received no portion of the profits which were made in the years ending 31st March 1938 and 31st March 1939. The money representing the profits remains with the company. All that the shareholders have got are share certificates representing the capitalisation of these profits and an additional sum taken from the reserve. Therefore there has been no release of assets of the company to the shareholders.

It has been said by Mr. Subbaraya Ayyar that the capitalisation of these moneys has not been lawfully carried out. He admits that the company has by reason of its memorandum and articles of association power to capitalise profits, but he says that the notice of the meeting contained no intimation that this would be part of the business before the meeting. In saying this the learned Advocate overlooks the fact that with this notice the shareholders received a copy of the annual report in which the directors make the proposal to capitalise the sums making up the Rs. 6,00,000. The Court is only concerned with the question referred, but assuming that the resolution had not been validly passed, even assuming that the meeting had done something which by reason of the memorandum and articles of association it had no power to do, the assessee's position here would be in no way improved. The bonus shares received by him would still not represent dividend income, and he has received nothing but the bonus shares.

We answer the question referred in the negative, and the assessee will pay the Commissioner's costs Rs. 250.

V.V.C.

INSOLVENCY JURISDICTION.

Before Mr. Justice Krishnaswami Ayyangar.

IN RE T. A. BALAKRISHNA ODAYAR (DECEASED),
INSOLVENT.*

1941,
August 29.

Presidency-towns Insolvency Act (III of 1909), sec. 68—Official Assignee—Compromise with creditor—Omission to obtain leave of Court—Validity of.

Where an Official Assignee, without applying for and obtaining leave of the Court under section 68 of the Presidency-towns Insolvency Act (III of 1909), entered into a settlement with the respondent to make a preferential payment of Rs. 12,000 against a claim of Rs. 24,000 and, in pursuance thereof, paid him a sum of Rs. 6,000 leaving the balance to be paid later, and the successor in office of the Official Assignee placed the matter before the Court for directions,

held: that the settlement arrived at previously between the Official Assignee and the respondent was valid and binding on the parties and that effect must be given to it. Want of leave would not render the settlement null and void as between the Official Assignee and the respondent. The omission to obtain leave means only that the Official Assignee would lose the benefit of a protection he would have got for himself had he obtained leave.

IN the matter of T. A. Balakrishna Odayar, an insolvent.

Official Assignee (V. Thygarajan) in person.

R. Gopalaswami Ayyangar for insolvent.

JUDGMENT.

KRISHNASWAMI AYYANGAR J.—This is an application taken out by the Official Assignee with respect to a settlement made by his predecessor in office of a claim to preferential payment made by the respondent.

KRISHNASWAMI
AYYANGAR J.

* Petition No. 552 of 1927.

BALAKRISHNA
ODAYAR,
In re.

KRISHNASWAMI
AYYANGAR J.

By that settlement the then Official Assignee had agreed to pay to the respondent a sum of Rs. 12,000 against a claim of Rs. 24,000 or thereabouts. In pursuance of the settlement, he paid a sum of Rs. 6,000 and there still remains a balance of Rs. 6,000 to be paid on foot of the settlement. The Official Assignee who entered into this settlement did so without applying for and obtaining leave of the Court under section 68 of the Presidency-towns Insolvency Act (III of 1909). The present Official Assignee has very properly placed the matter before the Court with the request that the Court may either give its approval to the settlement or give such other directions as the Court may consider it proper. The question thus raised by the present application is one of considerable importance likely to recur frequently and it is desirable that I should take this opportunity to lay down the correct rule for guidance in future.

Section 68 of the Presidency-towns Insolvency Act enacts as follows :—

“(1) Subject to the provisions of this Act, the Official Assignee shall, with all convenient speed, realize the property of the insolvent, and for that purpose may—

(a) sell all or any part of the property of the insolvent ;

(b) give receipts for any money received by him ; and may, by leave of the Court, do all or any of the following things, namely :—

(c) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same ;

(d) institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent ;

(e) employ a legal practitioner or other agent to take any proceedings or do any business which may be sanctioned by the Court ;

(f) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future

time or fully paid shares, debentures or debenture stock in any limited company subject to such stipulations as to security and otherwise as the Court thinks fit ;

(g) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts or for the purpose of carrying on the business ;

(h) refer any dispute to arbitration, and compromise all debts, claims and liabilities, on such terms as may be agreed upon ;

(i) divide in its existing form amongst the creditors according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot readily or advantageously be sold.

(2) The Official Assignee shall account to the Court and pay over all moneys and deal with all securities in such manner as is prescribed or as the Court directs.”

The powers and duties of the Official Assignee fall into two categories. Those in sub-section 1, clauses (a) and (b), can be exercised without the Official Assignee seeking the leave of the Court. But in regard to the others described in clauses (c) to (i) the section says that he may do all or any of them by leave of the Court. The point that arises for consideration is whether and how far the omission of the Official Assignee to seek and obtain the leave of the Court affects the validity of acts done by the Official Assignee under clauses (c) to (i) aforesaid, more particularly the question of the validity of compromises entered into by him without leave of Court. It may at once be mentioned that clause (h) does not make any distinction between compromises of claims in suits already instituted and those in respect of claims not brought before the Court. The contention of the respondent is that the absence of leave does not render the act of the Official Assignee invalid or inoperative ; only the Official Assignee will lose the benefit of a

BALAKRISHNA
ODAYAR,
In re.

KRISHNASWAMI
AYYANGAR J.

BALAKRISHNA
ODAYAR,
In re.
KRISHNASWAMI
AYYANGAR J.

protection he would have got for himself had he obtained the leave. At first sight the proposition may seem, as it did seem to me, to run counter to the language of the section. But a consideration of the history of the section and of the principle underlying it, as explained by the Bankruptcy Court in England in cases which have come before it on similar provisions in the English Bankruptcy Acts, has convinced me that the respondent is right.

In *Lee v. Sangster*(1) the Court had to consider the effect of section 153 of the Bankruptcy Act, 1849—12 and 13 Victoria, Chapter 106, which enacted that the Assignees with the leave of the Court upon application to such Court, but not otherwise, may commence, prosecute or defend any action at law or any suit in equity which the bankrupt might have commenced, prosecuted or defended and in such cases the costs to which they may be put in respect of such suit or action shall be allowed out of the proceeds of the estate of the bankrupt. The action was one brought in the name of the Official Assignee for the recovery of a debt due from the defendants to the bankrupt and had been commenced without obtaining the leave of the Court. The defendants moved for a rule calling upon the plaintiff to show cause why all proceedings in the case should not be stayed on the ground that the action had been brought without first obtaining the leave of the Court pursuant to section 153 of the Bankruptcy Act aforesaid. It was urged that the object of the section manifestly was to prevent the estate of the bankrupt from being squandered by bringing reckless actions. For the plaintiff it was answered that the section merely enacted a provision

(1) (1857) 2 C.B. (N.S.) 1; 140 E.R. 310.

for the internal management of the bankruptcy and the only persons who could complain of a breach were the creditors and such breach could not be made the ground of objection by the defendants. The point being a new one, the Court took time to consider it but in the end pronounced its judgment discharging the rule. WILLIAMS J., who delivered the judgment of the Court, conceded that the language of the section at first sight appeared strongly to support the rule. But on consideration the learned Judge was of opinion :

“ . . . that the statute intended to make the obtaining of the requisite leave a matter only between the assignees and the Court of bankruptcy, and not at all between the assignees and the other party to the suit. The enactment, it must be observed, extends to the defence by the assignees of actions which the bankrupt might have defended, as well as to the commencement and prosecution of actions which he might have commenced and prosecuted. And, if the assignees were to defend such an action without having obtained the leave of the Court of bankruptcy, it is difficult, if not impossible to suggest how the Court of common law in which the action was pending could interfere with the defendants' proceedings.”

The learned Judge also explained that the neglect of the Official Assignee to obtain the requisite leave would only result in his not being allowed his costs out of the bankrupt's estate and might also subject him to the disciplinary jurisdiction of the Court.

Leeming v. Lady Murray(1) is a case in which the Court had to construe the effect of section 27 of the Bankruptcy Act of 1869—32 and 33 Victoria, Chapter 71—which ran as follows :—

“ The trustee may, with the sanction of the committee of inspection, do all or any of the following things :—

(1) Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts ;

(1) (1879) 13 Ch.D. 123.

BALAKRISHNA
ODAYAR,
In re.
KRISHNASWAMI
AYYANGAR J.

BALAKRISHNA
ODAYAR,
In re.
—
KRISHNASWAMI
ATTYANGAR J.

(2) Refer any dispute to arbitration, compromise all debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any debtor or person who may have incurred any liability to the bankrupt, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon ;

(3) Make such compromise or other agreement as may be thought expedient with creditors, or persons claiming to be creditors in respect of any debts provable under the bankruptcy ;

(4) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person ;

(5) To divide in its existing form amongst the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot advantageously be realized by the sale.

The sanction given for the purposes of this section may be a general permission to do all or any of the abovementioned things, or a permission to do all or any of them in any specified case or cases."

In this case the trustee in bankruptcy brought an action for the recovery of a sum of money due on a policy of insurance effected on the life of the bankrupt. The defendants to the action were the insurance company and also another person who claimed a portion of the insurance amount on a mortgage alleged to have been executed by the bankrupt. The action was settled on a compromise by which the trustee agreed to the payment of a part of the policy amount to the claimant. The trustee having resigned his office, was succeeded by another trustee who refused to be bound by the settlement on the ground that neither the consent of the committee of inspection nor of the Court of bankruptcy had been obtained for the arrangement, and accordingly commenced the

action for the recovery of the money paid to the claimant. The defendant having demurred JESSEL M.R. upheld the demurrer on the ground that the power conferred by the section was a power for the trustee to do certain things so as to bind the creditors of the bankrupt and the creditors only, and that the case was not dissimilar to a compromise made by him out of Court in which case a person taking under the compromise would not be entitled to say that the trustee made it without the consent of the committee. To some extent the decision is complicated by a reference to section 83 of the Act of 1869 which conferred a power on the trustee to sue and be sued without the consent of the committee and by the further circumstance that there was an order of Court made on consent in the way. But I do not think that this affects the correctness of the principle which underlies the decision. This is made clear by the decision in *In re Branson. Ex parte The Trustee*(1) in which the Court had before it "an application by the trustee for an order that the debtor's solicitors should deliver up to him all books, papers, and documents in their possession belonging to the bankrupt together with a full cash account shewing the dealings" with him. The sanction of the committee of inspection had not been obtained at the time when the motion was commenced, indeed no committee of inspection had been appointed at the time, but the defect was made good later, and the question resolved itself into a question of costs as the defendants expressed their readiness to comply with the motion. Section 57 of the Bankruptcy Act of 1883-46 and

BALAKRISHNA
ODAYAR,
In re.
—
KRISHNASWAMI
ATTYANGAR J.

(1) [1914] 2 K.B. 701.

BALAKRISHNA
ODAYAR,
In re.

KRISHNASWAMI
ATTYANGAR J.

47 Victoria, Chapter 52—contained the following provision :—

“ The trustee may, with the permission of the committee of inspection, do all or any of the following things :

(1) Carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same ;

(2) Bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt ; ”

HORRIDGE J. stated the point for decision in the following words :—

“ The question is whether the obtaining of that sanction is a matter for the protection of the estate so that the trustee may not incur solicitors' costs without getting the sanction of the committee, or whether the section creates a condition precedent to the right of the trustee to take proceedings against any third parties.”

The learned Judge's decision was

“ that the obtaining of the consent of the committee of inspection to the taking of proceedings is merely a provision for the protection of the estate and is not one which the respondent or the defendant in any proceedings by the trustee is entitled to avail himself of in answer to those proceedings.”

The effect of these cases is, in my opinion, to lay down the proposition that the want of leave does not vitiate the act of the Official Assignee or render it null and void as between him and third parties, whatever its consequence may be in relation to his right to get his costs, charges and expenses out of the estate.

There are also a few Indian decisions to which reference may be made. In *Laduram Nathmull v. Nandalal Karuri*(1) the facts were these: The mortgagee under certain mortgages executed by an insolvent brought suits to enforce them, impleading the Official Assignee as a party. The subject matter of the suits was referred to arbitration with the consent

(1) (1919) I.L.R. 47 Cal. 555, 557.

of the Official Assignee and an award came to be passed. The award was attacked on the ground that the Official Assignee had not obtained the leave of the Court before consenting to the reference. RANKIN J., as he then was, accepted the principle of the English decisions referred to above and observed :

“ The Official Assignee is a person in whom there is vested by law all the property of the bankrupt ; it is his property, of course not that he may deal with it for himself, but that he may deal with it as a trustee for the benefit of the creditors, but in law it is his property ; and it seems to me to be settled now by the authorities, that those provisions which have come into our Insolvency Act from the English Act, and which require the leave of the Court, are administrative provisions only ; they are matters between the Court and the Trustee ; they are matters which may give creditors personal rights of action against the Trustee ; they are not matters which can be set up when the Trustee as the person in whom the bankrupt's property is vested is meeting his enemy in the gate and is at arm's length with the third party outside the bankruptcy altogether. That seems to be the result of *Lee v. Sangster*(1), the other case (which was decided by SIR GEORGE JESSEL) *Leeming v. Lady Murray*(2), and the last case before HORRIDGE J. *In re Branson. Ex parte The Trustee*(3), I do not think it is a matter with which the other party to an action has any concern at all, whether the trustee has behaved himself *vis-a-vis* his Court, *vis-a-vis* his constituents the creditors, or whether he has done that which he is not strictly entitled to do. They are entitled to look to the trustee just as they would be entitled to look to the insolvent had he never been adjudicated, and I am, therefore, against Mr. Sircar's contention that the Official Assignee having assented to this submission on his own authority the award is invalidated by reason of that fact.”

The learned Judge, however, felt bound to set aside the award upon other grounds. An appeal was preferred against the decision of RANKIN J., but the point did not arise in the appellate Court and there is

(1) (1857) 2 C.B. (N.S.) 1 ; 140 E.R. 310. (2) (1879) 13 Ch.D. 123.
(3) [1914] 2 K.B. 701.

BALAKRISHNA
ODAYAR,
In re.
KRISHNASWAMI
ATTYANGAR J.

BALAKRISHNA
ODAYAR,
In re.
KRISHNASWAMI
AYYANGAR J.

therefore nothing said in its judgment on it. In *The Official Receiver, Coimbatore District v. Kanga*(1), which was a case which proceeded on the language of section 20 of the Provincial Insolvency Act III of 1907, SPENCER and RAMESAM JJ. held, following the English decisions referred to above that, where an Official Receiver institutes a suit without the leave of the Insolvency Court, it is not a valid defence to the suit to say that such leave had not been obtained. The obtaining of the leave was held to be a matter between the Receiver and the Court whose Officer he was, and the want of leave could not be relied on by defendants in a suit, the only result being that the Official Receiver would be prosecuting the suit at his own risk in the matter of costs and cannot charge them on the insolvent's estate if he loses.

A contrary note appears to be struck in *C. E. Grey v. Lamond Walker & Co.*(2), which was decided by FLETCHER J. sitting on the Original Side. The suit was one by the Official Assignee to recover damages from the defendant company for failure to deliver goods in pursuance of certain forward contracts entered into by the insolvent. After holding that the Official Assignee was in fact carrying on the business of the insolvent in respect of these contracts, the learned judge doubted whether the Official Assignee had the power to do so without the sanction of the Court. He observed

"that the only two powers that he (the Official Assignee) has got in acting of his own motion are, first of all, to sell the property and, secondly, to give receipts."

But the expression of this opinion was not only *obiter*, but made without reference to the decided cases on the point.

(1) (1921) 42 M.L.J. 53.

(2) (1913) 17 C.W.N. 578.

In the light of the decisions referred to above, I am convinced that the settlement arrived at between the Official Assignee and the respondent is valid and binding on the parties and that effect must be given to it. My direction to the Official Assignee is that he is bound to fulfil the terms of the settlement. The Official Assignee will pay the costs of the respondent out of the estate in his hands.

V.V.C.

BALAKRISHNA
ODAYAR,
In re.
KRISHNASWAMI
AYYANGAR J.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Chandrasekhara Ayyar.

THE OFFICIAL ASSIGNEE OF MADRAS (RESPONDENT), APPELLANT,

1941,
September 3.

v.

E. V. D'SILVA (APPLICANT), RESPONDENT.*

Presidency-towns Insolvency Act (III of 1909), ss. 52 and 60—Future salary of insolvent—Salary below Rs. 100—Official Assignee not entitled to prospective order under sec. 60 regarding such salary—Right of Official Assignee to apply for and get portion of such salary after receipt by insolvent.

There is no statutory provision, apart from section 60 of the Presidency-towns Insolvency Act, which enables the Official Assignee to acquire a right in an insolvent's future earnings by way of salary. Section 60 enables the Official Assignee to obtain what is known as a "prospective order", i.e., an order directing the insolvent to pay over to the Official Assignee a portion of his salary for the benefit of the creditors; but such an order cannot be obtained under the section, except with the consent of the insolvent, when his salary falls below Rs. 100 per mensem.

* Original Side Appeal No. 12 of 1941.

OFFICIAL
ASSIGNEE,
MADRAS
v.
D'SILVA.

Such salary, however, though it be below Rs. 100 per mensem, becomes the property of the insolvent when paid to him and is then governed by section 52 of the Act. Thereafter, it would be open in law to the Official Assignee to apply for an order directing a portion of it to be paid over to him for the benefit of the creditors. But the Court might or might not pass such an order and, unless the circumstances are exceptional, it might very well refuse to do so in view of the principle embodied in section 60 of the Insolvency Act and section 60 of the Code of Civil Procedure that small salaries should not be attached.

APPEAL from the judgment and order of KRISHNASWAMI AYYANGAR J., dated 3rd February 1941, and made in the exercise of the insolvency jurisdiction of the High Court in Application No. 336 of 1940 in Insolvency Petition No. 217 of 1939.

K. V. Ramachandra Ayyar for *M. A. Srinivasan* for appellant.

S. J. S. Fernandez for respondent.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—Section 60, sub-section 1, of the Presidency-towns Insolvency Act states that, where an insolvent is an officer of the Army or Navy or of the Royal Indian Navy or a person in the civil service of the Crown, the Official Assignee shall receive for distribution amongst the creditors so much of the insolvent's pay or salary liable to attachment in execution of a decree as the Court may direct. Section 60 of the Code of Civil Procedure provides *inter alia* that the salary of a public officer shall not be attached to the extent of the first Rs. 100 and one-half the remainder of his salary. It has for many years been the practice of the Official Assignee of Madras in all the cases where the assets are insufficient to meet the debts due to the creditors to ask the Court to order an insolvent who is a public servant to pay over to him part of his

salary for the benefit of the creditors. The applications and the orders passed thereon have not been limited to public servants in enjoyment of salaries in excess of Rs. 100 per mensem, and many orders have been passed by consent when the salary has been far below this figure. The Official Assignee applied to the Master for an order against the respondent (who was adjudicated insolvent on 23rd November 1939) directing him to pay out of his monthly salary of Rs. 60 the sum of Rs. 6 for distribution to his creditors. The respondent who is a clerk in the Public Works Department objected to the proposed order but, notwithstanding his objection, the Master directed that he should out of his salary pay to the Official Assignee monthly a sum of Rs. 5. The respondent appealed from the order of the learned Master to the learned Judge sitting in insolvency (KRISHNASWAMI AYYANGAR J.) who held that the objection was well founded and set aside the Master's order. This appeal is from the order of the learned Judge.

By virtue of section 17 of the Presidency-towns Insolvency Act, on adjudication an insolvent's property vests in the Official Assignee. Section 52 provides that the property owned by an insolvent at the time of his adjudication and property which he has acquired subsequently, but before his discharge, shall be divisible among his creditors. It is common ground that apart from section 60 there is no statutory provision which enables an Official Assignee to acquire a right in an insolvent's future earnings by way of salary. Of course, once his salary has been paid over to him, the money comes within the category of after-acquired property. There is, however, no obligation on the part of an insolvent to deliver to the Official Assignee property acquired by him after his

OFFICIAL
ASSIGNEE
MADRAS
v.
D'SILVA
LEACH C.

OFFICIAL
ASSIGNEE,
MADRAS
v.
D'SILVA.
LEACH C.J.

adjudication, unless called upon by the Official Assignee to do so.

Section 60 has been inserted to enable the Official Assignee to obtain what is known as a "prospective order", but he cannot obtain such an order when the salary of the insolvent falls below Rs. 100 per mensem. The section is clearly a bar in such a case. In answer to a question put by the Court, Mr. K. V. Ramachandra Ayyar on behalf of the Official Assignee stated that the order which was passed by the learned Master against the insolvent must be deemed to have been passed under section 60, because there is no other section under which such an order could have been passed. Therefore it was passed contrary to the provisions of the Act and rightly set aside by KRISHNASWAMI AYYANGAR J. Of course, where an insolvent consents to an order of this nature being passed against him, there is no reason why the Court should not accede to his wishes. He is merely showing that he is an honest debtor. But when he does not consent it is an entirely different matter.

While there can be no doubt about the correctness of the order which the learned Judge has passed, it is necessary to refer to a passage in his judgment to which special exception has been taken. The passage is as follows :—

"If the Official Assignee cannot intercept it at the source, it is difficult to see how he can intercept it afterwards unless it be that he or his emissaries waylay the insolvent when returning home after receiving the salary or seize it immediately thereafter while it still remains unspent in his pocket. Theoretically no doubt he may be able to do this, but even then I doubt whether the law will permit him to do so, for it seems to me that it is against the fundamental principle underlying section 60 of the Insolvency Act and section 60 of the Civil Procedure Code to allow him to seize any portion

OFFICIAL
ASSIGNEE,
MADRAS
v.
D'SILVA.
LEACH C.J.

of an insolvent's salary which is below the attachable limit, as such a limit appears to my mind to have been fixed on public grounds to ensure the proper and efficient discharge of duty by a public servant."

In view of these remarks it is perhaps necessary to carry the matter a little further. Section 60 is a section which enables the Official Assignee to get a prospective order. It is an enabling section and nothing more, and the aid which it gives the Official Assignee is limited. The section does not, however, interfere with the provisions of section 52 of the Act. The salary received by a public servant, though it be below Rs. 100 per mensem, becomes, as we have already pointed out, his property when paid to him and therefore falls within section 52. In these circumstances it would be open in law to the Official Assignee to apply after the salary has been received for an order directing a portion of it to be paid over to him for the benefit of the creditors, but by the time such an application came on for hearing probably all the salary would have been spent. The Court might or might not pass such order but, unless the circumstances were exceptional, we consider that it might very well refuse to do so in view of the principle embodied in section 60 of the Insolvency Act and section 60 of the Code of Civil Procedure that small salaries should not be attached.

The appeal fails and will be dismissed, but we make no order as to costs.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice Kunhi Raman.

1941,
July 31.

RAMANATHAN CHETTIAR, MINOR BY NEXT FRIEND,
CHIDAMBARAM CHETTIAR (PLAINTIFF), APPELLANT,

v.

MUTHURAMAN NAIDU AND THREE OTHERS (DEFENDANTS
1, 3 AND LEGAL REPRESENTATIVES OF THE
SECOND DEFENDANT), RESPONDENTS.*

*Execution—Suit by endorsee of promissory note—Decree
against maker, manager of joint family—Junior member's
share—Not liable in execution.*

Held: The share of a junior member of a Hindu joint family in the family properties is not liable to be proceeded against in execution of a decree obtained by an endorsee of a promissory note against the manager of the family personally as the maker thereof.

Maruthamuthu Naicker v. Kadir Badsha Rowther(1) applied and followed.

Krishnan v. Somi(2) distinguished.

Case law reviewed and discussed.

APPEALS against the decrees of the Court of the Subordinate Judge of Kumbakonam, dated 20th December 1937, and passed in Original Suit No. 32 of 1935 and Original Suit No. 30 of 1935 (Appeal Suit No. 194 of 1938, on the file of the District Court, West Tanjore) respectively.

T. V. Muthukrishna Ayyar for *T. V. Ramiah* for appellant.

A. V. Viswanatha Sastri for *R. Sundaralingam* for second respondent.

Other respondents were not represented.

Cur. adv. vult.

* Appeals Nos. 227 of 1938 and 256 of 1939.
(1) I.L.R. [1938] Mad. 508 (F.B.). (2) I.L.R. [1940] Mad. 815.

JUDGMENT.

RAMANATHAN
v.
MUTHURAMAN.
MOCKETT J.

MOCKETT J.—This is an appeal from the judgment and decree of the learned Subordinate Judge of Kumbakonam in Original Suit No. 32 of 1935. In that suit the plaintiff (the present appellant) prayed for a decree declaring in substance that his (plaintiff's) half share in a house was not liable to be attached in execution of a decree passed in Original Suit No. 33 of 1932 in the East Tanjore District Court. He also prayed for an injunction restraining the first defendant from executing the said decree against his half share. Original Suit No. 33 of 1932 was a suit by one Muthuraman Naidu against R. M. M. S. T. Vairavan Chettiar for money due on a promissory note. Vairavan Chettiar is the natural father of the appellant (the plaintiff in Original Suit No. 32 of 1935). The promissory note was executed on 6th October 1929 by Vairavan Chettiar in favour of Thambuswami Naidu and this note was endorsed by the payee to Muthuraman Naidu, the plaintiff in Original Suit No. 33 of 1932. The promissory note is marked Exhibit VI. The judgment in Original Suit No. 33 of 1932 is marked as Exhibit VII-B and the decree based thereon as Exhibit B. As the arguments in this case have been directed to one aspect only it is unnecessary to set out at any great length the details of this suit. It will be enough to state that the plaintiff alleged that he was adopted by the widow of Chidambaram Chettiar, the brother of Vairavan Chettiar in 1924 and that in 1926 there was a division in status and an actual division of one house in that family. The lower Court found the allegation of adoption to be proved and no arguments have been addressed to us attacking that finding. The lower Court also found that the allegation regarding the division in status was not proved

RAMANATHAN v. MUTHURAMAN. MCKEET J. and that finding has not been attacked before us. The decree in Original Suit No. 33 of 1932 was assigned to the third defendant, the second respondent in this case. The essential facts in this case, and it is upon these facts that the arguments have been based, can therefore be summarised as follows :—

The appellant's natural father executed a promissory note to Thambuswami Naidu who endorsed it to the first defendant Muthuraman Naidu and on the basis of the decree passed in the suit on that promissory note, Original Suit No. 33 of 1932, in which Muthuraman was plaintiff, execution was sought to be levied on the appellant's share in the joint family property at the instance of the third defendant, the assignee of the decree from Muthuraman. The effect of the finding of the learned trial Judge with regard to the adoption in 1924 is that in 1929, the date of the execution of the promissory note, the plaintiff (appellant) was no longer the son of Vairavan Chettiar, the maker of the promissory note, having been adopted by the widow of Vairavan Chettiar's brother Chidambaram Chettiar. This is said to have an important bearing on this case. The learned trial Judge has dismissed the appellant's suit. The appellant contends that his property is not liable in execution because no liability of any sort can attach to him in view of the fact that the original decree against his father Vairavan Chettiar was based on a promissory note to which he (the appellant) was not a party and that Vairavan Chettiar was sued not by the payee but by an endorsee from the payee. There has been no contest on the facts as I have indicated. The learned Judge has investigated the status of the appellant's family. There is no doubt about who they are. They are an old-established Nattukottai Chetty firm whose

hereditary business is money lending and rice trade and their style and vilasam is R.M.M.S.T. Such families and such businesses are well known in South India and Burma. The appellant has contended in the first place that the learned Judge was wrong in his finding with regard to the form of the promissory note and the form of the suit. In paragraph 53 of his judgment there appears the following :

"It is clear on a reading of Exhibit VI that it was executed by Vairavan Chettiar not merely in his individual behalf but as representing his firm and trading business. The promissory note was in fact executed by the firm and the endorsee thereof has the same rights on the negotiable instrument as the endorser to sue the firm which is the executant of the promissory note. The suit was also against the firm represented by the manager who had executed the note on behalf of the firm."

On an examination of the promissory note and the pleadings and the decree I am unable to agree with this finding. The promissory note is signed by R. M. M. S. T. Vairavan Chettiar. It is in renewal of a former promissory note which is stated to have been executed by Subbayya Chettiar "who was the agent of our firm at Velipalayam." It is not signed on behalf of the firm. It is true that the words "we shall pay" are used, but it is not possible in view of the practice of Nattukottai Chetty agents who frequently use the word "we" as meaning "I", to attach any great importance to this. I observe that the translations of Exhibits VI and A vary. Exhibit A says "on demand I shall pay you", whereas Exhibit VI has the words "we shall pay." We have had therefore recourse to the Tamil interpreter of this Court who informs us that actually the word "we" is not present in the original, nor is the word "I", but the subsequent "shall" denotes the

RAMANATHAN
v.
MUTHURAMAN.
MOCKETT J.

plural. But whether the suit could have been filed against the firm—Vide *Ghulamsa Ravuthar v. Visvanathan Chettiar*(1), is of no great importance in this case. It may well be, that the plaint could have been so framed. The plaint in fact is not, in my view, framed against the firm. The defendant is R. M. M. S. T. Vairavan Chettiar and he is described as “R. M. M. S. T. Vairavan Chettiar, father’s name not known.” Paragraph 1 alleges that the defendant is carrying on money lending, etc., business under the vilasam (name and style) of R.M.M.S.T. at Velipalayam. That is a personal allegation that he himself is a firm or the proprietor of a firm. Paragraph 2 states that the money was borrowed in connection with and for the benefit of the defendant’s ancestral family business and the prayer is for a decree against “the defendant personally and out of the properties of the defendant’s business vilasam.” It must be observed that the plaint is not filed as against the R.M.M.S.T. Firm, in which case particulars could have been demanded as to its members under Order XXX of the Code of Civil Procedure, but appears to allege that the defendant owns the business. The decree describes the defendant as “R. M. M. S. T. Vairavan Chettiar, father’s name not given”, and the decree is that the defendant do pay to the plaintiff the sum of Rs. 22,341-14-0. It may be, as the learned Counsel for the respondents has argued, that this firm was so well known that the draftsman of the plaint overlooked the necessity for a careful pleading. The allegation in paragraph 2 is very clear that the money was borrowed for the benefit of the defendant’s ancestral family business and there is no shadow of

(1) (1917) 5 L.W. 721.

RAMANATHAN
v.
MUTHURAMAN.
MOCKETT J.

doubt on the record, nor is it suggested before us that that is not so and that the present appellant was not a member of the trading family of R.M.M.S.T. The conclusion I therefore arrive at is that, although the plaint is directed against the defendant personally and there is no allegation that the appellant is in any way concerned with the R.M.M.S.T. Firm, there is no doubt that this money was borrowed for purposes of the joint family trade and that the appellant was a member of the joint family.

In *Sadasuk Janki Das v. Sir Kishan Pershad*(1) the Privy Council have made it abundantly clear that the name of a person or firm to be charged upon a negotiable instrument should be clearly stated on the face or on the back of the document so that the responsibility is made plain and can be easily recognized as the document passes from hand to hand. Their Lordships observe :

“In this case the preliminary words mention no more than that Mohan Lal has been directed to execute the *hundis*, and they do not necessarily imply that he has been clothed with authority to execute them in any other form than that in which they were actually prepared—a form which it has already been shown constituted nothing more than a personal liability on behalf of Mohan Lal.”

In *Abdul Majid Khan v. Saraswatibai*(2) their Lordships have laid down :

“Where the karta of a Hindu trading family borrows money on promissory notes executed in his own name and not in the name of the firm, there is no presumption that the borrowing was for the purposes of the joint family business and the lender must prove that the money was required for the family business.”

The first of these decisions supports, I think, my construction of the promissory note and with regard

(1) (1918) I.L.R. 46 Cal. 663 (P.C.).
(2) (1933) L.R. 61 I.A. 90 ; 66 M.L.J. 65 (P.C.).

RAMANATHAN
v.
MUTHURAMAN.
MOCKETT J. to the second decision, I concur with the learned Judge's finding, which has not been attacked, that the money was borrowed by Vairavan Chettiar for the benefit of the R.M.M.S.T. Firm.

But Mr. A. V. Viswanatha Sastri has argued that notwithstanding this view of the pleadings, which we indicated to him appealed to us, the decree was still executable against the share of the appellant. Mr. T. V. Muthukrishna Ayyar has argued that the findings in this case that at the time of the making of the promissory note the appellant had been adopted by the widow of Chidambaram Chettiar combined with the view we take that the suit and the decree were *prima facie* against Vairavan Chettiar personally are fatal to the decision of the lower Court that this decree could be executed against the appellant. Mr. Muthukrishna Ayyar has argued that since the decision of the lower Court a decision of a Full Bench of this High Court has concluded the matter in his favour. That case is *Maruthamuthu Naicker v. Kadir Badsha Rowther*(1). In that case the facts were that a Hindu father executed a promissory note which was endorsed by the payee to the plaintiff. A suit was brought based on the promissory note and by the indorsee making the sons of the maker defendants. The decision of the Full Bench was that the sons were not liable on a negotiable instrument on which their names did not appear. Reference was made to the decision in *Sadasuk Janki Das v. Sir Kishan Pershad*(2), to which we have also referred, and the statement of the law by Lord BUCKMASTER cited. LEACH C.J. in the course of his judgment, with which the other members

(1) I.L.R. [1938] Mad. 568 (F.B.).

(2) (1918) I.L.R. 46 Cal. 663 (P.C.).

of the Bench concur, after reviewing the case law, stated:

"From these decisions it will be observed that there are two principles to be borne in mind. The first is the principle which I have already stated, namely, that no one whose name does not appear on a negotiable instrument can be sued on it. The second is that there is no privity of contract between an indorsee and the maker or acceptor."

The reference to the Full Bench was—

"Whether an indorsee of the promissory note executed by the managing member is entitled to recover the debt from the property of the non-executant coparceners on the ground of their liability under the Hindu law or whether he is limited to the remedy available on the note."

And the answer of the Full Bench was:

"The indorsee of a promissory note executed by the managing member of a joint Hindu family is limited to his remedy on the note, unless the endorsement is so worded as to transfer the debt as well and the stamp law is complied with, and therefore, in the case of an ordinary indorsement, the indorsee cannot sue the non-executant coparceners on the ground of their liability under the Hindu law."

At page 576, the learned Chief Justice observes:

"The maker alone can be sued on the note and the fact that under Hindu law sons are liable in respect of debts incurred on behalf of the family or by the father for his own purposes, provided they are not incurred for illegal or immoral purpose, does not affect the principle involved."

It seems to me that the decision of the Full Bench was concerned only with the question of an action on a promissory note. At no time was any question of rights of execution under Hindu law discussed. On the contrary the remarks and the observations in the judgment of the learned Chief Justice make it clear that this case was decided on the basis of a right of suit and that the discussion of any other rights under Hindu law was expressly excluded. But the latter question is raised in this appeal. This Full Bench

RAMANATHAN
v.
MUTHURAMAN.
MOCKETT J.

RAMANATHAN
v.
MUTHURAMAN.
MOCKETT J.

decision related to a promissory note made by a father and the liability under discussion was the liability of the son to an indorsee in a suit. We have to consider here the liability of a member of a trading family not in a suit but in execution for debts incurred by the manager for the purpose of the trading family. It is clear from the decision of the Full Bench that in a suit it matters not what the relationship between the maker and the person sought to be made liable is, if the latter's name is not upon the promissory note. There is a further decision of this High Court which is instructive. In *Krishnan v. Somi*(1) LEACH C.J. and KRISHNASWAMI AYYANGAR J. had before them an appeal in which a question of execution came up for consideration. The appellants obtained a money decree against the third respondent making the third respondent's sons parties to the suit. The suit was on a promissory note executed by the father alone and the decree was passed against the father alone, the plaintiffs deciding not to ask for a decree against the sons, who were dismissed from the suit. Notwithstanding this dismissal, the Bench held that execution can be levied against the sons' share in the joint family property on the basis that under Hindu law the sons were liable to pay their father's debts. There was of course no question of endorsement of a promissory note in that case, but it is a clear case of execution being levied on a person in respect of the debt due under a promissory note by the maker of that promissory note, although the name of the person on whose property execution was sought to be levied was not upon the promissory note. The Bench was largely concerned with the consideration of principles

(1) I.L.R. [1940] Mad. 815.

of *res judicata*, but the facts are of interest for the reason I have indicated. I derive this from that decision, that, although under the law relating to negotiable instruments and the framing of suits thereon the sons would not be liable in a suit by the payee against the father, the sole maker, nevertheless the result will ultimately be in the circumstances of that case that, although not liable in the suit, they were nevertheless liable in execution under a totally different system of law, namely, the Hindu law.

But, to return to the argument of the learned Counsel for the appellant, does the fact that in the case now before us the promissory note was endorsed alter the position? In *Maruthamuthu Naicker v. Kadir Badsha Rowther*(1) a distinction is made between the indorsee's remedy on a mere endorsement of the note and his remedy on an endorsement transferring the debt as well and complying with the stamp law. It has been naturally a matter for careful consideration as to whether that affects the question before us; it seems to me that it does. The absence of such a formal assignment of the debt is no doubt fatal to a suit by the indorsee purported to be based on the debt and with which the Hindu law is concerned. It seems to me that for the appellant to escape liability we must hold that there is no debt due by the manager (he happens to be their natural father) to the decree-holder which they are under an obligation to pay. In so far as a father and son are concerned, a decree passed against a father creates a debt *prima facie* dischargeable by the sons; *Periasami Mudaliar v. Seetharama Chettiar*(2). See also Mayne's Hindu Law, Tenth Edition, page 420. It

(1) I.L.R. [1938] Mad. 568 (F.B.). (2) (1903) I.L.R. 27 Mad. 243 (F.B.).

RAMANATHAN
v.
MUTHURAMAN.
MOCKETT J.

seems to be established that the judgment against the father having created a debt which the son is liable to discharge, the consequent proceedings against the son will not be upon the judgment but upon the debt created by the decree. But to create a debt payable by the son, I think it reasonable to suppose that the decree itself must relate to a debt for which he is liable. Whether the decree now sought to be executed not against the son but against a member of a joint trading family did relate to a debt will be a matter for consideration. So far the relationship of a father and son has been discussed.

So far as the powers of a manager to contract debts for family purposes are concerned, it seems clear that the manager of a joint family business has an implied authority to contract debts for the ordinary purpose of the family business, and, where such debts have been incurred, the other coparceners are liable, but only to the extent of their interest in the joint family: *vide* Mayne's Hindu Law, Tenth Edition, pages 449 and 450, for a summary of the law. In *Venkatanarayana v. Somaraju*(1) VENKATASUBBA RAO J. points out that

"there is a legal duty cast upon the son, as upon any other junior coparcener, to discharge a liability incurred by the father in his capacity of manager for family purposes, and it is therefore unnecessary on the facts here to invoke the doctrine of pious obligation."

It will be seen that the learned Judge emphasizes that, although the manager may also be the father, all the junior coparceners are under a duty to discharge liabilities properly incurred by him because of his position as manager.

(1) I.L.R. [1937] Mad. 880 (F.B.).

I have already indicated that the circumstances of this case show that, although the suit is not framed as against the firm, there is no doubt that it is against the manager for money advanced for the firm. The Full Bench decision in *Venkatanarayana v. Somaraju* (1) also held that the principle of representation by the managing member was not confined to immovable property but applied to other transactions as well, for instance, loans. I have been unable to understand why there should ever have been such a distinction. This decision of the Full Bench is, I consider, important in this case because it is an authority binding on me for the proposition that a Hindu father, by virtue of his position as manager, can represent the entire family in all transactions, not only with regard to immovable property but with regard to other transactions as well; that the decree need not be specifically passed against him as such; and that, once a liability is declared to be a family liability, every item of the joint family property is bound to satisfy that liability.

Our attention has been drawn to the decision of this High Court in *Lakshmana Chettiar v. Muthu Chellia Goundan*(2) which was not cited to the Full Bench in *Venkatanarayana v. Somaraju*(1). It appears from the facts of that case that the money borrowed was a personal debt and did not concern a trading family or an endorsed promissory note but it is evident that the learned Judges were reluctant to allow investigations in proceedings in execution to be made against persons who are not sons or descendants of the judgment-debtor where a suit is brought by an original payee against an original maker; there appears

(1) I.L.R. [1937] Mad. 880 (F.B.). (2) (1934) 68 M.L.J. 104.

RAMANATHAN v. MUTHURAMAN. MOCKETT J. to be no difficulty about the legal position of the members of the maker's family in execution proceedings; it is argued that the fact that the decree on which execution is sought to be levied against the appellant's property is based upon an endorsed promissory note materially affects his liability as a member of his family.

Except for the decision in *Maruthamuthu Naicker v. Kadir Badsha Rowther*(1) and the cases therein cited, no case relating to an endorsed promissory note has been brought to our notice and no case relating to execution on a decree on an endorsed promissory note. As in *Maruthamuthu Naicker v. Kadir Badsha Rowther*(1) so in this appeal, the following facts are in my view of vital importance:

(i) The promissory note was endorsed to Muthuraman Chettiar, and

(ii) the debt was not assigned to Muthuraman Chettiar.

There is the further fact that the element of pious obligation between a father and son is absent.

There is a wealth of authority "that a decree obtained against a managing member for a debt binding on the family can be executed against the shares of the other members"—Vide *Daulat Ram v. Mehr Chand*(2) and the numerous cases cited by Mayne, Hindu Law, Tenth Edition, at page 450.

The question in this appeal therefore seems to be whether there is a debt in the hands of the third defendant which the plaintiff is bound to pay. In my view there is not. I consider that the general principle laid down in *Maruthamuthu Naicker v. Kadir Badsha Rowther*(1) is applicable to this case.

(1) I.L.R. [1938] Mad. 568 (F.B.).

(2) (1887) I.L.R. 15 Cal. 70 (P.C.)

No debt was ever assigned to Muthuraman Naidu by Thumbuswami Naidu, the promisor under Exhibit VI. It could have been assigned, but it was not. By his endorsement and delivery Thumbuswami Naidu transferred the property in the note to Muthuraman Chettiar—section 50 of the Negotiable Instruments Act. The subsequent decree therefore can only have been on the note and not on the debt. There is not therefore in existence any decree based on a debt. Any decree against the maker of the note will be, as VARADACHARIAR J. points out in *Maruthamuthu Naicker v. Kadir Badsha Rowther*(1) at page 569, for compensation and not for debt—section 117 of the Negotiable Instruments Act. It seems to me therefore that the present decree-holder cannot, on the principle that the members of this trading family are liable to pay debts properly incurred by the manager, make their property liable in execution in respect of a decree against the manager not for a debt but for a remedy under the provisions of a Statute. I see no reason to stretch the principles of Hindu law in so far as they relate to the liability of persons not parties to suits, nor to extend the meaning of the word "debt." I again emphasize that the element of pious obligation by a son which seems to have given a somewhat comprehensive meaning to the word "debt" is absent in this appeal. That the payee might, had the plaint been correctly framed or the debt correctly assigned, have been entitled to recover from the plaintiff is no reason for taking another view; nor is the possibility that, had there been no endorsement, no difficulty would have arisen for Thumbuswami Naidu to recover. Indeed I consider that the fact

RAMANATHAN
v.
MUTHURAMAN.
MOCKETT J.

(1) I.L.R. [1938] Mad. 568 (F.B.).

RAMANATHAN
v.
MUTHURAMAN.
MOORETT J. that the plaintiff in the suit on the note preferred other methods is a reason for a holder of the decree therein being confined rigidly to his rights as they work out logically.

For the above reasons this appeal must be allowed with costs here and below.

It must follow also that Appeal No. 256 of 1939 will also be allowed with costs, which will be limited to the stamp duty paid, printing charges and other out of pocket expenses.

KUNHI
RAMAN J.

KUNHI RAMAN J.—I have had the advantage of perusing the judgment just delivered by my learned brother. In stating that I concur in the views expressed in it I wish to add a few words.

There is no doubt at all that the decree in Original Suit No. 33 of 1932 was not against a firm represented by Vairavan Chettiar as manager, but that it was against the individual Vairavan Chettiar. The decree cannot therefore be executed against other members of the firm or their properties.

It is clear from the decision of a Full Bench of this Court reported in *Maruthamuthu Naicker v. Kadir Badsha Rowther*(1), which is binding on us, that the payee of a promissory note executed by the manager of a joint Hindu family may, if he wishes to sue, base his suit on the note, in which case, only the maker of the note can be made liable, or on the debt, in which event, he may seek to make the sons or the other undivided members of the family of the maker also liable. When however, the payee indorses the note to a third party, without assigning the debt also to the indorsee, the latter can sue only on the note and not on the debt. In the present case, the suit was

by such an indorsee who did not therefore acquire any wider rights in respect of the debt under the Hindu law. The decree he obtained was only against the maker of the note, the cause of action being based purely on the negotiable instrument. Such a decree obviously cannot be executed against any other undivided member of the family of the maker of the note. Seeing that the appellant who is the natural son of the maker of the note was given away in adoption to his paternal uncle, no question of pious obligation to discharge the debt created by the decree in this case can also arise.

In the circumstances, I agree that the appeals must be allowed as indicated in the judgment of my learned brother.

V.V.C.

RAMANATHAN
v.
MUTHURAMAN
KUNHI
RAMAN J.

(1) I.L.R. [1938] Mad. 588 (F.B.).

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice
Chandrasekhara Ayyar.

1941,
August 21.

SUBBARAYA CHETTIAR (FIRST CREDITOR),
PETITIONER,

v.

THE DEBT CONCILIATION BOARD, CUDDALORE,
SOUTH ARCOT DISTRICT, AND FOUR OTHERS,
RESPONDENTS.*

*Madras Debt Conciliation Act (XI of 1936) ss. 4, 5, 6, 7 and 17—
Application under sec. 4 dismissed for non-compliance
with provisions of sec. 6—Fresh application in compliance
—Second application also dismissed under sec. 7 to evade
provisions of sec. 17—Dismissal illegal—Order quashed
by writ of certiorari.*

On 18th September 1939 the respondents who were debtors filed an application under section 4 of the Madras Debt Conciliation Act for the settlement of their debts. On 11th November 1939 the application was dismissed under section 7 for non-compliance with the provisions of section 6. Five days later a fresh application fully complying with the requirements of sections 5 and 6 was filed and the Board thereupon took steps under section 8. But the respondents failed to proceed to serve their creditors or the legal representatives of the deceased creditors with due diligence. On 12th November 1940, that is, four days before the expiry of twelve months contemplated under section 17, they applied to the Board to dismiss their second application also under section 7, which the Board accordingly did. On an application by a creditor to quash the said order by the issue of a writ of certiorari,

held: The Board had no power to reject under section 7 the second application which was in compliance with the provisions of sections 5 and 6 and its action in purporting

* Civil Miscellaneous Petition No. 1548 of 1941.

to do so can only be regarded as an evasion of its statutory duty under section 17.

The omission to give a Board power to extend the proceedings beyond twelve months, if it considers it right and proper to do so, is perhaps a defect in the Act; but the remedy lies with the Legislative Authority and not with the Court.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court may be pleased to issue a writ of certiorari calling for the records in D.C. No. 633 of 1939 on the file of the Court of the Debt Conciliation Board, Cuddalore, and to quash the proceedings, dated 13th November 1940, and made by the said Board.

T. M. Krishnaswami Ayyar and A. Balasubramania Ayyar for petitioner.

Government Pleader (K. Kuttikrishna Menon) for first respondent.

S. Panchapakesa Sastri for *T. E. Ramabhadrachari* for respondents 2 to 5.

The ORDER of the Court was pronounced by LEACH C.J.—This is an application for the issue of a writ of certiorari for the purposes of quashing an order of the Debt Conciliation Board, Cuddalore. The record shows that the order complained of has been passed without jurisdiction and the application will be granted.

On 18th September 1939 the debtor-respondents filed a petition under section 4 of the Madras Debt Conciliation Act, 1936, asking for the settlement of their debts. Section 5 of the Act states that every application shall be in writing and shall be signed and verified in the manner prescribed by the Code of Civil Procedure for signing and verifying plaints. Section 6 sets out the particulars which a debtor must give in his application. If the application does not comply with the requirements of section 5 or section 6, section 7

SUBBARAYA
v.
DEBT CONCILIATION BOARD,
CUDDALORE.

LEACH C.J.

SUBBARAYA
v.
DEBT CONCI-
LIATION BOARD,
CUDDALORE.
LEACH C.J.

requires the Board to reject it. When an application has been accepted as complying with the provisions of sections 5 and 6, the Board must by reason of section 8 pass an order fixing a date and place for the hearing of the application, and notice of this order must be sent by registered post to the applicant and his creditors. Section 9 gives the Board power to dismiss an application at any stage of the proceedings, if the Board does not consider it desirable or practicable to effect a settlement of debts or if in its opinion the applicant fails to pursue his application with due diligence or if it includes a claim which the Board considers is collusive and intended to defraud a creditor. Section 17 states that, if no amicable settlement is arrived at under sub-section 1 of section 14 within twelve months from the date of the application under section 4, the Board shall dismiss the application. There is no power to extend the proceedings beyond twelve months.

In this case the Board dismissed the petition, which the debtor-respondents filed on 18th September 1939, because of non-compliance with the provisions of section 6. The order dismissing the petition was passed on 11th November 1939. A dismissal under section 7 does not preclude a debtor from filing a fresh application and, this course being open, the debtor-respondents adopted it five days later. The new petition was found to be in order, and the Board took the steps which it was bound to take in view of the provisions of section 8. The debtor-respondents obviously did not proceed to serve their creditors or the legal representatives of deceased creditors with due diligence. The creditor who has instituted the present proceedings alleges that the debtor-respondents did not do so because they intended to delay the proceedings as far as they

possibly could with the object of being allowed to file a fresh petition at the end of the twelve months. The petitioner is a secured creditor and has obtained a mortgage decree against the debtor-respondents. Whether there is some excuse to be found for their failure to serve the creditors, or whether they deliberately neglected to do so as the result of a deep laid plot on their part, matters not for the purpose of deciding the application now before the Court.

What is important here is that on 12th November 1940, four days before the expiration of the twelve months contemplated by section 17, the debtor-respondents filed an application asking the Board to dismiss their petition by an order purporting to be passed under the provisions of section 7 of the Act, and this the Board did. There is no doubt that in taking this action the Board acted contrary to the spirit and the letter of the Act. The second petition having complied with the provisions of sections 5 and 6, the Board had no power to reject it under section 7, and its action in purporting to do so can only be regarded as an evasion of its statutory duty under section 17. That section leaves no option to the Board. If before the expiration of the twelve months no settlement has been arrived at, the debtor's petition must, as already stated, be dismissed. It is common ground that a dismissal under section 17 would have prevented another petition being filed. It may be that in some cases, especially where there is a large number of creditors and some of them die after the application has been filed, it is not possible to comply within the twelve months with all the Act contemplates, but that is a defect in the Act which the Court cannot remedy. The remedy lies with the Legislative Authority. On other occasions this Court has had to point out defects

SUBBARAYA
v.
DEBT CONCI-
LIATION BOARD,
CUDDALORE.
LEACH C.J.

SUBBARAYA
v.
DEBT CONCILIATION BOARD,
CUDDALORE.
LEACH C.J.

in this Act. The omission to give a Board power to extend the proceedings beyond twelve months, if it considers it right and proper to do so, perhaps, adds another to the list of defects. The fact that the Board considered it to be equitable to give the debtor-respondents an opportunity of filing still another petition is, however, a matter which the Court cannot take into consideration. What the Court has to decide is whether the Board had jurisdiction to dismiss the petition under section 7 of the Act in the circumstances of this case. Obviously it had not the jurisdiction. Consequently the Board's order will be quashed.

The result is that the petition will still be regarded as being on the file and it will be the duty of the Board to pass an order of dismissal under section 17. The petitioner is entitled to his costs which will be paid by the debtor-respondents.

N.S.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Chandrasekhara Ayyar.

SWAMINATHA PILLAI (APPELLANT), APPELLANT,

v.

KRISHNA PADAYACHI AND TWO OTHERS
(RESPONDENTS), RESPONDENTS.*

1941,
August 20.

Civil Procedure Code (Act V of 1908), O. XXI, r. 16—Decree against principal debtor—Decree amount paid by surety and transfer of decree in favour of his nominee—Nominee assigning decree in favour of bona fide transferee for value—Such transferee entitled to execute decree against surety—Principle in Lickbarrow v. Mason applied—Transfer of Property Act (IV of 1882), sec. 41—Sale of Goods Act (III of 1930), sec. 27.

On a decree for money being passed both against a principal debtor and his surety, the surety paid the decree-holder and obtained a transfer of the decree in favour of a third person, his nominee, with a view to defeat the provisions of the second proviso to Order XXI, rule 16, of the Civil Procedure Code. The nominee, however, transferred the decree in favour of another person who took the transfer for value and in good faith. This second transferee commenced thereafter proceedings in execution against the surety.

Held: (i) The second transferee was entitled to execute the decree against the surety.

Where one of two persons has to suffer by the act of a third person, the person who has enabled the third person to occasion the loss must sustain it.

Lickbarrow v. Mason(1) applied.

(ii) The principle of estoppel embodied in section 41 of the Transfer of Property Act applied to the case. That

* Letters Patent Appeal No. 36 of 1940.

(1) (1787) 2 T.R. 63, 70; 100 E.R. 35.

SWAMINATHA
v.
KRISHNA.

principle applies both to immovable and movable property and is embodied in section 27 of the Sale of Goods Act also.

Gregg v. Wells(1) followed.

APPEAL under clause 15 of the Letters Patent against the judgment and order of KING J., dated 17th September 1940, and passed in Appeal Against Appellate Order No. 251 of 1938 preferred to the High Court against the order of the Court of the Subordinate Judge of Kumbakonam, dated 7th October 1938, and made in Appeal Suit No. 67 of 1936, preferred against the order of the Court of the District Munsif of Kumbakonam, dated 8th August 1936, in Execution Petition No. 424 of 1933 in Original Suit No. 181 of 1929.

T. V. Muthukrishna Ayyar for appellant.

A. C. Sampath Ayyangar for first respondent.

Other respondents were not represented.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—The question involved in this appeal is whether the appellant shall be allowed to profit by a scheme (for which he himself was responsible) to defeat the provisions of rule 16 of Order XXI of the Code of Civil Procedure. One Srinivasa Ayyangar obtained a money decree against the appellant and one Idumban Chettiar. The appellant had become the surety for money owing by Idumban Chettiar and the decree was obtained in a suit filed to enforce repayment of the loan. In order to avoid execution proceedings being instituted against him, the appellant paid the decree-holder and naturally he desired to recover the amount from the principal debtor. Instead of adopting the proper course, which was to file a suit against Idumban

Chettiar, the appellant arranged with the decree-holder to transfer the decree to one Murugesu Padayachi. The decree-holder, having been paid, raised no objection to this course. It has been established that Murugesu was acting as the benamidar for the appellant who hoped that, with the decree standing in the name of a stranger to the suit, he would be able to execute it against Idumban Chettiar. The second proviso to rule 16 of Order XXI of the Code of Civil Procedure states that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others. As Murugesu was actually the appellant's benamidar, the transfer of the decree meant the transfer to the appellant himself. The appellant was not entitled to do something in the name of a dummy which the law does not allow him to do in his own name.

While Murugesu was the ostensible owner of the decree he sold it to Krishna Padayachi, the respondent. The respondent paid Rs. 1,000 as the consideration. He had no inkling of the appellant's claim and throughout acted in good faith. At any rate, that is the effect of the finding of the first appellate Court and its decision on the question of fact is binding upon us. The respondent having become the transferee of the decree, he wished to execute it against the appellant and accordingly instituted execution proceedings in the Court of the District Munsif of Kumbakonam. The District Munsif held that he was not entitled to an order in execution, but on appeal to the Subordinate Judge of Kumbakonam this decision was reversed. The appellant then appealed to this Court, but KING J. agreed with the Subordinate Judge and dismissed the appeal. The present appeal has been

SWAMINATHA
v.
KRISHNA.
LEACH C.J.

(1) (1839) 10 Ad. & E. 90; 113 E.R. 35.

SWAMINATHA
v.
KRISHNA.
LEACH C.J. filed under the provisions of clause 15 of the Letters Patent, the learned Judge having given the necessary certificate.

Mr. T. V. Muthukrishna Ayyar conceded that, in obtaining a transfer of the decree in the name of Murugesu, the appellant was guilty of what in law amounts to a fraud. His object was no doubt to escape the payment of the court-fee which a suit to recover from the principal debtor would involve but, in view of the very emphatic provision contained in the second proviso to rule 16 of Order XXI, the appellant was clearly not entitled to do what he endeavoured to do. The reason given by KING J. for dismissing the appellant's appeal was that he had allowed Murugesu to appear as the owner of the decree and consequently the principle embodied in section 41 of the Transfer of Property Act applied. That section only relates to immovable property, but the principle has been applied where movable property has been sold to a *bona fide* purchaser for value by the ostensible owner. The learned Judge in the course of his judgment drew attention to the judgment in *Gregg v. Wells*(1). That the principle can be applied to movable property as well as to immovable property cannot be doubted. In fact the principle is embodied in section 27 of the Sale of Goods Act.

Even if it were to be assumed that the appellant's action in obtaining a transfer of the decree in the name of Murugesu was justifiable and that he can be regarded as an innocent party, this would not help the appellant. The principle stated in *Lickbarrow v. Mason*(2) would then apply. Wherever one of two

(1) (1839) 10 Ad. & E. 90; 113 E.R. 35.
(2) (1787) 2 T.R. 63, 70; 100 E.R. 35.

innocent persons has to suffer by the act of a third person, the person who has enabled the third person to occasion the loss must sustain it. The appellant certainly allowed Murugesu to hold himself out as the holder of this decree and, having done so, he cannot be preferred to the respondent who bought the decree for valuable consideration and in full good faith. The appellant has only himself to blame for the position in which he finds himself. He could have avoided having to pay the decretal amount twice over, as he now has got to do, if he had not attempted to get round the provisions of Order XXI, rule 16. We consider that the decision of KING J. is in accordance with law and consequently this appeal must be dismissed with costs in favour of the first respondent.

N.S.

SWAMINATHA
v.
KRISHNA.
LEACH C.J.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice
Chandrasekhara Ayyar.

1941,
August 14.

K. G. PANDALAI (APPLICANT), APPELLANT,

v.

THE SOUTH INDIAN GENERAL ASSURANCE
COMPANY, LIMITED (IN LIQUIDATION) BY ITS OFFICIAL
LIQUIDATOR (RESPONDENT), RESPONDENT.*

Indian Companies Act (VII of 1913), sec. 91-B (1)—Resolution by directors authorizing receipt in advance of future calls on shares—Quorum for meeting of directors, three—Three directors only present and passing resolution—Two directors personally interested and incompetent to vote—Resolution invalid—Set off—Director not entitled to act on resolution and set off in his own favour.

P was a director and the managing agent of a company. He held 120 preference and 220 ordinary shares of Rs. 50 each, in respect of which only Rs. 15 per share had been paid up. In 1936 the company owed P a sum of Rs. 16,000. P's brother who was also a director had lent P a considerable sum of money which was utilized for the purposes of the company. An article of association of the company fixed the quorum for a directors' meeting at three. In pursuance of another article, P was authorized by a resolution passed on 15th December 1936 in a meeting of directors, consisting of himself, his brother and a third person, other directors being absent, to receive from any member willing to advance the same all or any part of the capital due upon the shares held by him beyond the sums actually called for and to pay interest on the amount so paid or satisfied. On 31st December 1936 P purported to set off Rs. 11,900 out of the amount due to him from the company against what he owed in respect of the shares and wrote to the Registrar of Joint Stock Companies to record that his shares had been fully paid up. On 29th August 1940 the High Court passed an order directing that the company

* Original Side Appeal No. 18 of 1941.

be wound up compulsorily. The Official Liquidator subsequently questioned the validity of the transaction of set-off made by P and included his name in the list of contributories. P objected.

Held: (i) The set-off was not proper and valid.

The resolution authorizing P to receive in advance future calls was not validly passed in view of the provisions of section 91-B (1) of the Indian Companies Act. P and his brother were not competent to vote as they were personally interested and the third director present, voting alone, could not pass the resolution.

(ii) Even assuming the resolution to have been lawfully passed P, being in a fiduciary position, could not act upon the resolution in respect of his own shares.

Pratt (Bombay), Ltd. v. M.T., Ltd. and Sassoon & Co., Ltd. v. Pratt (Bombay), Ltd.(1) and *Transvaal Lands Company v. New Belgium (Transvaal) Land and Development Company*(2) applied and followed.

(iii) It is open to a company to agree with a shareholder to whom it owes money that the debt shall be set off against future calls.

Adamson's case (In re Paraguassu Steam Tramway Company)(3) and *In re Jones, Lloyd & Co., Limited*(4) followed.

APPEAL from the order of GENTLE J., dated 28th February 1941, and passed in the exercise of ordinary original civil jurisdiction of the High Court in Application No. 36 of 1941 in Original Petition No. 206 of 1940.

O. T. G. Nambiar and K. N. Pandalai for appellant.
Official Liquidator (*William Lobo*) in person.

The JUDGMENT of the Court was delivered by LEACH C.J.—This is an appeal from an order passed by GENTLE J. confirming the action of the Official Liquidator of the South Indian General Assurance Company, Limited, in placing the appellant's name in the list of contributories. The company was formed in the year

PANDALAI
v.
SOUTH INDIAN
GENERAL
ASSURANCE
Co., LTD.

LEACH C.J.

(1) I.L.R. [1938] Bom. 421 (P.C.).

(2) [1914] 2 Ch. 488, 503.

(3) (1874) L.R. 18 Eq. 670.

(4) (1889) 41 Ch. D. 159.

PANDALAI
v.
SOUTH INDIAN
GENERAL
ASSURANCE
CO., LTD.
LEACH C.J.

1929. On 29th August 1940 this Court passed an order directing that it be wound up compulsorily. During the eleven years the company was operating, it never made a profit. Each year, in fact, showed a loss and, long before the winding up order was passed, the company was in a precarious position. The appellant was a director of the company and was also its managing agent. The managing agents were stated to be K. C. Pandalai & Company, but it is common ground that the appellant is the sole proprietor of that firm. In 1936 the company owed the appellant a sum of Rs. 16,000. The appellant held one hundred and twenty preference and two hundred and twenty ordinary shares of Rs. 50 each in respect of which only Rs. 15 per share had been paid up. The appellant's brother, Mr. K. S. Pandalai, was also a director of the company. He held some two hundred shares and these also were only paid up to the extent of Rs. 15 per share. Mr. K. S. Pandalai was not a creditor of the company, but he had lent a considerable sum of money to his brother and admittedly this money was utilized for the purposes of the company.

Article 29 of the articles of association stated that the directors might, if they thought fit, receive from a member all or any part of the capital due upon shares held by him beyond the sums actually called for, and permitted the directors to pay interest on any sum so received. On 15th December 1936 a meeting of the board was held and was attended by the appellant, his brother and Mr. P. E. Raman Menon who was also a director. They purported to pass the following resolution :—

“ Resolved that as per article 29 of the articles of association of the company the managing agents be hereby authorized, if they think fit, to receive from any member willing to advance the same, all or any part of the capital due upon the shares

PANDALAI
v.
SOUTH INDIAN
GENERAL
ASSURANCE
CO., LTD.
LEACH C.J.

held by him beyond the sums actually called for ; and upon the amount so paid or satisfied in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, to pay interest at 6 per cent per annum.”

There can be no doubt that this resolution was passed in order that an arrangement might be entered into relieving the appellant from liability in respect of his shares. This is obvious from what happened on 31st December 1936. On that date the appellant purported to set off Rs. 11,900 out of the amount due to him from the company against what he owed in respect of the shares and consequently called upon the Registrar of Joint Stock Companies to record that his shares had been fully paid up. When the company went into liquidation the validity of this transaction was questioned by the Official Liquidator and he decided that the appellant should be placed on the list of contributories in respect of the Rs. 11,900. The appellant objected and asked the Court to strike out his name from the list, but this GENTLE J. refused to do. The appellant as a director and the managing agent of the company was in a fiduciary position and in the circumstances the learned Judge held that he was not in a position to decide whether it was fit and proper from the company's point of view that there should be this arrangement. The learned Judge relied on the decision of the Privy Council in *Pratt (Bombay), Ltd. v. M.T., Ltd. and Sassoon & Co., Ltd. v. Pratt (Bombay), Ltd.*(1) where the Judicial Committee held that the provisions of section 91-B of the Companies Act as it was before the amendment of 1936 was a concise statement of the general rule of equity. The Judicial Committee approved of these observations of the

(1) I.L.R. [1938] Bom. 421 (P.C.).

PANDALAI
v.
SOUTH INDIAN
GENERAL
ASSURANCE
Co., LTD.
LEACH C.J.

Court of Appeal in England in *Transvaal Lands Company v. New Belgium (Transvaal) Land and Development Company*(1):—

“Where a director of a company has an interest as a shareholder in another company or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into engagements with the company of which he is a director, he is in our opinion within this rule. He has a personal interest within this rule or owes a duty which conflicts with his duty to the company of which he is a director. It is immaterial whether this conflicting interest belongs to him beneficially or as trustee for others. He is bound to do as well for his *cestui que trust* as he would do for himself. Again the validity or invalidity of a transaction cannot depend upon the extent of the adverse interest of the fiduciary agent any more than upon how far in any particular case the terms of a contract have been the best obtainable for the interest of the *cestui que trust*, upon which subject no enquiry is permitted.”

When the case was before GENTLE J., it appears to have been accepted that the resolution of 15th December 1936 was validly passed. The only point taken by the Official Liquidator was that the appellant could not act upon the resolution in respect of his own shares. It is, however, manifest that the validity of the resolution is open to question. Section 91-B (1) of the Indian Companies Act, as it stood at the time, read as follows:—

“No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested; and if he does so vote, his vote shall not be counted.”

At the time this resolution was passed there were five directors, but only three of them attended and two of those present, the appellant and his brother, were not in a position to vote on the question as they were personally interested. Article 113 fixes the quorum

(1) [1914] 2 Ch. 488, 503.

for a directors' meeting at three. As the appellant and his brother were not competent to vote and as the third director present, acting alone, could not give authority to the appellant to apply the provisions of article 29, the transaction cannot be regarded as binding upon the company. If three directors who had no interest in the matter had resolved that the debt due to the managing agent should be set off to the extent of the Rs. 11,900 against the appellant's liability on his shares, or the company in general meeting had so decided, the position would have been different. It is open to a company to agree with a shareholder to whom it owes money that the debt shall be set off against future calls. This is well settled law. See *Adamson's case*(1) and *In re Jones, Lloyd & Co., Limited*(2). But here the appellant applied the provisions of article 29 without lawful authority and consequently he cannot take advantage of what he has done. Even assuming the resolution to have been lawfully passed there is still the objection pointed out by GENTLE J.

The appeal fails and will be dismissed. There will be no order as to costs as the Official Liquidator appears in person.

N.S.

(1) (1874) L.R. 18 Eq. 670.

(2) (1889) 41 Ch.D. 159.

PANDALAI
v.
SOUTH INDIAN
GENERAL
ASSURANCE
Co., LTD.
LEACH C.J.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahman.

1941,
August 14.

PANTHANAM *alias* ALAGIANAYAKATHAMMAL
AND TWO OTHERS (LEGAL REPRESENTATIVES OF COUNTER-
PETITIONER), APPELLANTS,

v.

P. R. M. K. MUHAMMAD ABDUL RAHIMAN MARA-
KAYAR (PETITIONER), RESPONDENT.*

*Madras Estates Land Act (I of 1908), sec. 75 (8) (e)—Order of
District Court confirming the decision of Collector under
the section—No second appeal lies to High Court.*

No second appeal lies to the High Court against an order of a District Court made in an appeal under section 75 (8) (e) of the Madras Estates Land Act confirming an order of the Collector made under that section.

A right of appeal is a statutory right and cannot be inferred by implication.

Rajagopala Chettiar v. H.R.E. Board, Madras(1) and *Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon*(2) applied and followed.

APPEALS against the orders of the District Court of Ramnad at Madura in Appeal Suits Nos. 20, 23 to 25, 27 to 34, 36, 38 to 40, 47, 48, 50 to 53, 56 to 60, 62, 72 and 63 of 1937 preferred against the order of the Court of the Sub-Collector of Ramnad, dated 31st October 1936 and made in Miscellaneous Petitions Nos. 163, 167 to 169, 205, 207, 208, 210 to 212, 217, 218, 222, 224 to 226, 234, 235, 239, 241 to 243, 247, 250 to 253, 255, 209 and 256 of 1936 respectively.

U. Somasundaram for appellants.

B. Sitarama Rao for *T. K. Subramania Pillai* and *M. G. Shanmugam Pillai* for respondent.

* Second Appeals Nos. 906 to 934 and 999 of 1939.

(1) (1933) I.L.R. 57 Mad. 271 (F.B.). (2) (1912) I.L.R. 40 Cal. 21 (P.C.).

ORDER.

ABDUR RAHMAN J.—This is a batch of thirty second appeals. A preliminary objection has been raised by Mr. Sitarama Rao. He contends that in the absence of a provision in the Estates Land Act conferring a right on the appellants to prefer second appeals, these are not competent and are liable to be dismissed. The question to decide is whether they are ?

They arise out of objections made by the respondent landholder for appraisalment of the crop or division of the produce under section 74 of the Estates Land Act. On receiving these applications the Collector deputed an officer, as required by section 75 of the Act, to make the division or appraisalment. The officer appointed by the Collector carried out the orders and made a report. Objections were raised on behalf of the appellants to this. They were to the effect that the rent was payable in money and not in kind. These objections were disallowed. The appellants went up to the District Court in appeal but the Collector's decision was affirmed. They have preferred the present appeals against the orders of the District Court.

Sub-clauses (d) and (e) to section 75 (8) which contain the provisions relevant to the point to be determined read as follows :—

“(d) The Collector's order for the payment of rent and costs, if any, shall be final unless an objection of the nature described in clause (b) has been raised and shall be enforceable as a decree for arrears of rent.

(e) Where an objection of the nature described in clause (b) has been raised, the Collector's decision thereon shall be subject to an appeal to the District Court. Such appeal shall be presented within thirty days from the date of the Collector's decision.”

PANTHANAM
v.
ABDUL
RAHIMAN.
—
ABDUR
RAHMAN J.

PANTHANAM
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

Clause (b) referred to in these sub-clauses provides that if an objection is raised that the rent is not payable by division or appraisement or that no rent is payable and the Collector upholds the objection, he shall set aside the award made by the person who was deputed to make the division or appraisement.

According to the first of these sub-clauses, the Collector's order for the payment of rent and costs has been declared to be final. Since, during the course of argument, learned Counsel for the appellant contended that the order passed by the District Court and the orders passed by the Collector were decrees in fact, it would be useful to remember that the sub-clause (d) does not declare the Collector's orders to be decrees but merely orders that are enforceable as decrees for arrears of rent. As to the character of the decision made by the District Court, sub-clause (e) provides that, when the objection that the rent is not payable either at all or at least in kind, i.e., by division or appraisement but is payable in cash, is taken on behalf of a tenant, the Collector's decision (the use of the word "decision" to which reference was made during the course of the arguments is not important as it obviously refers to the order passed by the Collector and to nothing else) shall be subject to an appeal to the District Court. If these two sub-clauses are read together, there would be no doubt as to their meaning. They lay down that the Collector's order for payment of rent in kind would be final if no objection is taken under sub-clause (b) and would continue to be so even if an objection is taken under that sub-clause if the District Court on being appealed to does not come to a different decision from that of the Collector. In both these cases, it is the decision of the Collector that remains final. If the District Court takes a

PANTHANAM
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

different view, on the other hand, the order of the Collector is to be substituted or replaced by the order of the former. Whether such an order could be appealed against does not arise here for decision. But the point to be borne in mind is that in the absence of a different conclusion by the District Court the decision of the Collector would continue to hold the field and retain its character of finality.

There is no provision in the Act which permits a further appeal to the High Court; but learned Counsel for the appellant contends that in spite of the absence of a specific provision to that effect, such appeals are competent as under section 192 of the Estates Land Act, the provisions of the Code of Civil Procedure have been made applicable to all appeals under the Act and, in so far as the appeals to the District Court were laid under section 75 (d), a further appeal to the High Court would lie under section 100 of the Civil Procedure Code. But before the provisions of section 100 can be held to be attracted, it is incumbent upon the appellants to satisfy me that the orders passed by the District Court on appeals amounted to decrees. The proceedings, it must be remembered, arose out of applications made to the Collector for division or appraisement and not out of suits. The decision by the Collector has been described by clause (d) to be in the nature of an order. The appeal against that order must be regarded to be a continuation of the proceedings before the Collector. If the decision by the Collector culminated in an order only, how can a decision by the District Court on appeal be characterised as a decree? There are a large number of orders against which appeals have been provided under Order XLIII, rule 1, Civil Procedure Code. Can it be legitimately contended that the decision

PANTHANAM
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

of the Court of appeal would amount to a decree although the decision of the first Court was in the nature of an order? I do not think so. The Code makes a clear distinction between decrees and appealable orders and it is impossible to forget that distinction in deciding this question. My attention was drawn to the fact that the decisions of the District Court were final so far as that Court was concerned and that they were embodied in the form of decrees. But I do not feel impressed by these facts. An order does not become a decree merely because it happens to be an order which is final so far as the Court passing it is concerned. As to the form in which these orders were embodied, a practice seems to have grown up in this Presidency to embody every order or judgment passed by a Court in the form of a decree. In cases of orders, these formal expressions have come to be known by the style of decretal orders. This practice owed its growth probably to the difficulty experienced by the lower Courts in discriminating between judgments and orders and, since no appeal is competent in case of judgments unless they are formally drawn up and embodied in decrees, it was probably considered safer to embody both judgments and orders in that manner. This would not, however, confer a right of appeal where none exists or convert what was really an order into a decree.

Reliance was placed on behalf of the appellant on several decisions of this Court and of the Privy Council; but it is unnecessary to examine them in detail as the decisions in *Ravi Veeraraghavulu v. Venkata Narasimha Naidu Bahadur*(1), *Venkataramier v. Vythilinga Thambiran*(2) and *Ganne Kotappa v. Venkataramiah*(3)

(1) (1914) I.L.R. 37 Mad. 443 (P.C.).
(2) (1913) 1 L.W. 89. (3) (1900) 10 M.L.J. 398.

were decisions in suits instituted under the Rent Recovery Act or the Estates Land Act and must therefore have ended in decrees.

The decision in *Kamaraju v. The Secretary of State for India*(1) on which very great emphasis was laid by learned Counsel for the appellant has no application also, in my opinion, as the Forest Officer in that case was found by the Full Bench to have been constituted a Court with special jurisdiction which a Collector in deciding the question of appraisement under section 75 is not. The last decision to which reference was made during the course of the arguments was that of *Rajah of Mandasa v. Jagannayakulu*(2) but the real point to be determined in that case was whether the Civil Court was a competent revising authority in regard to the directions given by the Board of Revenue to revise the proceedings of a Revenue Officer who had made a settlement of rents under Chapter XI of the Estates Land Act. That is not the question which has to be determined now. In the course of the judgment, however, one of the learned Judges, ANANTHAKRISHNA AYYAR J., referred to the position whether second appeals would be competent in certain cases but there is nothing in those observations which may lead me to infer that the learned Judge was referring to the maintainability of such appeals from anything else other than decrees.

In my opinion, this case is governed by the principle enunciated in the Full Bench decision in *Rajagopala Chettiar v. H.R.E. Board, Madras*(3) and in *Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon*(4).

PANTHANAM
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

(1) (1888) I.L.R. 11 Mad. 309 (F.B.).
(2) (1931) I.L.R. 55 Mad. 883; 63 M.L.J. 450 (F.B.).
(3) (1933) I.L.R. 57 Mad. 271 (F.B.).
(4) (1912) I.L.R. 40 Cal. 21 (P.C.).

PANTHANAM
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

A right of appeal is a statutory right and cannot be inferred by implication. For the above reasons I must hold that the appeals are not competent.

A request is made to me on behalf of the appellants that they may be permitted to convert these appeals into revisions. As I am assured that there are points of law which may have to be considered by the Court and in the ends of justice, I have no objection to grant that permission provided that the appellants make up the deficiency in the court-fee and pay a consolidated sum of Rs. 50 to the learned Counsel on the other side both because these appeals have not been held to be competent and because of the adjournment which has been asked to make up the deficiency. These costs would be irrespective of any final orders as to costs that may be ordered to one party or to the other on the decision of appeals which are now being converted into revisions or what would be converted into revisions if the necessary deficiency in court-fee is made up.

The necessary deficiency may be made up and the costs paid to the other side within a month.

V.V.C.

APPELLATE CIVIL.

Before Mr. Justice Patanjali Sastri.

SEPULCHRE BROTHERS, PROPRIETORS, THE BELGIUM
EAST INDIA TRADING AND ENGINEERING COMPANY,
BOMBAY (DEFENDANTS), PETITIONERS,

1941,
August 8.

v.

SAIT KHUSHAL DAS JAGJIVAN DAS MEHTA,
TRADING IN THE NAME OF MESSRS. J. KHUSHAL DAS AND
COMPANY (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 20, cl. (c)—Jurisdiction
—Receipt of telegram accepting offer—Part of cause of action
—Place of receipt—Suit entertainable by Court having juris-
isdiction over such place.

Though an acceptance of an offer is complete as against the offeror as soon as the letter or telegram containing it is posted or despatched, it is a continuing act until it reaches the person to whom it is communicated and may thus be taken to be made also at the place where it is received. Where an offer is made and accepted through post or telegram, a part of the cause of action arises where the letter or telegram accepting the offer is posted or sent and a part where it is delivered.

Accordingly, a Court exercising jurisdiction over a place where a telegram accepting an order for goods is received has jurisdiction under section 20, clause (c), of the Civil Procedure Code to entertain a suit in respect of that order.

Venkata Reddy v. Nataraja Setti(1) followed.

Evans v. Nicholson(2) applied and followed.

The National Insurance Co., Ltd., Calcutta v. Seethammal(3)
and *Ahmad Bux v. Fazal Karim*(4) distinguished.

* Civil Revision Petition No. 2271 of 1939.

(1) (1924) 46 M.L.J. 371.

(2) (1875) 32 L.T.N.S. 778.

(3) (1933) 65 M.L.J. 455.

(4) I.L.R. [1940] Mad. 195.

SEFULCHRE
BROS.
v.
KHUSHAL DAS.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Bezwada, dated 17th August 1939 and made in Original Suit No. 348 of 1938.

N. Rajagopala Ayyangar for petitioners.

Kasturi Seshagiri Rao for respondent.

Cur. adv. vult.

JUDGMENT.

PATANJALI
SASTRI J.

PATANJALI SASTRI J.—The only question argued in this civil revision petition relates to the jurisdiction of the Court below to entertain the suit. The issue has been found for the plaintiff and the defendant has preferred this revision petition.

The suit was for damages for breach of contract for delivery of certain perforated steel sheets according to specification to the plaintiff who is a merchant trading at Bezwada. The defendants who are carrying on business at Bombay are the representatives of a Belgian firm of steel manufacturers. The plaintiff averred that the defendants broke the contract by failing to deliver the goods and they sued in the District Munsif's Court at Bezwada alleging that their cause of action arose in part at Bezwada. The defendants pleaded *inter alia* that the Court had no jurisdiction to entertain the suit as no part of the cause of action arose at Bezwada. The issue was tried by consent of parties as a preliminary issue and the letters by means of which the contract was concluded have been included in the record. The lower Court took the view that the indent form, which the defendants finally sent to the plaintiff to be duly completed and returned after the specifications and quotations had been exchanged, must be taken to be the offer, and the plaintiff's posting it duly signed

SEFULCHRE
BROS.
v.
KHUSHAL DAS.
—
PATANJALI
SASTRI J.

and completed was the acceptance, and that therefore the contract was concluded at Bezwada. The learned District Munsif was further of opinion that the Court had jurisdiction as the goods were to be received finally at Bezwada *via* Madras.

Mr. Rajagopala Ayyangar, the learned Counsel for the petitioner, urged that the view taken by the learned District Munsif was unsustainable. He contended that the plaintiff's return of the indent form duly completed and signed was merely a customary formality which the defendants required their customers to observe in such cases, and that the contract was really concluded by the defendant's telegram from Bombay accepting the plaintiff's order for the goods at the price quoted by the defendants. Mr. Rajagopala Ayyangar further submitted that the correspondence showed that the contract was on c.i.f. terms and that the shipping documents were to be delivered against payment at Bombay, while the harbour at which the goods were to be unloaded was Madras. The place of delivery, he therefore argued, must be taken to be either Bombay or Madras and not Bezwada. The respondent's learned Counsel, Mr. Seshagiri Rao, did not attempt to repel these contentions but sought to support the decision of the Court below on the ground that, if the telegram was to be treated as the acceptance, its receipt by the plaintiff was a part of the cause of action and, as this was admittedly at Bezwada, the Court below had jurisdiction to entertain the suit under section 20, clause (c), of the Code of Civil Procedure. The decision of RAMESAM J. in *Venkata Reddy v. Nataraja Setti*(1) was cited in support of this contention. After referring

(1) (1924) 46 M.L.J. 371.

SEFULCHER
BROS.
v.
KHUSHAL DAS.
—
PATANJALI
SASTRI J.

to the decisions holding that in suits arising out of contracts a part of the cause of action must be deemed to arise where the letter containing the offer was received, the learned Judge held that the receipt of acceptance when the contract was complete was a part of the contract, "there being no reason why acceptance should be in a worse position than offer". The learned Judge distinguished the case of *Clarke Brothers v. Knowles*(1) by pointing out that it did not appear from the affidavit, on which the application was based, that any letter of acceptance was received at West Hartlepool, and the case in *Kamisetti Subbiah v. Katha Venkatasawmy*(2) by observing that no attempt was made there to support the judgment under appeal on the ground that the letter of acceptance was received in Kurnool.

Mr. Rajagopala Ayyangar urged that this decision should not be accepted as sound because it was opposed to the two later cases decided by Divisional Benches of this Court and reported as *The National Insurance Co., Ltd., Calcutta v. Seethammal*(3) and *Ahmad Bux v. Fazal Karim*(4) in both of which the decision should have been the other way, if *Venkata Reddy v. Nataraja Setti*(5) were to be regarded as good law. In both these cases, which arose out of suits filed on the original side of this Court, it appears no doubt from the statement of facts that the communication of acceptance was received at Madras. But it is to be observed that no point was made of such receipt as being part of the cause of action, and the decision of RAMESAM J. referred to above does not appear to have been brought to the notice of the

(1) [1918] 1 K.B. 128.

(3) (1933) 65 M.L.J. 455.

(2) (1903) I.L.R. 27 Mad. 355.

(4) I.L.R. [1940] Mad. 195.

(5) (1924) 46 M.L.J. 371.

SEFULCHER
BROS.
v.
KHUSHAL DAS.
—
PATANJALI
SASTRI J.

learned Judges who held that the cause of action in each case did not arise in part within the original civil jurisdiction of this Court.

It was also argued that there was no real analogy between the receipt of an offer and the receipt of an acceptance; for, while the former was an essential step in the making of a contract as there could be no acceptance unless the offer was received, the receipt of acceptance was not necessary to complete the contract which was concluded as soon as the letter of acceptance was posted, as settled by a long course of decisions. The argument is not without force, and I should have hesitated to follow the decision of RAMESAM J. if there was nothing more to support it than the analogy of the receipt of an offer on which apparently it was based. But there is authority for the view that, although an acceptance is complete as against the proposer as soon as the letter containing it is posted, it is a continuing act until it reaches the person to whom it is communicated and may thus be taken to be made also at the place where it is received. This was the view taken in *Evans v. Nicholson*(1) which arose out of a motion for a writ of prohibition to the Mayor's Court on the ground that it had no jurisdiction to entertain an action for money due on an account stated, as the whole cause of action did not arise within the City of London. The defendant in that case received out of the City some goods which he had ordered from the plaintiff and in answer to a letter requesting payment of the price wrote that he would remit the amount as requested as soon as possible. This letter was posted at the defendant's place of residence out of the City

(1) (1875) 32 L.T.N.S. 778.

SEPULCHRE
BROS.
v.
KHUSHAL DAS.
—
PATANJALI
SASTRI J.

and was received by the plaintiff at his place of business in the City. It was argued on the analogy of cases relating to acceptance of an offer that the account must be deemed to have been stated out of the City where the defendant's letter was posted, but the Court held that, although a statement of an account was analogous to the acceptance of a contract and it was settled law that a contract was concluded as soon as the acceptance was posted, the statement, like the acceptance, was a continuous act until it reached the person to whom it was communicated and that therefore the defendant's letter was an account stated to the plaintiff at the place where the latter received it, i.e., the City of London. Lord COLERIDGE C.J. observed at page 780 :

"It has been pointed out, indeed, and with perfect truth, that the cases referred to have stopped at this point with laying down as law that a contract is complete when its terms are accepted, and that the acceptor need not wait till the other party receives his letter notifying his acceptance. But, then, that was all that it was necessary to decide in all those cases—*Adams v. Lindsell*(1), *Duncan v. Topham*(2), and *In re Imperial Land Company of Marseilles (Harris's case)* (3); and the Courts there needed not to go on and say whether the acceptance was a continuous act; still, all the reasoning in the cases upon which the judgments are founded, though the judgments themselves are confined to the points necessary to be decided, is applicable to the further proposition which we are now considering, viz., that the acceptance continues to be an act done by the person accepting in a uniform and unbroken course of dealing until it reaches the other person to whom it is notified. And, in my opinion, although complete when he sends it off by post and made then as against him, it is none the less made also when it reaches the mind of the offerer by reason of its having also been made before. This leads me to be unable to distinguish an acceptance so explained

(1) (1818) 1 B. & Ald. 681; 106 E.R. 250.
(2) (1849) 8 C.B. 225; 137 E.R. 495. (3) (1872) L.R. 7 Ch. 587.

SEPULCHRE
BROS.
v.
KHUSHAL DAS.
—
PATANJALI
SASTRI J.

from a statement of an account; and so, to apply the proposition to the facts in this case, I should say that, although an account was undoubtedly stated at Copthorne, wherever that may be, it was none the less stated again when the letter containing the admission was received in the City."

LINDLEY and ARCHIBALD JJ. expressed a similar opinion. DENMAN J., while agreeing that an account must be deemed to be stated where the person to whom it was addressed received the statement, doubted the applicability of the analogy of the posting of the letter of acceptance concluding a contract, to the case of an account stated. He added however :

"But, I do agree, that, if the letter speaks at the moment it is posted, it is in the nature of a continuous statement, and speaks also at the moment when it is received."

It will thus be seen that though the point actually decided related to an account stated, the decision was based on general principles applicable to all contracts, and this has been recognized in Halsbury's Laws of England, Hailsham Edition, Volume VIII, page 191, where this decision among others is cited as an authority for the proposition that, where an offer is made and accepted through post, a part of the cause of action arises where the letter accepting the offer is posted and a part where it is delivered. In this view, a part of the cause of action in the present case must be taken to have arisen at Bezvada where the defendants' telegram accepting the plaintiff's order was received by the plaintiff.

Mr. Rajagopala Ayyangar cited two English cases, viz., *Cowan v. O'Connor*(1) and *Holland v. Bennett*(2) as being in conflict with *Evans v. Nicholson*(3) referred to above. In the former an order to make certain bets was transmitted by postal telegraph by the

(1) (1888) 20 Q.B.D. 640. (2) [1902] 1 K.B. 867.
(3) (1875) 32 L.T.N.S. 778.

SEPULCHRE
BROS.
v.
KHUSHAL DAS.
—
PATANJALI
SASTRI J.

plaintiff residing outside the City of London to the defendant within the City, who telegraphed that the order had been carried out, and it was held that the contract of agency was made in the City and that the action was properly laid in the Lord Mayor's Court as the whole cause of action arose within the jurisdiction of the City. This, however, does not conflict with the view adumbrated in *Evans v. Nicholson*(1) for, as already observed, all that was held in the latter case was that an acceptance must *also* be deemed to have been made where the offerer received it. The fact, therefore, that the contract of agency could also be deemed to have been made at the plaintiff's place of residence without the City of London, did not militate against the exercise of jurisdiction by the Lord Mayor's Court within whose jurisdiction the contract was concluded by the despatch of the defendant's telegram notifying the carrying out of the plaintiff's order.

The case of *Holland v. Bennett*(2) related to an alleged wrongful dismissal of the plaintiff who was employed in England by a letter posted by his employer, the defendant, who was residing abroad. It was held that there was a complete breach of the contract when the letter giving notice of dismissal was posted abroad and that the English Court had no jurisdiction to entertain the action under Order II, rule 1 (e), of the Rules of the Supreme Court which authorized service out of the jurisdiction of a writ of summons in cases, *inter alia*, where the action was "in respect of a breach committed within the jurisdiction of a contract wherever made". The facts were entirely different and the provision under which

(1) (1875) 32 L.T.N.S. 778.

(2) [1902] 1 K.B. 867.

the case was decided did not make the exercise of jurisdiction by the Court depend upon the arising of the cause of action wholly or in part within the jurisdiction. I cannot therefore regard the case as being in conflict with *Evans v. Nicholson*(1).

For the reasons indicated, I hold that the Court below is competent to try the suit and accordingly I dismiss the civil revision petition with costs.

N.S.

SEPULCHRE
BROS.
v.
KHUSHAL DAS.

APPELLATE CIVIL—FULL BENCH.

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

RENGASWAMI AYYANGAR (THIRD DEFENDANT),
APPELLANT,

1941,
September 19.

v.

SIVAPRAKASAM PILLAI AND THREE OTHERS (PLAIN-
TIF AND NIL), RESPONDENTS.*

*Indian Limitation Act (IX of 1908), ss. 20 and 21—Hindu law—
Debt—Loan incurred by Hindu father and his youngest son
for family purpose—Death of father—Subsequent partition
between sons—Under partition, debt agreed to be discharged
by youngest son—Payment of interest by him thereafter—
Period of limitation not extended against his brothers by such
payment.*

A Hindu joint family consisted of a father and three sons. On 12th March 1925 the father and his youngest son executed a promissory note in respect of a debt incurred for a family necessity. The father died on 25th March 1925. Payments

(1) (1875) 32 L.T.N.S. 778.

* Second Appeal No. 993 of 1937.

RENGASWAMI
v.
SIVAPRAKASAM.

towards interest were made subsequently by the youngest son on behalf of himself and his brothers. On 13th June 1930 the sons entered into a partition and it was then agreed that the youngest son alone should be responsible for the repayment of the debt due on the promissory note. On 16th June 1933 the youngest son made a payment towards interest and endorsed on the promissory note the fact of his payment. On 24th July 1933 a suit was instituted against the youngest son and his brothers for the balance due on the promissory note, the suit being on the debt as well as on the instrument. The lower Court held that the payment of interest by the youngest son on 16th June 1933 operated to extend the period of limitation against his brothers as well as against himself and granted a decree against him personally and against his brothers limited to their shares in the family property. On appeal,

held by the Full Bench : The payment by the youngest son on 16th June 1933 did not keep the debt alive against his brothers. The youngest son was not the authorized agent of his brothers and his payment could not bind them.

After partition one member of a Hindu family cannot bind another by what he does alone and a part-payment of principal or interest by one member cannot affect the others so as to extend the period of limitation against them under section 20 of the Limitation Act.

Pangudaya v. Uthandiya(1) approved.

Edangapurandar v. Narasimhachariar(2) and *Lakshmi Naidu v. Gunnamma*(3) referred to.

APPEAL against the decree of the Court of the Subordinate Judge of Mayavaram in Appeal Suit No. 36 of 1937 (Appeal Suit No. 139 of 1935, District Court, Negapatam) presented against the decree of the Court of the District Munsif of Shiyali in Original Suit No. 142 of 1935.

N. R. Sesha Ayyar for appellant.—Payment of interest by one brother after partition does not save limitation as against the other brothers. The brothers are not in the position of co-heirs in regard to their father's debt. The brothers

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

(2) I.L.R. [1939] Mad. 140.

(3) (1934) I.L.R. 58 Mad. 418.

remained joint and undivided even after their father's death and it was only later that they became separated. Properties were taken by them by survivorship and not by inheritance from their father and the view of the Subordinate Judge that they were co-heirs is not correct. Though even in regard to co-heirs it has been held by the Calcutta and Allahabad High Courts that one co-heir cannot bind another by his payment and cannot extend limitation against the other under section 20 of the Indian Limitation Act by such payment, the Madras High Court has always taken a different view. In the case of Hindu undivided families, however, it is the manager that can make payments binding on the members of the family for purposes of limitation; see *Chinnaya v. Gurunatham*(1). No other member has power to make payments for saving limitation unless specially authorized in that behalf. Section 21 (3) (b) of the Limitation Act makes this clear. If that is the position with regard to payments made before partition, the case is *a fortiori* regarding payments after partition. Even a manager cannot make payments after partition so as to extend limitation against the other members of the family. The managership comes to an end on partition and authority to act on behalf of the other members ceases thereafter; see *Rama Vadhyar v. Manian Vadhyar*(2) and *Pangudaya v. Uthandiya*(3). In the present case the suit debt was allotted on partition to the youngest brother and he undertook to discharge it himself. Payments made by him after such partition can in no sense be considered to have been made on behalf of the others.

The decision in *Pangudaya v. Uthandiya*(3) has been distinguished in *Edangapurandar v. Narasimhachariar*(4). On the facts of this latter case it would appear that the father died possessed of separate property also, which was inherited by his sons. To that extent the sons stood in the position of co-heirs and payment by any one of them could operate to keep the debt alive against the others. But the learned Judge, in *Edangapurandar v. Narasimhachariar*(4) go further and say that the case in *Pangudaya v. Uthandiya*(3) is distinguishable on the ground that no question of pious

(1) (1882) I.L.R. 5 Mad. 169 (F.B.).

(2) (1937) 45 L.W. 767.

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

(4) I.L.R. [1939] Mad. 140.

RENGASWAMI
v.
SIVAPRAKASAM.

obligation under Hindu law arises there. This distinction is not material. The fact that the sons' liability arises under the rule of pious obligation in Hindu law does not enable one of them to make payments on behalf of the others under section 20 of the Limitation Act. The liability of the sons is based purely on their personal relationship to the father and their liability is not a joint liability in the sense in which the term is understood in English law; see *Narayanan v. Veerappa*(1). Each son's liability is distinct from that of the other and arises from the fact of his being the son of his father. There is no scope for applying section 20 of the Limitation Act to such a liability except when payments are made by or under authority from the person sought to be affected. Each son therefore, when he makes a payment, saves limitation in regard to his individual liability only.

S. Sankara Ayyar for respondents 3 and 4.—The debt is kept alive against the appellant also by reason of the payments made by his youngest brother. Under section 20 of the Limitation Act payment by a person liable keeps the debt alive as regards all persons liable for that debt. There is considerable difference between section 19 and section 20 of the Act. The true principle underlying section 20 is that, where there is a plurality of persons liable for a debt, who do not fall within the description of persons mentioned in section 21, payment towards the debt by any one of them saves the right of suit against all in respect thereof; see *Lakshmi Naidu v. Gunnamma*(2). The applicability of section 20 does not depend necessarily on any question of agency or representation, express or implied. Nor is it confined to liabilities arising under contract only. It applies to other kinds of obligations as well. In *Veloyudam Pillai v. Vaithialingam Pillai*(3) it was applied in respect of the liability of a universal donee to discharge the debt of his donor. It was held in that case that payment of interest by the donor subsequent to the gift kept the debt alive against the donee also. Section 20 was applied there even though the case was not one of joint liability.

The liability of the sons of a Hindu father under the rule of pious obligation to discharge the debts of their father may

(1) (1916) I.L.R. 40 Mad. 581. (2) (1934) I.L.R. 58 Mad. 418, 422.
(3) (1912) 24 M.L.J. 66.

not be a joint liability in the strict sense of that term as known to English law. Section 20 is nevertheless applicable because the liability is a liability of all of them together in respect of the same debt, namely, the debt of their father and section 21 has no application to the case; see *Lokanadha v. Lokhono*(1). The decision in *Edangapurandar v. Narasimhachariar*(2) is a direct authority in support of the contesting respondents. The decision was given on facts similar to the facts here and no point was made in the case that separate property was left by the father. The decision in *Pangudaya v. Uthandiya*(3) is distinguishable because it proceeded on a consideration of the scope and effect of section 21 (3) (b) of the Limitation Act which has no application to the present case.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by LEACH C.J.—The question which falls for decision in this appeal is whether a payment made after partition by a member of a Hindu family of interest due on a promissory note which was executed by the managing member when the family was joint starts a fresh period of limitation against the other members of the family, the payment having been duly acknowledged by the person who made it. There are conflicting decisions of this Court and it is for this reason that this appeal has been placed before a Full Bench for decision.

LEACH C.J.

The facts present no complication. On 12th March 1925 the appellant's father, one Thiruvenkatachariar, and his youngest son, Srinivasachariar, executed a promissory note for Rs. 2,384 in favour of one Gnanambal Achi. Thiruvenkatachariar had three sons and at the time of the execution of the promissory note the family was joint. It is common ground that the debt was incurred for a family necessity. On 25th

(1) A.I.R. 1930 Mad. 738. (2) I.L.R. [1939] Mad. 140.
(3) I.L.R. [1938] Mad. 968.

RENGASWAMI
v.
SIVAPRAKASAM.
LEACH C.J.

March 1925 the father died. Payments towards interest were made subsequently by Srinivasachariar on behalf of himself and his brothers. On 13th June 1930 the brothers separated. It was then agreed between them that Srinivasachariar should be responsible for the repayment of the debt due on this promissory note. In deciding what properties should be taken by Srinivasachariar as his share due allowance was made for his obligation to discharge the debt. On 10th June 1933 Srinivasachariar paid a sum of Rs. 55 on account of interest due on the promissory note and made an endorsement on it recording the fact that he had made the payment. On 24th July 1935 the first respondent, who has died during the pendency of the appeal and is now represented by the second respondent, instituted in the Court of the District Munsif of Shiyali the present suit to recover the balance due on the promissory note, it having been bequeathed to him by his mother in her will. All the sons of Thiruvengkatachariar were made defendants. The District Munsif held that the payment made by Srinivasachariar operated to extend the period of limitation against his brothers as well as against himself. Accordingly he granted a personal decree against Srinivasachariar as an executant of the promissory note and a decree against his brothers limited to their shares in the family properties. The appellant appealed to the Subordinate Judge of Mayavaram, who concurred in the judgment of the District Munsif and consequently dismissed the appeal. The present appeal is from the decree passed by the Subordinate Judge. The plaint has not been printed but it has been accepted for the purpose of the appeal that the plaintiff sued on the debt as well as on the instrument.

A payment of interest made by the person liable to pay the debt or by his agent duly authorized in this behalf extends the period of limitation, provided that an acknowledgment of the payment appears in the handwriting of or in a writing signed by the person making it. This is one of the provisions of section 20 of the Limitation Act. Sub-section 2 of section 21, however, says that nothing in section 20 renders one of several joint contractors, partners, executors or mortgagees chargeable by a payment made by one of them or his agent, and clause (b) of sub-section 3 of section 21 makes it clear that, where a liability is incurred by, or on behalf of, a Hindu undivided family, only the manager of the family or his duly authorized agent can make a payment which will have the effect of extending the time against all the members of the family. This clause was inserted by the Indian Limitation (Amendment) Act, 1927. As long ago as 1882 this Court held that the manager of a Hindu family had the same authority to acknowledge as he had to create debts, but without special authority he could not revive a claim against the family already time-barred; see *Chinnaya v. Gurunatham*(1). Some other High Courts did not share the opinion that the manager could acknowledge liability and the amendment was made in order to put an end to the controversy.

Now, it is manifest that, in making the payment of Rs. 55 on 10th June 1933, Srinivasachariar was not acting as the agent of his brothers. They had divided and, as already indicated, in allocating the shares of the three members in the assets and the liabilities of the family it was stipulated that

(1) (1882) I.L.R. 5 Mad. 169 (F.B.).

RENGASWAMI
v.
SIVAPRAKASAM.
LEACH C.J.

Srinivasachariar alone should be responsible for the payment of the debt in suit. The arrangement between the brothers could not, of course, affect the rights of the holder of the promissory note, but it makes it impossible to contend that Srinivasachariar was acting as the agent of his brothers when he paid the Rs. 55. Srinivasachariar was never the manager of the family although, until the partition took place, it would be legitimate to regard interest payments made by him as having been made under the authority of his eldest brother on whom devolved the managership of the family on the death of the father. The provision of law embodied in section 21 (3) (b) of the Limitation Act is an important factor in this case. While the family remains united, only the manager or his duly authorized agent can extend the period of limitation against the family. After partition there is no manager and therefore no one who can extend the period of limitation in respect of a family debt so as to affect the erstwhile members.

Before proceeding to examine the reported decisions of this Court which have bearing on the question to be decided, it will be useful to inquire into the nature of the liability of a Hindu son to pay his father's debts and of a member of a joint family in respect of a family debt. In *Narayanan v. Veerappa*(1) AYLING and SRINIVASA AYYANGAR JJ. observed:

"The liability of a Hindu son to pay the debts of his father not being illegal or immoral (*Avyavaharika*) has been developed by judicial decisions from his pious obligation to save the father from sin, as laid down by the Hindu law texts. This liability as now developed is certainly not a joint liability, nor a joint and several liability as ordinarily understood in English law; in fact it is difficult to bring it under

(1) (1916) I.L.R. 40 Mad. 581.

any particular legal category of the English law. In *Ramasami Nadan v. Ulaganatha Goundan*(1) which for the first time settled that the son could also be joined with the father in a suit to recover the father's debt, Sir V. Bhashyam Ayyangar, in his interesting argument, repeatedly admitted that the son was not jointly liable with the father. In his judgment in the Full Bench case, *Periasami Mudaliar v. Seetharama Chettiar*(2), BHASHYAM AYYANGAR J. treats it as settled law that the son could not be sued alone, during his father's lifetime for recovery of a debt due by the father, though the father can be sued alone without the son. It is also settled that after the father's death a suit can be instituted on the original cause of action though judgment had been recovered against the father. These positions show clearly that a Hindu son is not jointly bound with his father."

With these observations we are in full agreement. The son's liability under the pious obligation rule in no sense arises out of contract. His liability arises solely from the fact that he is the son of his father and his personal law regards it as being right and proper that he should pay his father's debts. His liability is personal to himself. This does not mean that he is personally responsible in the ordinary acceptance of the expression of personal liability but that the obligation devolves upon him by reason of his relationship. The position is no different when he has brothers. Each is similarly but separately liable. The position of a member of a joint family with regard to a debt binding on the family is very much the same. His liability arises from the fact that he is a member of the family, and the fact that it is limited to his individual share in the family properties emphasizes the personal nature of the liability. Therefore, in deciding whether after partition one brother can extend the liability of his brothers in respect of a debt incurred by the family before partition, the law of joint liability

(1) (1898) I.L.R. 22 Mad. 49 (F.B.). (2) (1903) I.L.R. 27 Mad. 243 (F.B.).

RENGASWAMI
v.
SIVAPRAKASAM.
LEACH C.J.

RENGASWAMI
v.
SIVAPRAKASAM.
LEACH C.J.

as understood in England is of no help. Regard can only be had to Hindu conception of liability arising out of relationship.

Turning now to the reported decisions, the judgment on which the appellant most strongly relies is that delivered by STODART J. in *Pangudaya v. Uthandiya*(1) in which MADHAVAN NAIR J. concurred. There a joint Hindu family consisted of three brothers the eldest of whom as the manager of the family executed in 1919 a promissory note in favour of the plaintiff. In the following year the brothers separated. After the partition the eldest brother made four payments of interest the last of which was on 5th March 1930. All the payments were endorsed on the promissory note. The suit was filed in 1931. The Court held that, even if the loan was contracted for the benefit of the family, the eldest brother could not after partition by making payments towards the loan and placing them on record as required by section 20 of the Indian Limitation Act keep the debt alive against his brothers. The learned Judges were of the opinion that the brothers were not co-debtors in the sense that one member by making a part-payment could keep the debt alive against the others. It was pointed out that, if one brother could extend the period of limitation against the others, there would have been no necessity for the Legislature to enact section 21 (3) (b).

For the respondent equal stress is laid on the decision of BURN and LAKSHMANA RAO JJ. in *Edangapurandar v. Narasimhachariar*(2). In that case the facts were these. A Hindu father executed a promissory note in 1918 which he kept alive by payments of

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

(2) I.L.R. [1939] Mad. 140.

interest. The last payment was made by him on 6th August 1921 and the fact of payment was endorsed on the promissory note. The father died in 1922, being survived by three sons. In February 1924 one of the sons, the first defendant in the suit, was converted to Islam which meant the separation of the family. On 5th August 1924 one of his brothers, the second defendant, paid Rs. 25 towards the debt and endorsed the fact of payment on the promissory note. On 4th August 1930 the suit was filed. The Court held that the payment of 5th August 1924 kept the note alive as against all the brothers. The basis of the decision was that all the sons were liable under the pious obligation rule. The Court distinguished the decision *Pangudaya v. Uthandiya*(1) on the ground that in that case the pious obligation rule had no bearing but the learned Judges overlooked the fact that the rule only creates a personal liability based on sonship. Whether a co-heir can bind his co-heirs may be another matter, but in the present case the Court is not concerned with the position of co-heirs. It is only concerned with the position of divided brothers in respect of a debt which was created for family purposes before partition.

The appellant also relies on *Rama Vadhyar v. Manian Vadhyar*(2) and the respondent on *Lokanadha v. Lokhono*(3). In the former case BEASLEY C.J., sitting alone, held that, where the manager of a joint Hindu family executes a promissory note for money required for a family necessity, a payment by the son who becomes the manager on his death does not save limitation against another son when the payment is made after partition. The learned Chief

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

(2) (1937) 45 L.W. 767.

(3) A.I.R. 1930 Mad. 738.

RENGASWAMI
v.
SIVAPRAKASAM.
LEACH C.J.

Justice pointed out that after a partition there is no undivided family and therefore no managing member of it and, unless there is authority to acknowledge the debt or make a part-payment, the other members of the family will not be bound by the acknowledgment or part-payment of one member alone. In *Lokanadha v. Lokhono*(1) CURGENVEN J., also sitting alone, held that payment of interest made by some of the descendants of a deceased mortgagor binds the other descendants even though they became divided from the family before the payment was made. The learned Judge considered that section 21 (2) could not save them because it did not relate to "co-heirs" and other persons who are liable by reason of their personal law and not from direct contract with the promisee. This view of section 21 (2) is obviously right, but it does not follow from this that after partition one member of a Hindu family can bind another member by what he does alone.

The learned Advocate for the respondent also referred to the decision of VARADACHARIAR and BURN JJ. in *Lakshmi Naidu v. Gunnamma*(2), but that case has very little bearing here. The facts there were these. A joint family consisted of two brothers both of whom were parties to a deed of mortgage of immovable property belonging to the family. A part-payment of interest due on the mortgage was made by the brother who was the managing member of the family. The payment was acknowledged by an endorsement on the deed, but this was only signed by the managing member. The mortgagee brought a suit to enforce payment of the loan. The question was whether the part-payment of interest by the managing member

would save limitation against the other brother. It was held that on the evidence it could be inferred that in making the payment the managing member was acting as the agent of his brother. The learned Judges did not consider it necessary in such circumstances to adjudicate on the contention which was raised that in the case of joint mortgagors payment by one cannot save limitation as against the co-mortgagors or their interests in the mortgaged property.

We consider that *Pangudaya v. Uthandiya*(1) was rightly decided and should be followed here. In the present case the sons were not parties to the instrument and before the partition their liability in respect of the debt which it represented could only be extended by the managing member. *A fortiori* after partition, when there was no managing member, a part-payment of principal or interest by one could not affect the others. From the beginning the liability of the sons was an individual liability, whether considered in connection with the pious obligation rule or in connection with membership of the family. It is not suggested that the plaintiff could call in aid the pious obligation rule in order to make the appellant liable and partition prevented even the erstwhile managing member extending the period of limitation against his brothers. In these circumstances the payment made by Srinivasachariar on 10th June 1933 could only bind his brothers if he was acting as their authorized agent, which clearly he was not. Therefore his action left them unaffected.

For these reasons we allow the appeal with costs throughout.

N.S.

(1) A.I.R. 1930 Mad. 738.

(2) (1934) I.L.R. 58 Mad. 418.

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

APPELLATE CIVIL—FULL BENCH.

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

1941,
September 17.

SREEMAT PRATIVADHI BHAYANKARAM VENKATA
NARASIMHACHARYULU (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL REPRESENTED BY THE COLLECTOR OF
KISTNA AT MASULIPATAM AND FOUR OTHERS
(DEFENDANTS), RESPONDENTS.*

Limitation—Madras Revenue Recovery Act (II of 1864), sec. 38
—Confirmation by Deputy Collector of revenue sale under—
Application to Collector under cl. 3 (3) of Regulation VII
of 1828—Final order by Collector—Madras Revenue
Recovery Act (II of 1864), sec. 59—Six months' period for
application to civil Court for redress to be computed from
date of final order by Collector and not from the date of
confirmation of sale by Deputy Collector.

Held: In a case where an application had been made to the Collector under clause 3 (3) of the Madras Regulation VII of 1828, the period of six months allowed in section 59 of the Madras Revenue Recovery Act to an aggrieved party for applying to the civil Court for redress must be computed from the date when the Collector passed his final order under the Regulation and not from the date when the Deputy Collector confirmed the revenue sale under section 38 of the Revenue Recovery Act.

Chinnammal Achi v. Saminatha Malavarayan(1) overruled.
Baijnath Sahai v. Ramgut Singh(2) and *Muthu Korakkai Chetty v. Madar Ammal*(3) followed.

APPEAL under clause 15 of the Letters Patent against the judgment and decree of VENKATARAMANA RAO J.

* Letters Patent Appeal No. 25 of 1940.

(1) (1907) I.L.R. 30 Mad. 367. (2) (1896) I.L.R. 23 Cal. 775 (P.C.).
(3) (1919) I.L.R. 43 Mad. 185 (F.B.).

dated 15th March 1940 and passed in Second Appeal No. 196 of 1937 preferred to the High Court against the decree of the Court of the Subordinate Judge of Masulipatam in Appeal Suit No. 71 of 1936 preferred against the decree of the Court of the District Munsif of Gudivada in Original Suit No. 267 of 1933.

ON THE REFERENCE :—

K. V. Rangachari for appellant.—If there is an application to the Collector to have the sale set aside then the limitation for proceedings in the civil Court begins to run from the date of the final order of the Collector. If there is no such application, then the limitation starts from the date of the final order of the Deputy Collector. Though *Chinnammal Achi v. Saminatha Malavarayan*(1) was decided long after the Privy Council decision in *Baijnath Sahai v. Ramgut Singh*(2) there is no reference in it to the Privy Council decision which supports the appellant's submission. It also conflicts with the Full Bench decision in *Muthu Korakkai Chetty v. Madar Ammal*(3) which follows the Privy Council decision.

Government Pleader (K. Kuttikrishna Menon) for first respondent.—The Privy Council had to consider the meaning of the words "when the sale became absolute" and not the words "when the cause of action arose". In a later case, *Juscurn Boid v. Pirthichand Lal Choudhury*(4), the Privy Council had to construe words similar to the one which the Full Bench has to decide now and the Privy Council held that the cause of action started from the date of the original decree and not from the date of the appellate decree. Following this decision the limitation should be held to start from the date of final decision of the Deputy Collector and not from that of the Collector.

P. Somasundaram and *P. Satyanarayana* for other respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by
LEACH C.J.—The substantial question in this appeal

VENKATA
NARASIMHA-
CHARYULU
v.
SECRETARY
OF STATE
FOR INDIA.

LEACH C.J.

(1) (1907) I.L.R. 30 Mad. 367. (2) (1896) I.L.R. 23 Cal. 775 (P.C.).
(3) (1919) I.L.R. 43 Mad. 185 (F.B.). (4) (1918) I.L.R. 46 Cal. 670 (P.C.).

VENKATA
NARASIMHA-
CHARYULU
v.
SECRETARY
OF STATE
FOR INDIA.
LEACH C.J.

is whether *Chinnammal Achi v. Saminatha Malavarayan*(1) was rightly decided by this Court. The appellant contends that the decision conflicts with the judgment of the Privy Council in *Baijnath Sahai v. Ramgut Singh*(2) and therefore cannot be allowed to stand.

The appellant instituted a suit in the Court of the District Munsif of Gudivada for a decree setting aside a sale of immovable property which had taken place under the provisions of the Madras Revenue Recovery Act. The allegation was that the fourth defendant had by fraud secured the order for the sale of the property. The sale took place on 18th July 1932 and was confirmed by the Deputy Collector on 28th September 1932. The appellant discovered the fraud on 15th November 1932 and three days later applied to the Collector for an order setting aside the sale. By an order dated 30th June 1933 the Collector refused to interfere and consequently on 18th July 1933 the appellant filed the present suit.

Section 59 of the Act allows an aggrieved party to apply to the civil Court for redress, subject to the proviso that the suit is instituted within six months "from the time at which the cause of action arose". Clause 3 (3) of Madras Regulation VII of 1828 gives full power to the Collector to confirm, modify or annul an order passed by a subordinate or assistant and to pass any further order in the case as he may see fit. Parts of the Regulation have been repealed, but this provision is still in force, and it is common ground that it conferred upon the Collector power to confirm or annul the order of sale which was passed by the Deputy Collector on 18th July 1932 in respect of the

(1) (1907) I.L.R. 30 Mad. 367.

(2) (1896) I.L.R. 23 Cal. 775 (P.C.).

VENKATA
NARASIMHA-
CHARYULU
v.
SECRETARY
OF STATE
FOR INDIA.
LEACH C.J.

land in suit. The order of the Deputy Collector confirming the sale was passed in pursuance of the authority given to him by section 38 of the Revenue Recovery Act which directs confirmation on the expiration of thirty days from the date of the sale if no application for an order setting aside the sale has been made. If such an application has been filed, the question of confirmation of the sale remains in abeyance until the application has been decided. The fact that a Subordinate Collector has confirmed the sale does not, however, prevent an aggrieved party from taking advantage of clause 3 (3) of the Regulation of 1828 and in case of fraud he has thirty days from the discovery of the fraud in which to apply to the Collector for redress. Section 18 of the Limitation Act specifically provides that where a person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of his right or of the title on which it is founded, the time limited for instituting a suit or making an application shall be computed from the time when the fraud first became known to him.

The District Munsif held that the sale in question was not fraudulent and that the suit was barred by the law of limitation. On appeal the Subordinate Judge of Masulipatam held that fraud had been proved, but he agreed with the District Munsif that the suit was time barred. The appellant then appealed to this Court. The appeal was heard by VENKATA-RAMANA RAO J. who feeling himself bound by the decision in *Chinnammal Achi v. Saminatha Malavarayan*(1) dismissed it, but granted a certificate under the provisions of clause 15 of the Letters Patent. In

(1) (1907) I.L.R. 30 Mad. 367.

VENKATA
NARASIMHA-
CHARYULU
v.
SECRETARY
OF STATE
FOR INDIA.
LEACH C.J.

the course of his judgment the learned Judge clearly indicated that in his opinion *Chinnammal Achi v. Saminatha Malavarayan*(1) conflicts with *Bajinath Sahai v. Ramgut Singh*(2), but as *Chinnammal Achi v. Saminatha Malavarayan*(1) has been decided some years after the decision in *Bajinath Sahai v. Ramgut Singh*(2) he felt that he could not ignore it.

In *Chinnammal Achi v. Saminatha Malavarayan*(1) certain lands were sold on 10th July 1901 under the provisions of the Madras Revenue Recovery Act for arrears of revenue. The sale was confirmed by the Head Assistant Collector on 28th September 1901. The plaintiffs petitioned the Collector under Regulation VII of 1828 without success, their petition being rejected by an order dated 10th May 1902. On 9th July 1902 they filed the suit out of which the appeal arose. The appeal was heard by BENSON and MILLER JJ. who held that the period of six months allowed for a suit to set aside a sale under section 59 of the Madras Revenue Recovery Act must be calculated from the date when the sale is confirmed and not from the date when the Collector on revision under Regulation VII of 1828 passes his final order. The learned Judge observed :

"In *Sabapathy Chetty v. Rengappa Naickan*(3) it was decided in effect that the sale is incomplete until confirmed, but that case gives no support to the contention that a sale is incomplete until the Collector decides whether or not to revise the order of the officer confirming the sale."

They did not, however, make any reference to the judgment of the Privy Council in *Bajinath Sahai v. Ramgut Singh*(2). Presumably it was not brought to their notice.

(1) (1907) I.L.R. 30 Mad. 367.

(2) (1896) I.L.R. 23 Cal. 775 (P.C.).

(3) (1902) I.L.R. 26 Mad. 495.

The appeal in *Bajinath Sahai v. Ramgut Singh*(1) was from a judgment of the Calcutta High Court and had reference to the provisions of the Public Demands Recovery Act (Bengal Act VII of 1880). In 1882 the Collector sold, for arrears of road cess and public works cess, lands belonging to the plaintiffs. On 25th January 1884 the Commissioner confirmed the sale, but on 12th August 1884 the sale was set aside by the Board of Revenue at the instance of the plaintiffs. In 1886 the Board of Revenue had occasion to review its order of 12th August 1884 and by an order, dated 21st August 1886, confirmed the sale. In July 1887 the plaintiffs instituted their suit and the question was whether it had been filed in time. The Judicial Committee held that it was in time as the cause of action did not arise until the Board of Revenue passed its order of 21st August 1886 confirming the sale. Lord DAVEY in delivering the judgment of the Board said :

"Their Lordships are of opinion that there was no final, conclusive and definite order confirming the sale, while the question whether the sale should be confirmed was in litigation or until the order of the Commissioner of the 25th January 1884 became definitive and operative by the final judgment of the Board of Revenue on the 21st August 1886, or (in other words) that for the purpose of the law of limitation there was no final or definitive confirmation of the sale until that date.

In fact, their Lordships are of opinion that there was not during the period which had elapsed between the date of the sale and the 21st of August 1886 any sale to set aside which a suit could have been brought by the present appellant and respondents. Therefore their Lordships are of opinion that the confirmation dates only from August 1886 and that the law of limitation is not a defence to this action."

(1) (1896) I.L.R. 23 Cal. 775 (P.C.).

VENKATA
NARASIMHA-
CHARYULU
v.
SECRETARY
OF STATE
FOR INDIA.
LEACH C.J.

VENKATA
NARASIMHA-
CHARYULU
v.
SECRETARY
OF STATE
FOR INDIA.
LEACH C.J.

Their Lordships here indicate in words which leave no room for doubt that until the final order has been passed no suit lies, which means that time only begins to run from the date of the passing of the final order.

The decision in *Chinnammal Achi v. Saminatha Malavarayan*(1) undoubtedly conflicts with the judgment of the Judicial Committee in the case just referred to and therefore cannot be allowed to stand. It is also in conflict with the decision of this Court in *Muthu Korakkai Chetty v. Madar Ammal*(2) which was decided by a Full Bench of five judges. There a court sale was confirmed without opposition on 26th April 1913, but on 3rd January 1914 an application for an order setting aside the sale was filed, fraud being alleged. The sale was set aside on 25th June 1915 as to part of the properties sold. On 17th February 1917 the auction purchaser applied for delivery of the remaining properties. The Full Bench held that the application was not barred under article 180 of the Limitation Act as time should be computed from the date of the order disallowing the petition asking for the setting aside of the sale and not from the date of the first order of confirmation. Article 180 fixes the period of limitation for an application by a purchaser of immovable property at a sale in execution of a decree for delivery of possession at three years from the date when the sale becomes absolute, and it was held that the sale did not become absolute until the application for an order setting it aside had been dismissed.

We consider that the present case is governed by the decision of the Privy Council in *Baijnath Sahai v. Ramgut Singh*(3). The appellant filed his

(1) (1907) I.L.R. 30 Mad. 367.

(2) (1919) I.L.R. 43 Mad. 185 (F.B.).

(3) (1896) I.L.R. 23 Cal. 775 (P.C.).

VENKATA
NARASIMHA-
CHARYULU
v.
SECRETARY
OF STATE
FOR INDIA.

application to the Collector under clause 3 of Regulation VII of 1828 in time and until that application had been decided the sale was not finally confirmed. The result is that the appeal will be allowed and the appellant's suit decreed with costs throughout.

G.R.

APPELLATE CIVIL—FULL BENCH.

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

HAMIDGANI AMMAL (ONE OF THE LEGAL REPRESENTATIVES OF THE DECEASED FIRST RESPONDENT) (PLAINTIFF), APPELLANT,

v.

AMMASAHIB AMMAL AND FOUR OTHERS (DEFENDANTS 1 AND 3 AND LEGAL REPRESENTATIVES OF FOURTH DEFENDANT), RESPONDENTS.*

Code of Civil Procedure (V of 1908) sec. 47—Scope of—Decree in suit for specific performance—Execution proceedings—Legal representative brought on record—Independent title to suit property—Not to claim in those proceedings—Separate suit lies.

In a suit for specific performance of an agreement to sell certain lands, filed by the purchaser against the vendor who had failed to execute a conveyance, a decree was granted to the plaintiff. But before it could be executed the vendor died and the appellant was made a party as his legal representative. In the course of execution proceedings, but before the conveyance was eventually executed by the Court, the appellant instituted a suit to establish her independent title to the property and the purchaser challenged her right to file the suit on the ground that her claim should have been

* Second Appeal No. 305 of 1938.

1941,
August 25.

HAMIDGAN
v.
ANIMASATH.

decided in the execution proceedings and that the suit was barred by reason of the provisions of section 47, Civil Procedure Code.

Held : that the appellant who was not a party to the suit, but who was brought into Court in execution proceedings as the legal representative of the deceased party, could not in those proceedings challenge the decree and that she could establish her right by a separate suit.

Kuriyali v. Mayan(1) overruled.

Kumaretta Servaigaran v. Sabapathy Chettiar(2), *Zamindar of Karvetnagar v. Trustee of Tirumalai Tirupati, etc., Devasthanams*(3), *Kelu Achan v. Parasu Pattar*(4) and *Lakshmadu v. Ramudu*(5) approved.

APPEAL against the decree of the Court of the Subordinate Judge of Tiruvarur in Appeal Suit No. 55 of 1936 preferred against the decree of the Court of the District Munsif of Tiruturaipundi in Original Suit No. 39 of 1935.

This Appeal at first came on for hearing before ABDUR RAHMAN J. who, in view of certain conflicting decisions, directed that the papers be placed before the Chief Justice for orders as to being posted before a Bench.

The case then came on for hearing before the Full Bench constituted as above.

K. V. Ramachandra Ayyar for appellant.—The appellant was not a party to the suit for specific performance. As a matter of fact she wanted to be impleaded as a party but the Court decided that she was neither a necessary nor a proper party to the suit. The suit for specific performance was instituted by a purchaser of immovable property against the vendor when he failed to execute a conveyance as per the agreement between them. A decree was passed but before it could be executed the vendor died. The appellant was then brought on record as his legal representative in

(1) (1883) I.L.R. 7 Mad. 255. (2) (1906) I.L.R. 30 Mad. 26.
(3) (1909) I.L.R. 32 Mad. 429. (4) (1916) 5 L.W. 158.
(5) I.L.R. [1940] Mad. 123.

HAMIDGAN
v.
ANIMASATH.

the execution proceedings. Eventually the Court executed a conveyance in favour of the plaintiff. While the execution proceedings were pending and before the conveyance was executed, the appellant filed a separate suit to establish her title to the suit property. The purchaser objected to the institution of the suit on the ground that the appellant ought to have established her right in the execution proceedings of the first suit and that, having failed to do it then, her right was barred under section 47 of the Civil Procedure Code. Both the Courts below upheld the objection and dismissed the suit of the appellant. Their decisions are wrong. No doubt there are some decisions of this High Court to support that view. [*Kuriyali v. Mayan*(1), *Chinnathayee v. Lakshmi Achi*(2), *Peer Bathummam Beevi v. Nagur Meerammam Beevi*(3) and *Govindarajulu v. Chinnathambi*(4) were referred to.]

The appellant was not a party to the suit. She was brought on record in the execution proceedings as a legal representative of the deceased party. She could not put forward a claim which is inconsistent with her character as a legal representative. She could not attack the decree for specific performance passed against the vendor of the property though independently in her own right she could claim a right to that property. In execution proceedings under section 47, Civil Procedure Code, she cannot establish her paramount title to the property as it does not relate to the execution, discharge or satisfaction of the decree. Though she was brought on record as the legal representative of the deceased, she was not a party to the suit, so section 47 of the Code of Civil Procedure is no bar to the filing of a separate suit by her to establish her independent right to the suit property. The decree in a suit for specific performance stands more or less on the same footing as that of a decree for sale in a mortgage suit. A legal representative brought on record in execution proceedings cannot attack the decree. If he has got any independent title to the property it has to be established by a separate suit. There are some decisions of this High Court relating to mortgage suits which favour this view and it is submitted that they are correct and apply to the present case.

(1) (1883) I.L.R. 7 Mad. 255. (2) (1936) 71 M.L.J. 511.
(3) (1936) 71 M.L.J. 725. (4) A.I.R. 1928 Mad. 1270.

HAMIDGANI
v.
AMMASAHIB.

[*Kumaretta Servaigaran v. Sabapathy Chettiar*(1), *Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc., Devasthanams*(2), *Kelu Achan v. Parasu Pattar*(3), *Lakshmadu v. Ramudu*(4) and *Lloyds Bank, Ltd., Lahore v. Mst. Rehmat Bibi*(5) were referred to.]

The decisions cited in *Kuriyali v. Mayan*(6) with approval are all cases of money decrees. In the case of a decree for money, where the judgment-debtor dies, his representative is entitled to oppose the execution of the decree against any particular property by showing that property was not the property of the judgment-debtor and was the property of the representative as, for example, that it was his self-acquired property. The reason is that there is no adjudication that the property which was subsequently brought to sale in execution of a money decree was the property of the judgment-debtor. So when any objection is taken by the representative as to the paramount title to the property it should be decided by the Court in execution proceedings. But in a mortgage suit where there is a decree for sale of the property, the executing Court must sell the property decreed and refer the person who objects to the sale of the property to a separate suit. Not so in the case of a mortgage decree or in the case of decree for specific performance wherein different considerations arise. This was pointed out in *Kumaretta Servaigaran v. Sabapathy Chettiar*(1) and in some of the later cases which took the same view.

P. V. Rajamannar and *R. Sundaralingam* for third and fourth respondents.—The appellant failed to put forward her claim of paramount title in the execution proceedings. She was precluded from raising it in a separate suit. Section 47, Civil Procedure Code, is a bar to such a suit [sections 47 and 50, Civil Procedure Code, were referred to]. Unlike in a suit, in execution proceedings no separate application is necessary to bring the legal representatives on record and when they are so brought on record they can raise any objection in those proceedings, *vide* Order XXII, rule 4 and Order XXII, rule 22, Civil Procedure Code.

The JUDGMENT of the Court was delivered by LEACH

LEACH C.J. C.J.—The question which arises in this appeal is

(1) (1906) I.L.R. 30 Mad. 28.

(3) (1916) 5 L.W. 158.

(5) (1939) I.L.R. 20 Lah. 493.

(2) (1909) I.L.R. 32 Mad. 429.

(4) I.L.R. [1940] Mad. 123.

(6) (1883) I.L.R. 7 Mad. 255.

whether a person who has been brought into Court in execution proceedings merely as the legal representative of the judgment-debtor is compelled to have his own claims to the property in suit decided in the execution proceedings or whether he can establish his rights by a separate suit.

On 24th November 1927 one Habib Muhammad Maracair agreed to sell certain wet lands to one Vythilinga Mudaliar, who was the fourth defendant in the suit out of which this appeal arises and is now represented by the third and fourth respondents. The vendor failed to execute a conveyance and the purchaser instituted a suit in the District Court of Negapatam for a decree for specific performance. The suit was subsequently transferred to the Subordinate Judge's Court for hearing. The appellant was made a party to that suit because she claimed a share (7/12) in it. She was made a party on her own application, which was opposed by the plaintiff. An issue was then framed on the question whether she was a necessary party to the suit and it was decided that she was not. Consequently her name was struck off the record. On 8th August 1931 a decree for specific performance was granted to the plaintiff, but before it could be executed the vendor died. The result was that appellant was made a party as his legal representative. The application for execution then proceeded and eventually the Court executed a conveyance in favour of the purchaser.

In the course of the execution proceedings, but before the conveyance was signed, the appellant instituted in the Court of the District Munsif of Tiruturaipundi the present suit. The purchaser challenged her right to institute it. He maintained

HAMIDGANI
v.
AMMASAHIB.
LEACH C.J.

HAMIDGANT
v.
AMMASANTH.
LEACH C.J.

that her claim should have been decided in the execution proceedings and it was now too late to raise it. The District Munsif accepted this argument and dismissed the suit. His decision was concurred in by the Subordinate Judge of Tiruvarur. The appellant then appealed to this Court and the second appeal came before ABDUR RAHMAN J. who has made the reference which this Full Bench is now called upon to consider.

The reference became necessary because there are conflicting decisions of this Court on the question involved. The first case to which our attention has been called is that of *Kuriyali v. Mayan*(1). That appeal arose out of a mortgage suit and in execution proceedings the legal representative of the mortgagor claimed an interest in the mortgaged property. The claim was investigated by the District Munsif in execution proceedings, but on appeal to the District Court it was held that the District Munsif had no power to decide the legal representative's title and that the proper course was for the decree-holder to attach the property and for the legal representative to make a claim. This course was adopted and resulted in the legal representative's claim being rejected. Thereupon he brought a suit to cancel the sales which had taken place in the course of the execution of the decree and it was held that the suit did not lie. The Court did not, however, consider a very important question, namely, whether it is open to a legal representative with a claim of his own to challenge in execution proceedings the validity of a mortgage decree which has been passed against the person he is representing.

(1) (1883) I.L.R. 7 Mad. 255.

HAMIDGANT
v.
AMMASANTH.
LEACH C.J.

A decision running counter to the judgment in *Kuriyali v. Mayan*(1) was given by another bench of this Court in *Kumaretta Servaigaran v. Sabapathy Chettiar*(2). In that case the appellant was the defendant in a mortgage suit and in an application for a final order for sale which was made in execution proceedings (the Code of Civil Procedure of 1882 then being in force) the appellant sought to stop the sale on the ground that the decree which had been passed against him was not binding on the property, because since the passing of the decree he had been adopted into the family of another person to whom the property belonged. The Subordinate Judge over-ruled his objection and made an order for the sale of the property. This was held by BODDAM and WALLIS JJ. to be right. In the course of the judgment they pointed out that the objection taken by the appellant was that, though the decree to which he was a party was a decree for the sale of specified immovable property, he was entitled to object in execution to the sale of the property; in other words, the appellant's objection was an objection to the decree itself and not to the execution, discharge or satisfaction of the decree. Reference was made to the decision in *Kuriyali v. Mayan*(1) and the defect in that judgment was indicated.

Dissent from *Kuriyali v. Mayan*(1) was also expressed in *Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc., Devasthanams*(3) which was decided by WHITE C.J. and ABDUR RAHIM J. There a mortgage decree was passed against the holder of an impartible estate. On the death of the mortgagor his son sought to set up in execution proceedings a

(1) (1883) I.L.R. 7 Mad. 255. (2) (1906) I.L.R. 30 Mad. 26.
(3) (1909) I.L.R. 32 Mad. 429.

HAMIDGANT
v.
AMMASAHIB.
LEACH C.J. contention that the mortgage was not binding upon him. It was held that this course was not open to him. After stating that there was abundant authority to support the proposition that the decree in a mortgage suit directing sale could not be impeached in execution proceedings the Court observed :

"The case of *Kuriyali v. Mayan*(1) no doubt supports the contention that the rights of the judgment creditors who have obtained mortgage decrees can be determined in execution proceedings, but as Mr. Sundara Ayyar pointed out in that case the Court would seem to have overlooked the fact that the decree itself contained a direction for sale and that notwithstanding the decree for sale the properties had been attached as if the proceedings had been in execution of a money decree. Apparently all the cases in which *Kuriyali v. Mayan*(1) is cited with approval are cases in which the decree sought to be executed was a simple money decree or, at any rate, was not a mortgage decree and the question we have to determine did not arise."

The decision in *Kuriyali v. Mayan*(1) was criticised by AYLING and SESHAGIRI AYYAR JJ. in *Kelu Achan v. Parasu Pattar*(2). On the other hand it receives support from the judgments given by MADHAVAN NAIR and STODART JJ. in *Chinnathayee v. Lakshmi Achi*(3) by CORNISH J. in *Peer Bathummal Beevi v. Nagur Meerammal Beevi*(4) and by RAMESAM and JACKSON JJ. in *Govindarajulu v. Chinnathambi*(5). It is, however, significant, that in these cases no reference was made to the decisions in *Kumaretta Servaigaran v. Sabapathy Chettiar*(6), *Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc., Devastanams*(7) and *Kelu Achan v. Parasu Pattar*(2). CORNISH J. did refer to certain other decisions, but the decisions related to proceedings in execution of money

(1) (1883) I.L.R. 7 Mad. 255.

(3) (1936) 71 M.L.J. 511.

(5) A.I.R. 1928 Mad. 1270.

(2) (1916) 5 L.W. 158.

(4) (1936) 71 M.L.J. 725.

(6) (1906) I.L.R. 30 Mad. 26.

(7) (1909) I.L.R. 32 Mad. 429.

decrees, where the considerations are not the same as they are here or in proceedings in enforcement of a mortgage decree. The latest decision of this Court was given by VENKATARAMANA RAO and ABDUR RAHMAN JJ. in *Lakshmadu v. Ramudu*(1) and their judgment supports the judgments which dissent from *Kuriyali v. Mayan*(2).

We are firmly of the opinion that *Kuriyali v. Mayan*(2) was wrongly decided and that the law on the question now before the Court is correctly expressed in *Kumaretta Servaigaran v. Sabapathy Chettiar*(3), *Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc., Devastanams*(4), *Kelu Achan v. Parasu Pattar*(5), and *Lakshmadu v. Ramudu*(1). When a person comes into Court in execution proceedings as the legal representative of a deceased party he cannot question the decree which has been passed. If the decree concerns property in which he claims an interest, the decree will not be binding upon him unless he was a party to the suit. If he was not a party to the suit or, as in this case, he had been dismissed from the suit, his rights will be entirely unaffected and he will be in a position to enforce them in a suit instituted by him for that purpose.

Section 47 of the Code of Civil Procedure only requires to be decided in execution proceedings those questions which arise between parties to the suit in which the decree has been passed or their representatives and which relate to the execution, discharge or satisfaction of the decree. Where a stranger to the suit claims as his immovable property which has been the subject-matter of a decree, that claim cannot

(1) I.L.R. [1940] Mad. 123.

(3) (1906) I.L.R. 30 Mad. 26.

(2) (1883) I.L.R. 7 Mad. 255.

(4) (1909) I.L.R. 32 Mad. 429.

(5) (1916) 5 L.W. 158.

HAMIDGANT
v.
AMMASAHIB.
LEACH C.J.

HAMIDGANI
v.
AMMASAHIB.
LEACH C.J.

in law be regarded as being a question relating to the execution, discharge or satisfaction of the decree. There are decisions of this Court to the effect that in execution proceedings arising out of money decrees questions relating to the property attached must be decided in execution proceedings and not by a separate suit, but this is an entirely different matter because the correctness of the decree is not called into question. Therefore the correctness of such decisions does not arise. We are here dealing with a case where it is said that a person who is not a party to the suit, but is brought into Court in execution proceedings as the legal representative of a deceased party, can in those proceedings be allowed to challenge the decree and if he fails to do so he has for ever lost the right claimed by him in the suit property. Obviously the answer must be that he cannot in execution say the decree is wrong, and he has his remedy by suit.

It follows that we hold that the District Munsif and the District Judge erred in dismissing the appellant's suit on the ground that it did not lie. The case will be remanded to ABDUR RAHMAN J. to decide the other questions which arise in the appeal.

The costs of this reference will be made costs in the appeal.

V.V.C.

INCOME-TAX REFERENCE.

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

COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

1941,
September 25

v.

FIRM OF N. V. ABDULLA SAHIB, RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 26-A—Instrument of partnership—Statement of individual shares of partners necessary before instrument can be registered under section—Minors as a body given a share in the instrument with rights of survivorship amongst themselves—Instrument cannot be registered under section.

A firm had been registered under section 26-A of the Indian Income-tax Act. One of the partners died and his death resulted in the re-constitution of the firm. His widow was taken in as a partner and his three sons and three daughters, all of whom were minors, were admitted to the benefits of the partnership. In an application for registration of the new firm it was, *inter alia*, stated that the widow was entitled to a six annas share. As a fact, her share was two annas and the remaining four annas being intended for the benefit of the minors who were admitted to the benefits of the partnership as a body and not as individuals. The intention disclosed by the partnership deed, read as a whole, was that the minors were not to take a vested share in the fund but that their rights should be governed by the law of survivorship when the fund had to be distributed.

Held: Section 26-A contemplates the registration of a firm which is constituted under an instrument of partnership which clearly states what the individual shares of the partners are to be. The minors as a body cannot be regarded as a taxable unit. The individual shares of the minors who were admitted to the benefits of the partnership cannot be said to have been specified in the deed within the meaning of the section.

* Original Petition No. 101 of 1941.

COMMISSIONER
OF INCOME-TAX
v.
FIRM OF
ABDULLA SAHIB.

IN the matter of the Indian Income-tax Act (XI of 1922).

ON THE REFERENCE:—

B. Pocker for assessee.—By mistake the widow was stated in the application for registration to be entitled to a six annas share. As a fact she was entitled to only a two annas share. There were six minors. They were together entitled to the remaining four annas share in equal shares. The mistake was condoned by the Income-tax authorities. Rights of survivorship were provided in the deed to prevent the legal representative of any deceased minor from getting any benefit in the partnership. The fact that by subsequent events, for instance by the death of a minor, the share of each minor may become altered by the clause about survivorship, cannot stand in the way of the Income-tax authorities registering the deed; see *Commissioner of Income-tax v. Seth Mangoomal Lunidasingh*(1).

K. V. Sessa Ayyangar for petitioner.—[Counsel read the several clauses in the deed of partnership and proceeded:] The minors are treated as a body, individuals composing the same being entitled to rights of survivorship. No specific share is mentioned for each minor. Though at any specific time the share of each minor might be arrived at by calculation, the deed provides for a fluctuating share and states the reason for such a provision. The exact share of a minor at any moment depends on various contingencies. The Income-tax Act contemplates annual registration of deeds. The deed must state on its face the share of each partner and it ought not to leave it to the Income-tax authorities to spell out a statement about shares by construing the deed with the help of the canons of construction.

B. Pocker in reply.—The receipt or non-receipt of profits by a minor at a later date cannot be the test. A proper construction of the deed will lead to the inference that the shares of the minors are defined. The clause about survivorship cannot have the effect of making the defined shares vague.

[PATANJALI SASTRI J.—Your argument leads to this anomaly. If a minor is alive at the time of taking accounts of the partnership and in the year of account but dies in the year of assessment, the other minor partners

get the deceased minor's share of profit by survivorship and these profits cannot be taxed in the survivor's hands because it was not due to them as profits in the year of account.]

COMMISSIONER
OF INCOME-TAX
v.
FIRM OF
ABDULLA SAHIB.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by LEACH C.J.—The assessees constitute a firm trading in timber under the style of N. V. Mammaly & Sons. Before the year 1939–40 the firm had been registered under section 26-A of the Income-tax Act, and on 10th October 1939 an application for a renewal of the registration was made. Three weeks later N. V. Abdulla Sahib, the senior partner, died and his death resulted in the re-constitution of the firm. His widow was taken in as a partner and his three sons and three daughters, all of whom are minors, were admitted to the benefits of the partnership. In the application for the registration of the new firm under section 26-A the shares of the partners were stated to be:—N. V. Ummarkutty, six annas; N. V. Kayumma, two annas; N. V. Mariyumma, two annas; and K. Bibi (the widow of N. V. Abdulla Sahib), six annas. K. Bibi had not in fact a six annas share in the partnership. Her share was two annas, the remaining four annas being intended for the benefit of the minors, who were admitted to the benefits of the partnership as a body and not as individuals.

LEACH C.J.

Clause 5 of the partnership deed states:

“That the said six minor children, viz., three sons and three daughters of said late N. V. Abdulla are hereby agreed and declared to be admitted to the benefits of the said partnership. They shall as a body be jointly entitled to two-eighths share of the net profits of the business, if any, and the said body shall for the purposes of the partnership be regarded as a unit or a single individual so that the benefits of the partnership hereinbefore agreed and declared shall enure and accrue to them and the survivors of them at the time when the accounts of the partnership are taken from time to time.”

COMMISSIONER
OF INCOME-TAX
v.
FIRM OF
ABDULLA SAHIB.
LEACH C.J.

Clause 16 of the deed reads as follows :—

“ That in the event of any of the children of said late N. V. Abdulla attaining the age of majority as and when each child of his should attain such majority, he or she shall be called upon by the firm or its managing partner to elect to become a partner in the business or not to do so, and if he or she should elect to become a partner, then his or her share of profits shall be as may be agreed to between the parties hereto and his or her as the case may be. But if he or she should elect not to become a partner then he or she shall be entitled, in the manner hereinafter provided, to the payment of what may stand to his or her credit in the separate account and also to his or her proper share in the share of profits standing on such date to the credit of the body of minor children of said late N. V. Abdulla. The total amount of profits standing at any time to the credit of the minor children of said late N. V. Abdulla as a body as hereinbefore provided shall at the time of division or whenever required be divisible equally among all the children alive at the time without reference to the sex of the children or shares under Muhammadan law. And it is also hereby expressly declared and provided that if at any time the amount due to any of the children of late N. V. Abdulla under his or her separate account, or as his or her proper share in the profit account, the same shall be payable by the firm only on the expiry of one year from the date of demand or intimation.”

This clause is reproduced from the statement of the case, but it would appear that the words “ be demanded ” or similar words have been omitted after the words “ in the profit account ”. Throughout, the drafting of this clause is faulty, but reading the deed as a whole it is clear that the intention is that the minors are not to take a vested share in the fund, but that their rights shall be governed by the law of survivorship when the fund is distributed. Mr. Sessa Ayyangar on behalf of the Commissioner of Income-tax has, however, expressed the opinion that a duly constituted guardian of a minor would at any time be entitled to withdraw his ward's share.

Section 26-A of the Income-tax Act reads as follows :—

“(1) Application may be made to the Income-tax Officer on behalf of any firm constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax.

(2) The application shall be made by such person or persons and at such times and shall contain such particulars and shall be in such form, and be verified in such manner, as may be prescribed and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed.”

Section 2 (6) (b) states that the expression “ partners ” includes any person who being a minor has been admitted to the benefits of partnership.

The application which was made for the registration of the new partnership clearly did not comply with the requirements of section 26-A. The individual shares of the partners were not correctly specified. The widow was credited with a six annas share, whereas she was only entitled to a two annas share and nothing was said about the admission of the minors to the benefits of the partnership. The Income-tax Officer rejected the application on these grounds and there can be no doubt that in doing so he was acting in accordance with the law. The appellate Assistant Commissioner of Coimbatore having upheld the Income-tax Officer's refusal to register the firm, the assessee applied to the Commissioner of Income-tax to state a case to this Court and in accordance with their request the Commissioner, acting under section 66 (2), has referred the following question :—

“ Whether the individual shares of the minors who were admitted to the benefits of partnership can be said to have been specified in the deed presented for registration under section 26-A of the Act.”

COMMISSIONER
OF INCOME-TAX
v.
FIRM OF
ABDULLA SAHIB.
LEACH C.J.

It will be observed that in framing the question in this way the Commissioner raises the wider issue whether the deed itself, not the application, specified the individual shares of the minors in the benefits of the partnership.

We have no hesitation in answering the question in the negative. No doubt the deed contemplates the admission of the minors to the benefits of the partnership, but it does not specify with certainty what their shares are to be. As the deed stands, should one of the minors die before the fund is distributed, his or her estate will not participate in the fund. The dead minor's share will go to the survivors. The Act requires the tax in a particular year to be levied on the income of the previous year. Now supposing a minor died in the year of assessment he or she would have no right whatever in the profits made during the year of account, and unless the partnership deed specifically indicates what each partner shall receive out of the profits in the year of account it is not possible for the firm to comply with the requirements of section 26-A. The section only contemplates the registration of a firm which is constituted under an instrument of partnership which with clearness states what the individual shares of the partners are to be, and that is certainly not the case here. The minors as a body cannot be regarded as a taxable unit.

As the question referred is answered in the negative the Commissioner of Income-tax is entitled to his costs which we fix at Rs. 250.

G.R.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice and Mr. Justice Chandrasekhara Ayyar.

PARAMANAND DOSS CHOTA DOSS & SONS AND
ANOTHER (DEFENDANTS 3 AND 8), APPELLANTS,

1941,
September 25.

v.

NANNULAL KANJI AND NINE OTHERS (PLAINTIFFS
1 TO 7 AND DEFENDANTS 1, 2 AND 7), RESPONDENTS.*

Hindu law—Joint family—Manager—Right of, to give power of sale to mortgagee under sec. 69 of the Transfer of Property Act (IV of 1882) when executing a mortgage of joint family property for family necessity.

A manager of an undivided Hindu family, in creating for a family necessity a mortgage of immovable property in Madras, has power under section 69 of the Transfer of Property Act to confer on the mortgagee a power of sale which can be exercised without recourse to the Court.

APPEALS from the judgment and decree of SOMAYYA J., dated 30th January 1940 and passed in exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 125 of 1926 (pauper).

V. V. Srinivasa Ayyangar, T. M. Krishnaswami Ayyar, M. S. Venkatarama Ayyar and L. Krishna Das for appellants.

K. P. Bhat for first to seventh respondents.

M. Sundaram Ayyar for tenth respondent.

Other respondents were not represented.

Cur. adv. vult.

* Original Side Appeals Nos. 18 and 31 of 1940.

JUDGMENT.

PARAMANAND
DOSS
v.
NANNULAL
KANJI.
LEACH C.J.

LEACH C.J.—These two appeals which arise out of the same judgment raise an important question of law and questions of fact. The question of law is whether a manager of an undivided Hindu family in creating for a family purpose a mortgage of immovable property in Madras may confer on the mortgagee a power of sale which can be exercised without recourse to the Court. The appeals have been heard together and can be dealt with conveniently in one judgment.

The suit was filed on the original side of this Court by respondents 1 to 7, all of whom are minors. The first and second respondents are the sons of the first defendant in the suit. The third respondent is the son of Mulji Lala, the brother of the first and second defendants. Mulji Lala died before the institution of the suit. Respondents 4 to 7 are the sons of the second defendant. The first and second defendants and Mulji Lala constituted an undivided Hindu family and the family remained joint after Mulji Lala's death which occurred in 1928. The first defendant has, at all times material to the issues, been the manager of the family. The family is a business family and during the period with which this suit is concerned its activities were confined to building contracts entered into with railways. The family owned immovable properties in Madras, in the Native State of Sachin and in the district of Surat. The Madras properties consisted of land and premises known as Nos. 34 and 35 Gollavar Agraharam, Tondiarpet, and land and premises known as Nos. 9 and 10 Hunters Road, Vepery. For the sake of convenience I shall refer to the former property as "the Tondiarpet property" and the latter as "the Vepery property".

On 23rd October 1931, the first defendant, as manager of the family, mortgaged the Tondiarpet property with the firm of Paramanand Doss Chota Doss & Sons, the third defendant, to secure a loan of Rs. 15,000. The mortgage deed contained a power of sale. On 27th March 1935 the first and second defendants created a second mortgage on the Tondiarpet property in favour of the seventh defendant for a sum of Rs. 1,000 and on 15th April 1935 a third mortgage in his favour for the like amount. On 16th November 1935 the third defendant exercised the power of sale under the mortgage and the property was purchased by the eighth defendant for the sum of Rs. 16,300. On 13th October 1932, the first and second defendants deposited with the fifth defendant by way of equitable mortgage to secure a loan of Rs. 20,000 the title deeds of the Vepery property. The deposit was evidenced by a memorandum executed on the same day. On 12th May 1933, the first defendant created a second mortgage in favour of the fourth defendant to secure a loan of Rs. 5,000. This deed also contained a power of sale, which was exercised on 9th April 1935, when the property was purchased by the sixth defendant for Rs. 28,500. The plaintiffs allege that all these mortgages are invalid so far as their respective interests in the properties are concerned. It is denied that the monies were required for the business of the family or for any family purpose. They allege that the first and second defendants are addicted to drink, profligacy and gambling and that the monies raised on the mortgages were spent on vice. They aver that the manager of an undivided Hindu family cannot, even when mortgaging family property for a family necessity, confer upon the mortgagee a power of sale.

PARAMANAND
DOSS
v.
NANNULAL
KANJI.
LEACH C.J.

PARAMANAND
DOSS
v.
NANNULAL
KANJI.
LEACH C.J.

The suit was tried by SOMAYYA J., who held that section 69 of the Transfer of Property Act does not extend to the manager of a Hindu family when mortgaging family property. On the evidence he found that the mortgage of the Tondiarpet property to the third defendant was binding on the family to the extent of Rs. 6,000, that of the Rs. 15,000 advanced by the third defendant Rs. 10,000 had been repaid, that the first mortgage to the fifth defendant of the Vepery property was valid so far as the family was concerned to the extent of Rs. 10,000 (half the amount of the loan) and that the second mortgage of the Vepery property in favour of the fourth defendant was not binding on the family at all. The seventh defendant in whose favour the second and third mortgages of the Tondiarpet property had been created led no evidence in support of his mortgages and in these circumstances the learned Judge held that they were not binding on the plaintiffs. In the end the learned Judge declared that the plaintiffs were entitled to their shares in the Tondiarpet and Vepery properties, and, as I read his judgment, free from all liability. Appeal No. 18 of 1940 has been filed by the third and eighth defendants and Appeal No. 31 of 1940 has been filed by the fourth defendant. The fifth and the sixth defendants have filed memoranda of cross-objections in Appeal No. 31 of 1940.

It is manifest that the persons who are responsible for this suit are the first and second defendants. The first defendant has gone so far as to give evidence in support of his sons' allegation against him of immorality and he allowed his motor car driver to be called to give the names of women with whom it is said he had had immoral relations. It is a regrettable fact that the Courts of this Province are not infrequently

PARAMANAND
DOSS
v.
NANNULAL
KANJI.
LEACH C.J.

called upon to decide cases in which Hindu fathers have set their sons up to plead parental immorality in order to defeat alienees of family properties, but until this case came into Court I had never met with a case where a father had gone to the length of supporting by his own evidence a plea of immorality made against him by his son. When the Vepery property was sold on 9th April 1935 the first and second defendants wrote to the purchaser offering to buy back the property from him for Rs. 500 more than he had agreed to pay for it. There was no suggestion in the letter that the power of sale had been unlawfully exercised. The notice which preceded the exercise of the power of sale was dated 30th November 1934 and no reply was sent. On 2nd August 1935, the sixth defendant, the purchaser of the Vepery property, filed a suit against the first and second defendants to recover possession of it, and on 30th November 1936, he obtained a decree. On 17th February 1936, the present suit was filed and there can be no doubt that its immediate object was to defeat the sixth defendant. The fact that the institution of the present suit had been instigated by the two fathers does not, of course, prevent the plaintiffs from being granted the reliefs to which they are entitled in law, but it is important to bear in mind that the fathers are behind this suit when it comes to consider the evidence relating to the issues of fact.

It will be convenient now to decide the question whether the manager of a Hindu family may lawfully create a mortgage which confers upon the mortgagee a power of sale when the money is required for a family necessity. SOMAYYA J. is emphatic in his opinion that the manager of a Hindu family is outside the scope of section 69 of the Transfer of Property Act.

PARAMANAND
DOSS
v.
NANNULAL
KANJI.
LEACH C.J.

Obviously the learned Judge was greatly impressed by the fact that a power of sale embodied in a mortgage created by the manager of a Hindu family might mean that the other members of the family would not have recourse to the property should the mortgage prove to be invalid and they would have to be content with a money decree, which might not be enforceable. The learned Judge's reasons for holding that the manager of a Hindu family is outside the scope of section 69 are that the section was passed in the interests of the commercial community, that it does not profess to affect or modify the rules of Hindu law, and that there is no authority in the manager of the family to delegate his powers. Accepting all this to be true, it does not follow that the manager of a Hindu family cannot avail himself of section 69 when he has occasion to mortgage family property for a family necessity.

The section applies to Hindus and the manager of an undivided Hindu family is himself always a Hindu. The wording of the section is free from ambiguity. It says that notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, a mortgagee or any other person acting on his behalf shall, subject to the provisions of the section, have power to sell or concur in selling the mortgaged property or any part of it, in default of payment of the mortgage money, without the intervention of the Court in certain specified cases. One of the cases specified is where a power of sale without the intervention of Court is expressly conferred on the mortgagee by the mortgage deed and the mortgaged property or any part of it was on the date of the execution of the mortgage deed situate within certain towns, of which Madras is one of those named. The section goes on to provide that the power

shall not be exercised until (a) notice in writing requiring payment of the principal money has been served on the mortgagor or on one of several mortgagors and default has been made in payment of the principal money or part of it for three months after the service of the notice or (b) some interest under the mortgage amounting at least to Rs. 500 is in arrear and unpaid for three months after becoming due. In passing it may be mentioned that it is not suggested that the notices which were served by the third and fourth defendants were in any way defective. There is nothing in the section itself or in any part of the Act which indicates that it does not apply to a mortgage created by a managing member of a Hindu family and this being the case the Court is bound to give effect to it, even if there is a manifest hardship in its application. I do not suggest that the section works any hardship in this case, but supposing that it did the Court could not take the hardship into consideration. The case must be decided on what the section says. Of course there must be a power to mortgage. Unless money is required for the purposes of the family the manager has no power to mortgage, and if a mortgage is itself invalid the deed cannot confer a power to sell. This has been freely conceded by the appellants.

But the matter can be carried further. A power to mortgage in itself implies a power to give the mortgagee a right of sale, if the conditions in the mortgage with regard to repayment are not fulfilled. The power can undoubtedly be taken away by statute, but in the case of a mortgage of property by deed in one of the specified towns the right to give such a power has in fact been recognized by the inclusion

PARAMANAND
DOSS
v.
NANNULAL
KANJI.
LEACH C. J.

PARAMANAND
DOSS
v.
NANNULAL
KANJI.
LEACH C.J.

Obviously the learned Judge was greatly impressed by the fact that a power of sale embodied in a mortgage created by the manager of a Hindu family might mean that the other members of the family would not have recourse to the property should the mortgage prove to be invalid and they would have to be content with a money decree, which might not be enforceable. The learned Judge's reasons for holding that the manager of a Hindu family is outside the scope of section 69 are that the section was passed in the interests of the commercial community, that it does not profess to affect or modify the rules of Hindu law, and that there is no authority in the manager of the family to delegate his powers. Accepting all this to be true, it does not follow that the manager of a Hindu family cannot avail himself of section 69 when he has occasion to mortgage family property for a family necessity.

The section applies to Hindus and the manager of an undivided Hindu family is himself always a Hindu. The wording of the section is free from ambiguity. It says that notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, a mortgagee or any other person acting on his behalf shall, subject to the provisions of the section, have power to sell or concur in selling the mortgaged property or any part of it, in default of payment of the mortgage money, without the intervention of the Court in certain specified cases. One of the cases specified is where a power of sale without the intervention of Court is expressly conferred on the mortgagee by the mortgage deed and the mortgaged property or any part of it was on the date of the execution of the mortgage deed situate within certain towns, of which Madras is one of those named. The section goes on to provide that the power

PARAMANAND
DOSS
v.
NANNULAL
KANJI.
LEACH C. J.

shall not be exercised until (a) notice in writing requiring payment of the principal money has been served on the mortgagor or on one of several mortgagors and default has been made in payment of the principal money or part of it for three months after the service of the notice or (b) some interest under the mortgage amounting at least to Rs. 500 is in arrear and unpaid for three months after becoming due. In passing it may be mentioned that it is not suggested that the notices which were served by the third and fourth defendants were in any way defective. There is nothing in the section itself or in any part of the Act which indicates that it does not apply to a mortgage created by a managing member of a Hindu family and this being the case the Court is bound to give effect to it, even if there is a manifest hardship in its application. I do not suggest that the section works any hardship in this case, but supposing that it did the Court could not take the hardship into consideration. The case must be decided on what the section says. Of course there must be a power to mortgage. Unless money is required for the purposes of the family the manager has no power to mortgage, and if a mortgage is itself invalid the deed cannot confer a power to sell. This has been freely conceded by the appellants.

But the matter can be carried further. A power to mortgage in itself implies a power to give the mortgagee a right of sale, if the conditions in the mortgage with regard to repayment are not fulfilled. The power can undoubtedly be taken away by statute, but in the case of a mortgage of property by deed in one of the specified towns the right to give such a power has in fact been recognized by the inclusion

PARAMANAND
DOSS
v.
NANNULAL
KANJI.
—
LEACH C.J.

of section 69 in the Transfer of Property Act. In *Russell v. Plaice*(1) ROMILLY M.R. said :

“The power of sale given to a mortgagee must, I think, be considered, not as the delegation of the power entrusted to the executor, which is a power to sell for the benefit of his *cestui que trust*, but as the creation of a new power to sell, not for the benefit of the persons interested in the testator's estate, but for the benefit of the person interested in the mortgage ; that is, a power to render the mortgage effectual ; and I think that the right to create this power is incidental to the authority of the executor to mortgage.”

In that case the question was whether an executor could give a power of sale when mortgaging property of the estate. It was contended that he could not, but this contention was emphatically overruled and the opinion expressed by ROMILLY M.R. has been accepted as a correct statement of the law. In *Bridges v. Longman*(2) ROMILLY M.R. had occasion to refer again to this question. In that case he observed :

“I think that no objection can be taken before me that the power of mortgaging was executed by means of a mortgage, which contained a power of sale, because I think that such a power is incident to the power to mortgage unless expressly excluded.”

In *Niamat Rai v. Din Dayal*(3) the Privy Council held that it was for the manager to decide whether he should mortgage or sell. In delivering the judgment of the Board, Sir JOHN WALLIS said :

“The learned Judges of the High Court were of opinion that as in this case the business had recently resulted in loss the managing member was not justified in putting more money into it, and that in any case he should have raised money by mortgage instead of sale. As regards the latter question, it is not clear that borrowing, probably at a high

(1) (1854) 18 Beav. 21 ; 52 E.R. 9. (2) (1857) 24 Beav. 27 ; 53 E.R. 267.
(3) (1927) I.L.R. 8 Lah. 597 (P.C.).

rate of interest, would have been more beneficial than sale. In any case this was a question for the manager to decide.”

As the manager of an undivided Hindu family may sell or mortgage as he deems fit for the purpose of raising money for a family necessity it follows that, apart from any statutory provision to the contrary, he has the right to confer upon a mortgagee a power of sale. Of course where the Transfer of Property Act is in force the mortgage must be one of those specified in section 69. In *Kanhaya Lal v. National Bank of India*(1) the Privy Council held that a power of sale embodied in a mortgage of property situate in a part of India where the Transfer of Property Act did not apply was a lawful provision.

Therefore, we have these factors in favour of the contention of the appellants : (i) section 69 applies to Hindus and there is no indication in the Act that the Legislature intended to exclude a mortgage created by the managing member of an undivided Hindu family, (ii) the power to mortgage in itself implies a power in the mortgagor to confer upon the mortgagee a right to sell the mortgaged property without the intervention of the Court, and (iii) the manager of an undivided Hindu family has the power to sell as well as to mortgage. This being the position it seems to me that the considerations which weighed with SOMAYYA J. must be ignored. It follows that I consider that the learned Judge misread section 69. Should it be found that the section results in hardship to members of joint Hindu families, the remedy lies with the Legislature, but it must be remembered that the section does not apply to mufassal mortgages, and comparatively speaking there is little scope for the misuse of it.

PARAMANAND
DOSS
v.
NANNULAL
KANJI.
—
LEACH C.J.

(1) (1923) I.L.R. 4 Lah. 284 (P.C.).

PARAMANAND
DOSS
v.
NANNULAL
KANJI.
LEACH C.J.

The plaintiffs contend that even if the mortgagee of the Vepery property was entitled to exercise the power of sale mentioned in the deed there could in law be no sale of the mortgaged property without the intervention of the Court. This contention is based on the fact that the power of sale was only conferred on the second mortgagee. The first mortgagee admittedly concurred in the exercise of the power by the second mortgagee, of course, on the understanding that he was paid first. The plaintiffs say that the first mortgagee had no right to concur in the sale by the second mortgagee, but here again the provisions of section 69 of the Transfer of Property Act are overlooked. There is nothing in the section to prevent a mortgagor giving to a second mortgagee, if he likes to do so, a power of sale, even when he has not given one to the first mortgagee. Sub-section 1 of the section says that a mortgagee or a person acting on his behalf shall, subject to the provisions of the section, have power to sell or concur in selling the mortgaged property. There can be nothing plainer than this and the first mortgagee in this case did in fact concur. Therefore if the second mortgage was lawfully created the sale of the Vepery property to the sixth defendant cannot be disturbed.

I now come to the findings of fact and I will commence with the findings of the learned Judge with regard to the mortgage of the Tondiarpet property. As already mentioned, the appellants here are the third and the eighth defendants. Mr. V. V. Srinivasa Ayyangar on their behalf has given no reason for challenging the finding of the learned Judge that only Rs. 6,000 out of the Rs. 15,000 advanced by the third defendant on this mortgage can be regarded as binding on the family. In fact he has made no attempt

PARAMANAND
DOSS
v.
NANNULAL
KANJI.
LEACH C.J.

whatever to dispute the correctness of the learned Judge's conclusion. Therefore the finding must be accepted. It is equally clear that the learned Judge was right in holding that there remains only Rs. 5,000 of the principal sum advanced on this mortgage. On 2nd November 1938, Rs. 10,000 of the Rs. 15,000 was repaid. It is not disputed that the Rs. 10,000 came out of monies belonging to the family and this being the case the family liability of Rs. 6,000 was discharged. But as the property has been lawfully sold the plaintiffs have lost their interests in it. Their rights are now restricted to the proceeds of the sale. Sub-section 4 of section 69 says that the money which is received by the mortgagee arising from the sale after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet a prior incumbrance, shall, in the absence of a contract to the contrary be held by him in trust to be applied, first in payment of all costs, charges and expenses incurred in connexion with the sale; and secondly, in discharge of the mortgage money and costs and any other money due under the mortgage; and the residue shall be paid to the person entitled to the mortgaged property. Consequently the plaintiffs are merely entitled to payment of their shares in the balance of the Rs. 16,300 which was realized by the sale of the property, after the expenses of the sale have been met and the mortgagee has received all which he is entitled to in law as against the plaintiffs.

In holding that it has not been proved that the Rs. 5,000 obtained from the fourth defendant on the security of the second mortgage was not needed for family purposes, the learned Judge was influenced by the unsatisfactory nature of some of the oral evidence.

PARAMANAND
DOSS
v.
NANNULAL
KANJI.
LEACH C.J.

[His Lordship discussed the evidence and held that the business was in need of funds when the second mortgage in favour of the fourth defendant was created and proceeded :]

A person who lends money to the manager of a Hindu family after being satisfied that the money is required for a family purpose has not to see to the application of the money. He has done all that the law requires him to do in making inquiries with regard to the need for the money. It has been shown that the family business was in need of the Rs. 5,000 and the money having been lent in connexion with a family necessity the mortgage must be held to be valid. It may be added that in his evidence the first defendant admitted that part of the Rs. 5,000 had been utilized in the business.

I am also unable to agree with the decision of the learned Judge that only Rs. 10,000 of the Rs. 20,000 advanced by the fifth defendant on the first mortgage of the Vepery property can be charged against the family.

[His Lordship discussed the evidence and proceeded :]

In addition to Rs. 7,140 paid to Mr. Subbaraya Ayyar and the amounts making up the Rs. 7,141-11-11 the fifth defendant is entitled to charge against the plaintiffs Rs. 100, the expenses incurred in connexion with the mortgage to him, and Rs. 175 paid on account of interest. Therefore the mortgage is valid against the plaintiffs in respect of the following sums :— Rs. 7,140, Rs. 7,141-11-11, Rs. 100 and Rs. 175, in all Rs. 14,556-11-11. This finding disposes of the memorandum of cross-objection filed by the fifth defendant.

The memorandum of cross-objections filed by the sixth defendant is concerned with an opinion expressed

PARAMANAND
DOSS
v.
NANNULAL
KANJI.
LEACH C.J.

by the learned Judge that Brittichand was the real purchaser of the property. I do not consider that the evidence justifies this conclusion. Moreover no suggestion has been made that the property was sold for an inadequate price and no issue was framed on the question whether the sixth defendant was a benamidar for Brittichand. The position is that the two mortgages on the Vepery property are valid, one to a limited extent and the other in full, and that the power of sale was properly exercised. In these circumstances the question whether the sixth defendant was a benamidar for Brittichand does not arise.

The result is that the decree passed by the learned Judge will be set aside and the suit remanded to the Original Side for the taking of an account of what the plaintiffs are entitled to receive out of the proceeds of the sales of the properties. During the arguments the Court indicated that this course might be adopted should it consider that the learned Judge had misread section 69 of the Transfer of Property Act and find that the mortgages are binding, either in whole or in part, on the family. No objection was raised to this course being adopted and the parties accepted the position that if the plaintiffs have lost all interest in the properties themselves they are entitled to have recourse to the sale-proceeds in this suit. The account will be taken in the light of this judgment and regard will be had to considerations arising out of the personal law of the minors, such as their liability under the pious obligation rule. When the account has been taken the trial Court will pass a fresh decree.

The appellants in each appeal are entitled to their costs against respondents 1 to 9 and I consider that the fifth defendant should have his costs on Rs. 4,556-11-11 in respect of his cross-objections but that no costs

PARAMANAND
DOSS
v.
NANNULAL
KANNI.
LEACH C.J.

should be awarded on the memorandum of objections filed by the sixth defendant. The plaintiffs have sued *in forma pauperis*. The question of the court-fee will be decided by the learned trial Judge when he is giving directions for the drawing up of the new decree. He will also decide the question of the costs to be awarded in the trial Court.

CHANDRASEKHARA AYYAR J.—I agree and have nothing to add.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao.

THIRUVENGADAM PILLAI AND TWO OTHERS
(PLAINTIFFS), APPELLANTS,

v.

KOOLAI alias MUTHUSAMI PILLAI AND TWO OTHERS
(DEFENDANTS), RESPONDENTS.*

Revenue Recovery Act (II of 1864)—Arrears of revenue—Pattadar—Defaulter—Sale of land of a pattadar—Death of pattadar before sale—Sale infructuous and no title would pass to purchaser—Procedure to be followed in case of death of defaulter before sale.

The Revenue Recovery Act contemplates the continued existence of the defaulter till the date of sale and if, before the date of sale, the defaulter dies, the sale would be infructuous and would pass no title to the purchaser.

The procedure to be followed in a case where the defaulter dies before the date of sale pointed out.

* Second Appeal No. 471 of 1939.

APPEAL against the decree of the Court of Small Causes of Trichinopoly in Appeal Suit No. 17 of 1938 preferred against the decree of the Court of the District Munsif of Trichinopoly in Original Suit No. 371 of 1935.

V. K. Thiruvenkatachari for appellants.

T. V. Muthukrishna Ayyar for third respondent.

Other respondents were not represented.

Cur. adv. vult.

JUDGMENT.

VENKATARAMANA RAO J.—The question for decision in this second appeal relates to the validity of a revenue sale. The relevant facts are these. The suit properties belonged to one Ramanarayana Pillai in whose name the patta stood in the revenue registry and the total extent of the land sold was about 14 acres. There was default in the payment of arrears of revenue for fasli 1340 amounting to Rs. 11-5-0. On 10th September 1931 a notice (Exhibit III) was issued under section 25 of the Revenue Recovery Act calling upon the said Ramanarayana Pillai to pay the arrears within ten days. The notice was not personally served on him but was affixed to his house. A copy of the notice was also affixed on the land and published in the District Gazette. In the notice it was stated that the sale would take place on 12th November 1931. Ramanarayana Pillai died on 27th October 1931 leaving the plaintiffs his sons who were then minors. The property was sold on 12th November 1931 and purchased for Rs. 11-12-0 by the first defendant who has since transferred the property to the third defendant. This suit was filed by the plaintiffs for a declaration that the sale is null

THIRU-
VENGADAM
v.
MUTHUSAMI.

VENKATA-
RAMANA RAO J.

THIRU-
VENGADAM
v.
MUTHUSAMI.
—
VENKATA-
RAMANA RAO J.

and void. It was attacked on various grounds but both the lower Courts decided against the plaintiffs and held that the sale was valid.

Mr. Tiruvenkatachari, the learned Counsel for the plaintiffs, has confined himself only to one ground, namely, that Ramanarayana Pillai having died before the date of sale, the sale must be held to be null and void and in support of his contention he relied on some observations of the learned Judges in *Marukkolanda-yammal v. Secretary of State for India*(1). In that case the registered pattadar was dead and his legal representative, the widow, was not registered in his place. His widow was however paying the assessment but she committed default in fasli 1331. The Collector took steps for realizing the same. The requisite notices under the Revenue Recovery Act were issued in the name of the dead man and affixed to the property and the property was sold. It was held that the sale was invalid. The learned Judges observed thus :

"The whole procedure in connection with sale of immovable property is based on the assumption that there is 'a defaulter', i.e., in the case of a human being a living person who is in default To go through, with the name of a dead man, the procedure intended for giving living men a chance of saving their property is a farce and futility The sale proceedings were of no force and effect by reason of the absence of the fundamental requisite for giving the revenue authorities jurisdiction to conduct a sale, i.e., that there should be a defaulter living who can receive the notices and avoid the sale by payment of the arrears."

Mr. Muthukrishna Ayyar for the contesting respondent contends that this case is distinguishable on the ground that the defaulter in that case was dead even before the proceedings were initiated, whereas in the present case all the requisite notices were served

(1) (1932) I.L.R. 55 Mad. 876, 881.

on the defaulter and all that remained was to sell the property and therefore the jurisdiction of the revenue Court could not be said to have been taken away by the mere fact that the defaulter died, that after service of the requisite notices the jurisdiction to sell the property was complete and that there is no procedure for bringing on record in the proceedings the legal representatives of the deceased defaulter.

The question is which of these contentions is tenable. A close analysis of the various provisions of the Act leads me to the conclusion that the Act contemplates the continued existence of the defaulter till the date of sale and, if before the date of sale the defaulter dies, the sale would be infructuous and would pass no title to the purchaser. Section 2 of the Act says :

"The land, the buildings upon it, and its products, shall be regarded as the security of the public revenue."

The land in that section means the land of the landholder and in the present case the ryotwari interest of the proprietor, Ramanarayana Pillai. If there was default in the payment of arrears of revenue, the Act empowers Government to initiate proceedings for realizing the said revenue by sale of the defaulter's movable or immovable property which would include land in respect whereof there has been default in the payment of revenue, or by execution against the person of the defaulter. Sections 25 to 44 deal with the procedure which the Collector is enjoined to adopt if he decides to sell the land in respect whereof arrears are due or the other immovable property of the defaulter, and these provisions undoubtedly indicate that what will be sold will be the land of the defaulter. Sections 26 and 44 clearly provide what it is the Collector is empowered to sell. Section 26 says :

"He shall proceed to recover the arrear by the attachment and sale of the defaulter's land."

THIRU-
VENGADAM
v.
MUTHUSAMI.
—
VENKATA-
RAMANA RAO J.

THIRU-
VENGADAM
v.
MUTHUSAMI.
—
VENKATA-
RAMANA RAO J.

Section 44 says :

"It shall be lawful for the Collector, or other officer empowered by the Collector in that behalf, to sell the whole or any portion of the land of a defaulter in discharge of arrear of revenue."

In *Subbaraya v. The Sub-Collector of Chingleput*(1) INNES J. explained thus the rights of the Government in regard to the realization of revenue when default was committed (page 310) :

"On non-payment of the Government dues, the right to the land would be liable to forfeiture, and the Collector might proceed according to law to sell the lands. Until such procedure was taken, it is difficult to see how the mirasidars could have forfeited their right to the land . . . For the right of the Government is only a right to a charge on the land, and a right to forfeit by due course of law the title of the person holding land who does not pay the charge."

Therefore until the property is sold the title of the defaulter to the land is not lost and the Government could have the property sold only by due course of law, that is, by following the appropriate procedure provided by the Act. What would be sold and what would pass at the revenue sale is only the proprietary interest of the registered pattadar. That is clear from the declaration which has to be made by the Collector after the issue of a sale certificate. Under section 39 of the Act.

"the Collector has to advertise the name of the purchaser and the date of purchase together with a declaration of the lawful succession of such purchaser to all the rights and property of the former landholder in the said lands."

Construing this section TURNER C.J. in *Zamorin of Calicut v. Sitarama*(2) observed :

"According to section 3 it is the proprietor that is liable for the payment of the revenue. According to section 39 it is his right and property that passes by the revenue sale."

(1) (1883) I.L.R. 6 Mad. 303.

(2) (1884) I.L.R. 7 Mad. 405, 406.

THIRU-
VENGADAM
v.
MUTHUSAMI.
—
VENKATA-
RAMANA RAO J.

Vide also the observations of WALLIS C.J. in *Subbaroya Goundan v. Ranganada Mudaliar*(1). The form of declaration framed by the Board of Revenue and which is actually published establishes this beyond doubt. The form in the Board of Revenue Standing Orders, Vol. II, page 398 (Form No. 10), runs thus :

"It is hereby publicly notified for general information that AB of village in taluk of the district has purchased on 191 at a public auction the undermentioned lands sold for arrears of revenue due by , landholder in the undermentioned village, and has paid the full purchase money, viz., Rupees , and that the lands have been registered in his name. It is therefore declared that the said AB has succeeded to all the rights and property of the present registered holder in the said lands."

This view is further strengthened by section 36 (4) of the Act which provides that where a re-sale takes place in consequence of the non-payment by the purchaser of the purchase-money and where the lands may on the second sale sell for a higher price than at the first sale, the difference or increase shall be the property of him on whose account the said first sale was made. This clearly indicates that what was sold is only the proprietary interest of the defaulter and that until the property is sold it continues in the defaulter. That the law contemplates the continued existence of the defaulter down to the date of sale is also clear from sections 37 and 47 of the Act which provide that it is open to the defaulter to pay up the arrears before the date of sale or tender security to avert the sale. As observed in *The Secretary of State for India in Council v. Pisipati Sunkarayya*(2), in the eye of the law the land must be his property at the time of the sale. The question therefore is, can it be

(1) (1915) I.L.R. 40 Mad. 93, 66. (2) (1910) I.L.R. 34 Mad. 493, 495.

THIRU-
VENGADAM
v.
MUTHUSAMI.
—
VENKATA-
RAMANA RAO J.

considered to be Ramanarayana Pillai's property on the date of sale in this case? He having died, his property vested in his sons and therefore on the date of sale the property belonged to them. No doubt they took the property subject to the obligation of paying the arrears of revenue; nevertheless it was their property. The moment a man dies the ownership which he had in the property is lost. That is the fundamental principle of jurisprudence; *vide* Holland's Jurisprudence, thirteenth edition, page 222. As Salmond observes in his book on Jurisprudence:

"Dead men are no longer persons in the eye of the law. They have laid down their legal personality with their lives and are now as destitute of rights as they are free from liabilities . . . They do not even remain the owners of the property until their successors enter upon the inheritance" (page 332, eighth edition).

So when the land was sold as the property of the defaulter, what was sold was the right of the dead man and the sale would pass no title to the purchaser. I would respectfully adopt the following observations in *Groves v. Administrator-General*(1) though they were made in connection with a sale in execution of a decree of Court:

"The only thing sold was the right of a dead man which passes no property, as the dead man has no right at the time of the sale, the rights of the dead man being at the time of the sale in his legal representatives and their rights were not sold or in any way affected because they were not on the record."

According to the declaration under section 39 of the Act the purchaser succeeds to the rights and property of the "present registered holder". When registered holder is dead, the recould be no "present registered holder" to whose rights the purchaser can succeed.

(1) (1898) I.L.R. 22 Mad. 119, 125.

THIRU-
VENGADAM
v.
MUTHUSAMI.
—
VENKATA-
RAMANA RAO J.

It is contended by Mr. Muthukrishna Ayyar that there is no procedure for bringing on record the legal representatives of a defaulter under the Revenue Recovery Act and that a revenue sale cannot be rendered invalid on that account. I quite agree; but there can be no doubt that the proceedings taken by the Collector under the Act are legal proceedings to which the defaulter must be deemed to be a party. Though strictly speaking there is no provision for substituting his legal representative still, when a party to a proceeding is dead, there can be no valid legal proceeding against him. A duty is enjoined on revenue officers to substitute the legal representatives in the registry. What the Collector should have done was to substitute the names of the minors in the registry, fix a fresh date of sale, issue a fresh notification under section 36 of the Act and serve a copy on the mother, the legal guardian of the minors, and proceed with the sale or commence the whole proceeding *de novo* by issuing a fresh demand under section 25 of the Act on the mother as the guardian of the minors and, in default of compliance with it, take further steps as provided in the Act. As neither procedure was adopted by the Collector in this case, I must hold that the sale was invalid and therefore passed no title to the purchaser, the first defendant.

In the result, the decrees of both the lower Courts are set aside and there will be a decree in favour of the plaintiffs. The plaintiffs are directed to pay Rs. 100 to the third defendant as and for the improvements effected by him. The plaintiffs are entitled to get delivery of possession of the property only after payment to the third defendant of the said sum of Rs. 100 has been made. The plaintiffs are given leave

THIRU-
VENGADAM
v.
MUTHUSAMI.

to deposit the said sum into Court. Having regard to the circumstances of this case I direct each party to bear his own costs of the litigation throughout. There will be no order in regard to mesne profits.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth and Mr. Justice Patanjali Sastri.

THAYYANAYAKI AMMAL, BY AGENT VISWALINGAM
CHETTIAR (PLAINTIFF), APPELLANT,

v.

SUNDARAPPA *alias* APATH SAHAYA KANDIAR AND
TEN OTHERS (DEFENDANTS 1 TO 8 AND NIL),
RESPONDENTS.*

Indian Limitation Act (IX of 1908), ss. 19 and 20—Difference between—Part-payment by mortgagor after parting with equity of redemption—Mortgagor still personally liable for debt—Mortgage kept alive by such part-payment under sec. 20 as regards all persons liable including transferee of equity of redemption.

In a suit filed in 1937 on a mortgage executed on 4th June 1913, five part-payments made by the mortgagor and endorsed by him on the mortgage bond were relied on for extending the period of limitation. Of the five endorsements the first three evidencing payments made respectively on 11th December 1914, 9th April 1916 and 6th April 1922 were found to be genuine by the trial Court. But the last two made respectively on 23rd February 1928 and 13th November 1932 were held by that Court to be not genuine and the suit was accordingly dismissed. On appeal, however, the High Court held that these last payments and endorsements were also

* Appeal No. 436 of 1938.

genuine and the question arose whether these payments by the mortgagor operated to save the right of suit against an alienee of one of the mortgaged items of property who purchased that item in 1917. THAYYANAYAKI
v.
SUNDARAPPA.

Held: The payments by the mortgagor operated to extend the period of limitation against the alienee also.

A part-payment by a mortgagor who has parted with the mortgaged property but is personally liable to pay under his covenant saves the right of suit against the purchaser of the equity of redemption. Section 20 of the Indian Limitation Act, unlike section 19 does not require that interest or part of the principal should be paid by the party against whom the debt or legacy is claimed or by some person through whom he derives title or liability, but enacts simply that a fresh period of limitation shall be computed where interest or part of the principal has been paid by the person liable to pay or by the debtor. On such payment, the right of suit is saved in its integrity against all the persons who might have been sued within the prescribed period.

Pavayi v. Palanivela(1) explained and distinguished.

Domi Lal Sahu v. Roshan Dobay(2) followed.

Lewin v. Wilson(3) referred to.

APPEAL against the decree of the Court of the Subordinate Judge of Kumbakonam in Original Suit No. 65 of 1937.

R. Ramasubba Ayyar for *K. V. Krishnaswami Ayyar* for appellant.

C. A. Seshagiri Sastri for second respondent.

M. Krishna Bharathi for third respondent.

V. Natesan for seventh respondent.

M. S. Venkatarama Ayyar for eighth and eleventh respondents.

S. Swaminathan for ninth respondent.

K. Srinivasan for tenth respondent.

Other respondents were not represented.

Cur. adv. vult.

(1) I.L.R. [1940] Mad. 872 (F.B.).

(2) (1906) I.L.R. 33 Cal. 1278,

(3) (1886) 11 App. Cas. 639.

THAYYANAYAKI
v.
SUNDARAPPA.
PATANJALI
SASTRI J.

The JUDGMENT of the Court was delivered by PATANJALI SASTRI J.—This appeal has been preferred by the plaintiff from a decree of the Subordinate Judge, Kumbakonam, dismissing a suit brought to enforce a mortgage executed by one Rajagopala Kandiyar on 4th June 1913. Plaintiff claims title to the mortgage under the will of her father Sabapathi Chetti who was the son of the mortgagee and died in December 1934. The first defendant is the son of the mortgagor and the sixth defendant is the Official Receiver of Tanjore in whom the estate of the mortgagor has become vested on his adjudication as insolvent. The other defendants claim interest as purchasers in different items of properties comprised in the mortgage. The suit was filed in 1937 and certain part-payments alleged to have been made from time to time and endorsed on the bond by the mortgagor were relied on as extending the period of limitation. The Court below held that some of these alleged payments and endorsements were not genuine and dismissed the suit as barred by limitation, and the main question argued in the appeal is whether this finding is correct.

There are five endorsements on the mortgage bond (Exhibit A) and these have been marked as Exhibits A-1 to A-5. Of these, the first three endorsements evidencing payments of Rs. 521-11-6, Rs. 100 and Rs. 10 made respectively on 11th December 1914, 9th April 1916 and 6th April 1922 are admitted to be genuine and the dispute relates to the last two (Exhibits A-4 and A-5) dated respectively 23rd February 1928 and 13th November 1932.

[His Lordship discussed the evidence and proceeded:]

We are therefore unable to agree with the Subordinate Judge's conclusion that the endorsements Exhibits

A-4 and A-5 were fabricated in order to save the suit from the bar of limitation.

THAYYANAYAKI
v.
SUNDARAPPA.
PATANJALI
SASTRI J.

It was next argued on behalf of the second defendant, the alienee of the tenth item that, even if the disputed payments and endorsements were genuine, they could not operate to save the right of suit against this defendant, as he had purchased the property in 1917 long before these payments and endorsements were made by the mortgagor. Reliance was placed in support of this contention on the recent Full Bench decision of this Court in *Pavayi v. Palanivela*(1) of which the headnote runs thus :

“ 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.”

This would seem, no doubt, to support the contention, but it appears from the facts stated by the Full Bench who were dealing with a case placed before them and not answering a question of law referred to them that, when the mortgagor made the payment, there was no subsisting liability to pay, as the enforcement of the personal covenant had become barred and the mortgaged property had been alienated before the date of such payment. In view of this fact, it could hardly have been maintained that there was a payment by the debtor or the person liable to pay within the meaning of section 20 of the Act and no question could

(1) I.L.R. [1940] Mad. 872 (F.B.).

THAYYANAYAKI therefore arise with reference to that provision. This
 v.
 SUNDARAPPA. was pointed out at page 886 where it was observed :

—
 PATANJALI
 SASTRI J. “ 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 authorised in that behalf. If the personal remedy against the mortgagor is barred he is no longer liable to pay the debt.”

It is thus clear that the Full Bench were not concerned on the facts before them with the question whether a part-payment by a mortgagor who has parted with the mortgaged property but is personally liable to pay on his covenant saves the right of suit against the purchaser of the equity of redemption. It will be seen that the payment there in question was towards interest and was endorsed on the bond, the endorsement being signed by the mortgagor. It was therefore argued that the payment so endorsed could be considered to be a valid acknowledgment under section 19 as it fulfilled the requirements of that provision, and the question arose—this was the point which the Full Bench had really to determine—whether for purposes of section 19 which requires that an acknowledgment of liability in respect of any property or right must, in order to be effective, be given by “ the party against whom such property or right is claimed or by some person through whom he derives title or liability”, the derivation of title or liability should take place after the acknowledgment has been given. It was held that it should, following certain English and Indian decisions. But no such question can arise on the language of section 20 which, so far as it is material here, runs thus :

“ 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 authorised in this behalf, or where part of the principal of a debt is

before the expiration of the prescribed period, paid by the THAYYANAYAKI
 debtor or by his agent duly authorised in this behalf, a fresh v.
 period of limitation shall be computed from the time when SUNDARAPPA.
 the payment was made.”

It will be observed that this section does not require, unlike section 19, that interest or part of the principal should be paid by the party against whom the debt or legacy is claimed or by some person through whom he derives title or liability, but enacts simply that a fresh period of limitation shall be computed where interest or part of the principal has been paid by the person liable to pay or by the debtor. A fresh period of limitation for what suit? Evidently for such suit as the creditor might have brought before the expiration of the prescribed period. That is to say, the right of suit is saved in its integrity against all the persons who might have been sued within the prescribed period. This difference in language is the more remarkable as section 20 follows immediately on section 19 which has made an acknowledgment binding only on the party making it or some person in privity with him. The following observations of the Privy Council in *Lewin v. Wilson*(1) are here pertinent :—

“ It must be remembered that payment and acknowledgment are two very different things. As regards the person making them, acknowledgment may, as pointed out in *Bolding v. Lane*(2), be made by a person who, though a party to the mortgage contract, has ceased to have any substantial interest in it, and has nothing to lose by the acknowledgment ; whereas, payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties, he is in full enjoyment of his bargain, and is not put upon any further assertion of his rights, but not so if he only receives acknowledgment. If, therefore, we find that the Legislature

(1) (1886) 11 App. Cas. 639. (2) (1863) 1 De G.J. & S. 122 ; 46 E.R. 47.

THAYYANAYAKI
v.
SUNDARAPPA.
—
PATANJALI
SASTRI J.

has used different language about the two cases, we must not readily conclude that it has done so by accident or without meaning."

The view we have expressed is in accord with the decision of the Calcutta High Court in *Domi Lal Sahu v. Roshan Dobay*(1), the principle of which has also been followed in *Roshan Lal v. Kanhaiya Lal*(2) and *Badri Das v. Pasupati Banarji*(3).

We may here observe that, even under the English statutes of limitation, it has been recognised that a payment stands on a different footing from an acknowledgment as regards its effect in saving rights of action. After reviewing the various statutory provisions and the decisions bearing upon them, Lightwood observes :

"The statutory provisions although varying slightly in their language are all subject to the same rule ; the payment if so made as to be effectual at all is effectual to keep alive the creditor's remedies generally. Thus a payment by a person entitled to make it will keep alive the remedy on a mortgage or charge against the land although the person making it is not in possession of the land or in possession of a limited interest only ; it will keep alive the personal remedy on a covenant although the remedy is to be enforced against another than the person paying ; and after the death of a mortgagor or speciality debtor a payment by any one person interested in the estate will keep alive the liability of all other persons interested." See Lightwood on The Time Limit on Actions, page 365.

It was further contended for the second defendant that the property purchased by him, i.e., item 10 of the plaint schedule, should be directed to be sold last as he purchased it in 1917 paying full consideration to the mortgagee. Similarly, the learned Advocate for the fifth defendant urged that the properties in which he is interested, namely items 1 to 5, should be sold after items 6 to 8 purchased by the seventh defendant

(1) (1906) I.L.R. 33 Cal. 1278.

(2) (1918) I.L.R. 41 All. 111.

(3) (1932) I.L.R. 12 Pat. 93.

from the Official Receiver and transferred to the eighth defendant. It was pointed out that the fifth defendant purchased all the properties comprised in the mortgage as well as some other properties in court-auction in execution of a money decree against the mortgagor in December 1925 and that he subsequently sold the properties so purchased other than items 1 to 5 back to the mortgagor by a sale deed dated 16th June 1928 reserving the bulk of the consideration with the mortgagor for discharging this mortgage, which however the mortgagor failed to do. It was, therefore, urged that items 6 to 9 which were among the items thus sold to the mortgagor and which have subsequently passed by transfer to the eighth and the ninth defendants should be sold before items 1 to 5. We consider that the equity claimed by the second and fifth defendants should prevail and we accordingly direct that items 6 to 8 held by the eighth defendant and item 9 purchased by the third defendant should be sold before items 1 to 5 in the hands of the fifth defendant and item 10 in the hands of the second defendant are brought to sale.

It only remains to deal with the claim of defendants 2, 4, 5 and 8 to relief under the Madras Agriculturists Relief Act. The Court below has held that, inasmuch as the debt was incurred originally by an agriculturist, these defendants are entitled to the benefits of the Act as transferees from him, whether they are themselves agriculturists or not. This view is not correct as we have held that a person who claims to be entitled to the benefits of the Act must prove that he is an agriculturist within the meaning of the definition in section 3 (ii). As the issues relating to this matter have not been determined by the Court below, they must now be investigated and, if these defendants

THAYYANAYAKI
v.
SUNDARAPPA.
—
PATANJALI
SASTRI J.

THAYYANAYAKI are proved to be agriculturists, the debt will have to be scaled down so far as they are concerned.

v.
SUNDARAFFA.

PATANJALI
SASTRI J.

In the result, the decree dismissing the suit is set aside and a preliminary mortgage decree will be passed by the Court below in the light of the judgment after determining issues 5 and 8. The appellant will have her costs here and below. The court-fee paid by the appellant will be refunded to her. As against defendants 2, 4, 5 and 8, the appellant will be entitled only to proportionate costs in the trial Court and here.

N.S.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Happell.

1941,
September 18.

BYSANI VENKATARATNAM CHETTI (THIRD
RESPONDENT), APPELLANT,

v.

R. VENKATAYYA OF KADIRI AND TWO OTHERS
(SUBSTITUTED PETITIONER, FIRST RESPONDENT AND
NIL), RESPONDENTS.*

*Provincial Insolvency Act (V of 1920), sec. 16—Substituted
creditor—Not bound to prove the qualification of the original
petitioning creditor.*

A creditor's petition for adjudicating his debtor was not prosecuted with due diligence by him. Another creditor was substituted in his place under section 16 of the Provincial Insolvency Act and an order of adjudication was subsequently passed against the debtor. A third creditor who was proceeding in execution of his decree against the debtor contended that the order of adjudication should not be made as

* Appeal Against Order No. 340 of 1939.

the substituted creditor failed to show that the creditor who originally filed the petition was competent to file it.

Held: A creditor who is substituted under section 16 of the Provincial Insolvency Act cannot be compelled to prove the qualification of the original creditor to file a petition in insolvency; and the mere accident of the fact that the creditor who has filed the petition should turn out not to have been qualified to do so cannot prevent a substituted creditor from taking advantage of its date and the act of insolvency mentioned therein.

Venkata Hanumantha Rao v. Gangayya(1) applied and followed.

In re Maund. Ex parte Maund(2) distinguished.

APPEAL against the order of the District Court of Anantapur, dated 3rd July 1939 and made in Insolvency Petition No. 62 of 1934.

A. Bhujanga Rao for appellant.

G. V. Ramalingam and *R. S. Swaminathan* for first respondent.

S. Ranganatha Ayyar for third respondent.

Second respondent was not represented.

The JUDGMENT of the Court was delivered by KING J.—The question at issue in this appeal is whether a certain Sathrasala Appayya has or has not been rightly adjudicated an insolvent. The petition upon which the order of adjudication has been passed was originally filed by one of his creditors on 25th August 1934 and stated that the act of insolvency was the execution of a mortgage deed by the debtor on the 17th of August of that year. In 1937 the second petitioner was allowed to continue the insolvency under the provisions of section 16 of the Provincial Insolvency Act, as the Court was satisfied that the original petitioner was not proceeding with due

VENKATA-
RATNAM
v.
VENKATAYYA.

KING J.

(1) (1928) I.L.R. 51 Mad. 594.

(2) [1895] 1 Q.B. 194.

VENKATA-
RATHNAM
v.
VENKATAYYA.
—
KING J.

dugence. At the enquiry into the petition it was held that the second petitioner's debt entitled him to ask for the adjudication of the insolvent as such and on the question of the nature of the mortgage executed by the insolvent there was no contest. His adjudication accordingly followed.

One of the arguments taken against the adjudication was by the present appellant who is another creditor of the insolvent and was proceeding in execution against him at the time of the insolvency petition. His point was that the first petitioner was not in fact a creditor of the insolvent at all, and therefore under section 9 of the Act was not entitled to present this petition in August 1934, and that when the second petitioner was allowed to continue the petition in 1937 it was incumbent upon him not to prove his own status as a creditor for more than Rs. 500 but to prove the status of the first petitioner as such a creditor and that, as he has failed to do this, the order of adjudication must be set aside and the matter remanded for further enquiry. The appellant in the lower Court relied in support of this argument upon a case reported as *Chockalingam Chettiar v. Muthiah Chettiar*(1). This case has not been discussed by the learned District Judge and we cannot see in what way any such discussion would be material to the solution of the present issue. On the other hand the respondents relied upon a case reported as *Venkata Hanumantha Rao v. Gangayya*(2). That is also a case of the substitution of one creditor for another creditor under the provisions of section 16. That substitution took place at the time when the second creditor's debt had become barred by limitation. It was held by

(1) (1938) 2 M.L.J. 390.

(2) (1928) I.L.R. 51 Mad. 594.

VENKATA-
RATHNAM
v.
VENKATAYYA.
—
KING J.

this Court that, in spite of that fact, substitution might be allowed and the second creditor might continue the petition, taking advantage of the date on which it was originally presented. This ruling also does not deal directly with the point now in issue but, as will be shown presently, it seems to us to proceed upon principles which may fairly be applied to the facts of the present case also.

In the argument in appeal, learned Counsel for the appellant has referred us to an English case, *In re Maund. Ex parte Maund*(1). That was a case in which a petition in bankruptcy was filed by three creditors who had occasion to fear that the Court would find that the amount of their debts did not entitle them to file the petition. They then sought to amend their petition by joining with themselves two other creditors, so that the total indebtedness of the five might qualify them for taking action. At that time more than three months had elapsed from the date of the alleged act of bankruptcy. It was held by the Court that such amendment could not be allowed and it is stated in page 197 :

"It is perfectly clear that the Court ought not to allow, after three months have elapsed from the date of the committal of the act of bankruptcy, the introduction of creditors, as petitioning creditors, who could not themselves present a petition, and the introduction of a debt which, after the same period has elapsed, would not be a debt upon which a petition could be founded."

This case is to some extent analogous with the case which is now before us, but we are not prepared to follow it where the facts are so dissimilar. In the English case, as has been stated, the three creditors who originally presented the petition were continuing

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

VENKATA-
BATNAM
v.
VENKATAYYA.
KING J.

to prosecute it and merely wanted to strengthen their position by joining two other creditors with themselves. In the present case an order under section 16 presumes the fact that the original petitioner does not proceed with due diligence on his petition. The English decision was not therefore upon any provisions in the English Bankruptcy Act which correspond to section 16. In those circumstances, we do not feel ourselves called upon to consider whether the principles upon which the English decision was given could be applied to the facts of this case. On the other hand, *Venkata Hanumantha Rao v. Gangayya*(1) deals directly with the question of section 16, and it points out that the object of the section is to prevent other creditors from being injured by the action of one creditor who by reason of collusion or otherwise may not diligently prosecute the petition. *Venkata Hanumantha Rao v. Gangayya*(1) gives the second creditor in a case of this kind the benefit of the date of the original petition, no matter how much later may be the date of his own introduction into the case; and we see no reason on principle why a second creditor, as in the present case, should not have the benefit of that date not only in regard to the question whether his own debt is barred by limitation, but in regard to the question of the act of insolvency of the insolvent himself. If it once be conceded that the purpose of section 16 is that the general body of creditors should be benefited, and if it also be remembered that other creditors will very probably hold their hand and decline to file unnecessary insolvency petitions themselves when they know that one creditor has already done so, we do not think that the mere

(1) (1928) I.L.R. 51 Mad. 594.

accident of the fact that the creditor who has filed the petition should turn out not to have been qualified to do so should prevent a subsequent creditor, who but for that petition might well have filed one himself, from taking advantage of its date.

One further point of practical importance appears to us to support the view that the Legislature can hardly have expected a creditor substituted under section 16 to be compelled to prove the qualification of the original creditor to file a petition and that is that, in the circumstances of the case, it would inevitably be difficult for one creditor to prove the existence of another creditor's debt. The original creditor, who *ex hypothesi* has no further interest in the case, would naturally be in possession of the necessary documents and have knowledge of the necessary evidence.

On these grounds we see no good reason to interfere with the decision of the learned District Judge and dismiss this appeal with costs.

N.S.

VENKATA-
BATNAM
v.
VENKATAYYA.
KING J.

APPELLATE CRIMINAL.

*Before Mr. Justice Horwill.*1941,
August 21.

MOONGAN AND TEN OTHERS (ACCUSED), PETITIONERS,

v.

MIR ROSHAN ALI SAHIB (COMPLAINANT), RESPONDENT.*

Code of Criminal Procedure (Act V of 1898), sec. 239—Mis-joinder of persons—Court ordinarily to presume prejudice.

Two sets of accused persons, who were cutting trees in different parts of a forest which had been leased to the complainant, were all tried together, although separate charges were framed against the two sets of accused, and they were convicted. The Courts below did not find that there was any intention or object common to the two sets of accused. On revision,

held: that there was a misjoinder of parties; and that the case should be remanded for fresh and separate trials of the two sets of accused.

The purpose of the Legislature in laying down various restrictions with regard to charges against a number of persons or of different charges against the same person was to avoid embarrassing the accused by a multiplicity of charges or by bringing together evidence relating to a number of accused persons; and so in cases where mandatory provisions as to the joining of charges are disregarded, it is reasonable to presume that the accused has been prejudiced because his trial has been complicated and his defence therefore rendered more difficult. Where there is a mis-joinder of accused persons, there is always a possibility that the Court will be unconsciously prejudiced by evidence that would be irrelevant if the accused were tried separately. A mis-joinder does not always vitiate a trial but a Court should ordinarily presume prejudice until it is quite certain that there could have been none.

Case law reviewed and discussed.

* Criminal Revision Case No. 316 of 1941
(Criminal Revision Petition No. 300 of 1941).

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Hosur, dated 19th December 1940, and made in Criminal Appeal No. 50 of 1940 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Krishnagiri in Calendar Case No. 1121 of 1940.

K. S. Jayaram Ayyar for *G. Gopalaswami* and *V. V. Radhakrishnan* for petitioners.

V. T. Rangaswami Ayyangar for *K. S. Sundaram* and *M. R. Ramachandra Pant* for respondent.

Public Prosecutor (V. L. Ethiraj) for the Crown.

ORDER.

HORWILL J.—All the petitioners entered into a forest which had been leased to the complainant and cut certain trees. They were all tried together, although separate charges were framed with regard to two sets of the accused who were cutting trees in different parts of the same forest. They have all been convicted. In this petition it is contended on behalf of the petitioners that there was a mis-joinder of persons and that the conviction is therefore illegal and should be set aside.

Although the matter was taken in appeal, neither of the Courts say that there was any intention or object common to the two sets of persons cutting trees in different parts of the forests; so that I agree with the learned Advocate for the petitioners, as well as with the learned Public Prosecutor, that there was a mis-joinder of parties. Mr. V. T. Rangaswami Ayyangar for the complainant contends that there was no mis-joinder and quotes *In re Sambasiva Mudali*(1), but it is

(1) (1930) 35 L.W. 98.

MOONGAN
v.
ROSHAN ALI
SAHIB.

HORWILL J.

MOONGAN
v.
ROSHAN ALI
SAHIB.
—
HORWILL J.

clear from the judgment in that case that KRISHNAN PANDALAI J. was satisfied that the two acts complained of, although on different dates, were parts of the same transaction and that the object on the two occasions was the same.

The only other question that arises in this case is whether the fact that all the accused were tried at one trial is a sufficient ground for setting aside their conviction and ordering a re-trial. For many years after *Subrahmaniam Ayyar v. King-Emperor*(1) it was held that any disobedience or failure to comply with the mandatory provisions of the Criminal Procedure Code was an illegality that vitiated the conviction. That was a case in which there was a mis-joinder of causes of action, and a Full Bench of this Court held that there was a mis-joinder but that it was open to them to strike out the first count, to reject the evidence with regard to it, and to deal with the evidence on the remaining counts of the indictment. But their Lordships of the Privy Council held that the disregard of any express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by section 537, Criminal Procedure Code, and that such a phrase as "irregularity" was not appropriate to the illegality of trying an accused person for more or different offences at the same time, if those offences were spread over a longer period than in a year. In 1927 a case, *Abdul Rahman v. The King-Emperor*(2), was considered by the Judicial Committee in which the depositions of witnesses had not been read over in the presence of the accused as required by section 360, Criminal Procedure Code. It was held that this was a mere irregularity curable under section 537 of

(1) (1901) I.L.R. 25 Mad. 61 (P.C.).

(2) (1926) I.L.R. 5 Ran. 53 (P.C.).

MOONGAN
v.
ROSHAN ALI
SAHIB.
—
HORWILL J.

the Code. This decision showed that a mere disregard of the mandatory provisions of the Code did not necessarily vitiate a conviction; but it left it rather difficult to say whether in a particular case a disregard of a mandatory provision amounted to an illegality or was a mere irregularity. BURN J. in *Bomman Chetty v. Emperor*(1), which dealt with a mis-joinder of charges, referred to the failure to obey a mandatory provision of the Code as an "irregularity", but added that it was not one of the kind indicated by their Lordships of the Privy Council in *Abdul Rahman v. The King-Emperor*(2). In *Subramania Reddi v. Emperor*(3) five persons were tried together; but there should have been two trials, one for the first accused and one for accused 2 to 5. The accused 2 to 5 were however acquitted; and it was therefore argued that there no prejudice had resulted to the first accused. BURN J., however, held that

"the joint trial was illegal and the illegality could not be cured by the acquittal of accused 2 to 5 of the offences under which they were charged."

In *Karuppa Goundan v. Emperor*(4), in which there was a mis-joinder of causes of action, KING J. held that it was not a mere irregularity such as was referred to in *Abdul Rahman v. The King-Emperor*(2) and that the trial and conviction were therefore illegal. None of these cases decided by single Judges however refer to *In re Ramaraja Tevan*(5) in which the effect of a mis-joinder of persons was considered. There, WALLACE and JACKSON JJ. say:

"Ever since the pronouncement of the Judicial Committee in *Subrahmaniam Ayyar v. King-Emperor*(6) it has been the general practice to assume that if a mandatory provision of the

(1) 1936 M.W.N. (Cr.) 195.

(2) (1926) I.L.R. 5 Ran. 53 (P.C.).

(3) 1936 M.W.N. (Cr.) 163.

(4) 1935 M.W.N. (Cr.) 230.

(5) (1930) I.L.R. 53 Mad. 937.

(6) (1901) I.L.R. 25 Mad. 61 (P.C.).

MOONGAN
v.
ROSHAN ALI
SAHIB.
—
HOBWILL J.

Code has been infringed in framing the charge, the Court must of necessity be held to have failed in administering justice to the accused. Section 537 affords no real ground for any such assumption, and the Judicial Committee itself, when it had occasion to refer to *Subrahmaniam Ayyar v. King-Emperor*(1) in *Abdul Rahman v. The King-Emperor*(2), clearly indicated that the impugned procedure must be one that is not only prohibited by the code, but also works actual injustice to the accused. In the latter case, the code was clearly infringed but the curative provision of section 537 was considered a sufficient remedy."

So the position is not altogether clear even to-day, although *In re Ramaraja Tevan*(3) is not binding on me, because the above-quoted remark was obiter, it being found that in fact there was no mis-joinder. But the purpose of the Legislature in laying down various restrictions with regard to charges against a number of persons or against the same person of different charges was to avoid embarrassing the accused by a multiplicity of charges or by bringing together evidence with regard to a number of accused; and so in cases where mandatory provisions as to the joining of charges are disregarded, it is reasonable to presume that the accused has been prejudiced because his trial has been complicated and his defence therefore rendered more difficult. Where there is a mis-joinder of accused, there is always a possibility that the Court will be unconsciously prejudiced by evidence that would be irrelevant if the accused were tried separately. It is not necessary to disagree with the above-quoted opinion from *In re Ramaraja Tevan*(3), and to say that a mis-joinder always vitiates a trial; but I think that a Court should ordinarily presume prejudice until it is quite certain that there could have been none.

(1) (1901) I.L.R. 25 Mad. 61 (P.C.). (2) (1926) I.L.R. 5 Ran. 53 (P.C.).
(3) (1930) I.L.R. 53 Mad. 937.

In the present case, apart from the presumption of prejudice, the trial Magistrate and even the appellate Magistrate, seemed to be of opinion that it was not proper to try the two sets of accused separately and that was why the trial Magistrate framed separate charges. He however erroneously thought that in doing so and in allowing each batch of accused to recall and cross-examine the prosecution witnesses separately he was giving them separate trials. Mr. V. T. Rangaswami Ayyangar does not deny that there was in fact only one trial and not two. It is conceded by Mr. Jayarama Ayyar that the two sets of accused were animated each with the common intention if the prosecution story is true; and so he demands only two trials and not a trial for each accused separately.

The petition is therefore allowed, the convictions and sentences set aside, and the case remanded for fresh and separate trials of the two sets of accused by the District Magistrate himself or by some other Magistrate subordinate to him other than the Magistrate who tried the case.

V.V.C.

MOONGAN
v.
ROSHAN ALI
SAHIB.
—
HOBWILL J.

APPELLATE CRIMINAL.

*Before Mr. Justice Horwill.*1941,
August 1.THE INSPECTING ASSISTANT COMMISSIONER OF
INCOME-TAX (COMPLAINANT), PETITIONER,

v.

CHOTABHAI JAVERBHAI AND FOUR OTHERS
(ACCUSED NOS. 1 AND 3 TO 6), RESPONDENTS.*

Indian Income-Tax Act (XI of 1922), sec. 52—Submission of income-tax return alleged to be false by agent of firm under power of attorney—Partners of firm and their agent charged with offences under that section and under ss. 193 and 196, Indian Penal Code—Legality of prosecution—"Person" in sec. 52 of the Income-Tax Act includes person duly authorised.

The partners of a firm carrying on business in Madras and their agent under a power of attorney were charged with offences under section 52 of the Indian Income-Tax Act (XI of 1922) and under sections 193 and 196 of the Indian Penal Code in respect of an income-tax return submitted by the agent on behalf of the firm to the authorities and supported by entries in accounts which were alleged to be false. All the accused were discharged by the Magistrate on the grounds that the agent had no authority to submit income-tax returns on behalf of the firm, that no person could in law submit a valid income-tax return on behalf of another, and that it was not shown that the accused had knowledge that the entries in the accounts were false. On revision to the High Court,

held: (i) there is nothing in the Income-Tax Act to suggest that the act of sending in an income-tax return should be done only by an assessee and not by his agent. The word "person" in section 52 of the Act includes a person duly authorised.

(ii) The agent had authority in law and in fact to make the income-tax return on behalf of the firm. The case against

* Criminal Revision Case No. 806 of 1940 (Criminal Revision Petition No. 760 of 1940).

the agent, therefore, required further enquiry and disposal. The order of discharge, so far as he was concerned, was accordingly set aside.

(iii) The order of discharge with regard to the partners was confirmed as it was not shown beyond all reasonable doubt that they knew that the agent was making fraudulent returns.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Chief Presidency Magistrate of the Court of Presidency Magistrates, Egmore, dated 2nd September 1940 and made in Calendar Case No. 2186 of 1940.

V. L. Ethiraj for A. S. Sivakaminathan for petitioner.

K. S. Jayaram Ayyar for second respondent.

V. V. Srinivasa Ayyangar and P. S. Sarangapani for third respondent.

T. R. Venkatarama Sastri, N. D. Varadachari and R. Viswanathan for fifth respondent.

Crown Prosecutor (P. Govinda Menon) for the Crown.

Other respondents were not represented.

ORDER.

HORWILL J.—The five accused in the lower Court are partners of a firm of the name of Chotabhai Javerbhai, doing business in yarn and silver, and the sixth accused is the son of the first accused and the power of attorney agent of the firm in Madras. The sixth accused submitted an income-tax return showing profits of about Rs. 5,000. P.W. 4, the then Income-tax Officer, upon looking through the accounts of the accused firm, discovered that the figure "1" had been introduced in front of the figures 3180 on the debit side, thus indicating an expenditure of Rs. 10,000 more than if that "1" had not been inserted. This aroused P.W. 4's suspicions, and so he examined the accounts

INSPECTING
ASST.
COMMISSIONER
OF INCOME-TAX
v.
JAVERBHAI.

INSPECTING
ASST.
COMMISSIONER
OF INCOME-TAX
v.
JAVARBHAI.
—
HORWILL J.

more closely. He then discovered that many fraudulent entries had been made in the accounts and that the profits were at least Rs. 41,672. After a full examination of the accounts he assessed the firm's profits at more than Rs. 65,000; but as an appeal is pending with regard to Rs. 24,000, the case proceeded on the footing that the profits of the firm for the year in question were Rs. 41,672. It was the sixth accused who had made calculations and submitted the return; but a complaint was filed by the Inspecting Assistant Commissioner against all the accused, alleging that they had fraudulently introduced these false entries into their accounts with a view to defraud the Income-tax authorities and had thereby made themselves liable for punishment under section 52 of the Income-tax Act and under sections 193 and 196 of the Indian Penal Code. The learned Chief Presidency Magistrate by whom this case was tried, came to the conclusion that neither in law nor in fact was the sixth accused authorised to file an income-tax return and that therefore no prosecution could be launched with regard to a return which had no legal significance. In considering the charges under sections 193 and 196 of the Penal Code he came to the conclusion that, although it was true that the false entries had been made in these accounts, there was nothing to show that the sixth accused—and still less the other five accused—had any knowledge of these false entries and that the necessary *mens rea* for a criminal conviction was lacking. He therefore discharged all the accused. A revision petition has been filed by the Crown against this order of discharge.

It is not here disputed that the sixth accused was the agent of accused 1 to 5 in the conduct of the Madras business. A general power of attorney by

the five partners in his favour has been marked as Exhibit U. It is however argued by all the six accused that the sixth accused had no authority to file an income-tax return. The power of attorney is worded in the very widest terms, although no specific reference is made to the filing of income-tax returns. The sixth accused is empowered under clause 5

“to sign and verify plaints—and all other documents and papers and to institute or defend any proceeding in any Court of law, etc.”

In clause 11 he is authorised to appear and represent the firm

“before any Revenue Officer, Railways, Port Trust, Corporations, and all departments of the Government or Local authority.”

Under clause 14 he is authorised

“generally to do all acts and things necessary or expedient in the interests of the said firm as fully and effectually as we could have done if personally present”; and the partners

“agree to ratify and confirm all that our said attorney or attorneys shall do or cause to be done in the execution of these presents.”

The sixth accused for many years acted as the agent of the firm and in pursuance of this power of attorney, dated 7th February 1935, he did in fact send in income-tax returns. The other partners of the firm knew that he was sending in income-tax returns and they of course knew in due course what profits he had shown in his accounts and in his return to the Income-tax officer; and they seem to have always approved of his conduct and his representations before the Income-tax authorities. In the year in question, when he presented his return, P.W. 4 asked him why he had submitted his report and not the partners themselves; and the sixth accused's

INSPECTING
ASST.
COMMISSIONER
OF INCOME-TAX
v.
JAVARBHAI.
—
HORWILL J.

INSPECTING
ASST.
COMMISSIONER
OF INCOME-TAX
v.
JAVERBHAI.
—
HORWILL J.

reply was that he was the accredited agent of the firm in Madras. In support of his statement he showed the Income-tax officer Exhibit U. P.W. 4 acted upon this representation as he or his predecessors had done in previous years. There can therefore be no doubt—whether the very wide and general terms of Exhibit U extracted above expressly authorised the sixth accused or not—that the sixth accused regarded himself as the agent of the firm for the purpose of filing Income-tax returns and that accused 1 to 5 intended him to file them and expressly or impliedly authorised him to file the return in question.

A more serious argument against the validity of the prosecution is that in law he was not the agent of the firm, in that the Income-tax Act does not permit of an agent presenting an income-tax return. It is pointed out that section 22 (2), for example, requires the Income-tax officer to serve a notice upon any person whose total income in his opinion is such an amount as is liable to render such person liable to income-tax. That person is then required to make a report. The subsequent sections continue to refer to that person. That person may be a firm, it is argued, but it must be some individual or body of individuals, himself or themselves liable to assessment. I have not however been given any cogent reason why, if an assessee can present a return, his agent cannot do it for him. The principle *qui facit per alium facit per se* is of very wide and general application. An exception would arise if a person entered into a contract to have something done by one on whose personal skill he relied. There seems however to be nothing in the Income-tax Act which suggests that it is essential that this act of sending in an income-tax return should be done only by an assessee. It can be

done not only equally well by the person in charge of the business, but very much better. Paragraph 90 of the instructions issued by the Central Board of Revenue says :

“Returns and verifications required under the Act must be signed either by the assessee himself or by some representative duly authorised for the purpose in proper legal form, so that his acts will bind his principal.”

Section 52, which is one of the provisions of law under which the accused have been charged, says :

“If a *person* makes a statement in a verification mentioned in section 19-A or section 20-A or section 22—which is false and which he either knows or believes to be false—he shall be deemed to have committed the offence described in section 177 of the Indian Penal Code.”

Mr. Venkatarama Sastri contends that the word “person” referred to here means the assessee, as it does in section 22 (2) and elsewhere, and that one should not give to the word “person” in this section its ordinary meaning. I do not see why the word “person” should not have its dictionary meaning in section 52; but even if it means only what the same word means in section 22 (2), I am satisfied for the reasons given above that the word “person” includes a person duly authorised. Far from agreeing, therefore, with the learned Magistrate that “the sixth accused had no authority in law or in fact to make the return which he did,” I hold that the sixth accused had authority both in law and in fact to make the return he did.

The learned Magistrate has discussed but little the actual evidence against the accused which would go to support a charge under section 52 because he had arrived at the conclusion that, whatever may have been the guilty knowledge and intention of the sixth accused, he could not be liable under section 52 of the

INSPECTING
ASST.
COMMISSIONER
OF INCOME-TAX
v.
JAVERBHAI.
—
HORWILL J.

INSPECTING
ASST.
COMMISSIONER
OF INCOME-TAX
v.
JAVERBHAI.
—
HORWILL J.

Act. It has been argued by Mr. Venkatarama Sastri for the sixth accused that the evidence on record is insufficient to justify this Court in ordering any further proceedings. I wish to say as little about the matter as possible, because it is desirable that the Magistrate and not this Court should adjudicate upon the weight of the evidence and give a finding whether or no the evidence is sufficient to bring home the charge to the accused. I need only say that it is difficult in the absence of some sort of explanation by the sixth accused to understand how on one day a clerk or subordinate could put Rs. 10,000 in his pocket without the manager of the business being any the wiser, on another day not long afterwards putting Rs. 8,400 in his pocket, and the day after that again another Rs. 1,600. It is also difficult to understand how an intelligent man of business could not be aware that his business was making a substantial profit (Rs. 40,000 and more a year) and believe that his firm was doing so badly as to make only Rs. 5,000 a year. I do not wish to express any opinion whether this in itself would be sufficient evidence to justify a conviction. Still less do I wish to say that this is so conclusive against the accused that nothing he can say would rebut that evidence. But I think that these facts and the other evidence in the case require further consideration by the Magistrate.

With regard to the charge against the accused under sections 193 and 196 of the Indian Penal Code Mr. Venkatarama Sastri has put up a very strong argument which, if correct, would show that the complaint had not been made by the proper person within the meaning of section 195 of the Criminal Procedure Code. This objection to the complaint was not raised in the Magistrate's Court, and

Mr. Ethiraj points out that because that was not done, he is not in a position on the evidence on record to satisfy me that the complaint was made by a proper person. He however contends that, if it is questioned in the trial Court, he is prepared to adduce evidence to satisfy the Court that the complaint made was a proper one upon which a Court can proceed. As the case is going back to the Magistrate, the question of the propriety of the complaint with regard to the charges under sections 193 and 196, Indian Penal Code, will be left open for the consideration of the Magistrate.

Although accused 1 to 5 knew that the sixth accused was showing that the firm had made a profit of nearly Rs. 5,000 and must have been somewhat surprised it was not doing better, yet, in a criminal case where the burden of proving knowledge and intention is upon the prosecution, I do not think it can be said that accused 1 to 5 knew beyond all reasonable doubt that the sixth accused was making fraudulent returns. So that I do not think it is in the interests of justice that I should require the Presidency Magistrate to make any further inquiry into the charges against them.

In the result, the order of discharge by the Presidency Magistrate with regard to the sixth accused only is set aside and some Magistrate other than the Magistrate against whose judgment this petition has been preferred is ordered to make further inquiry into the case against him.

The petition against accused 1 to 5 is dismissed.

V.V.C.

INSPECTING
ASST.
COMMISSIONER
OF INCOME-TAX
v.
JAVERBHAI.
—
HORWILL J.

APPELLATE CIVIL—FULL BENCH.

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

THE CANNANORE BANK, LIMITED (FIRST DEFENDANT), APPELLANT

v.

PATTARKANDY ARAYANVEETIL MADHAVI AND FOURTEEN OTHERS (PLAINTIFFS 1 TO 5 AND RESPONDENTS 2 TO 11), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 63—Order on claim petition under r. 58 in these terms: "Petition not pressed. It is dismissed."—"Adverse order" within r. 63—Subsequent suit for declaration—Limitation, twelve months from date of order.

An order that was passed on a claim petition was in these words: "Petition not pressed. It is dismissed."

Held: If the petition was one which fell within Order XXI, rule 58, of the Code of Civil Procedure and the petitioner had not sought permission of the Court to withdraw it without prejudice to his rights but merely stated that he did not press the petition, the order dismissing it would be an "adverse order" within the meaning of Order XXI, rule 63, of the Code of Civil Procedure and, if the petitioner wishes to reopen the matter, he has got to file a suit within one year from the date of the order.

Venkataratnam v. Ranganayakamma(1) followed.

Kumara Goundan v. Thevaraya Reddi(2), *Lakshminarasamma v. Navugotla Pydanna*(3), *Lingama Naidu v. Official Receiver, Madura*(4) and *President, Co-operative Credit Society, Kaikaran v. Narasimha Rao*(5) overruled.

* Appeal No. 112 of 1938.

- (1) (1918) I.L.R. 41 Mad. 985 (F.B.). (2) (1924) 48 M.L.J. 616.
(3) A.I.R. 1925 Mad. 265. (4) (1928) 110 I.C. 511.
(5) (1940) 2 M.L.J. 402.

APPEAL against the decree of the Court of the Subordinate Judge of Tellicherry in Original Suit No. 27 of 1936.

CANNANORE
BANK, LT
v.
MADHAV

This appeal in the first instance came on for hearing before a Bench (LEACH C.J. and VENKATARAMANA RAO J.) when LEACH C.J. on behalf of the Court made the following

ORDER OF REFERENCE TO A FULL BENCH:—

This appeal arises out of a suit filed by respondents 1 to 5 in the Court of the Subordinate Judge of Tellicherry for the following reliefs:—(i) a declaration that certain immoveable property was tarwad property and therefore could not be brought to sale as the result of an attachment in execution proceedings instituted by the appellant-bank in respect of a decree obtained against defendants 2 to 4, and (ii) the setting aside of an order passed on a claim petition. Defendants 2 to 4, who are respondents 6 to 8, borrowed money from the appellant-bank and, as the loan was not repaid, the bank sued for its recovery and obtained the decree which led to the attachment of the property in execution proceedings. On 12th July 1932 the plaintiffs-respondents applied for the removal of the attachments, but did not press their application. The result was that on 12th July 1932 the following order was passed by consent in respect of their application for removal of the attachment: "Petition not pressed. It is dismissed." Notwithstanding this order the plaintiffs-respondents on 5th September 1935 filed another application for the removal of the attachment. This was dismissed on the 14th of the following month. On 12th October 1936, that is two days short of twelve months, the plaintiffs-respondents filed the suit out of which this appeal arises. The appellant-bank contended that it was barred by the law of limitation and that in any event the suit could not be maintained because the property attached was in fact the private property of the judgment-debtors. The Subordinate Judge held that the suit was in time and that the property was tarwad property. Both these questions are raised in the appeal.

The first question involves the consideration of authorities which are in conflict and we propose to refer the question to a

CANNANORE
BANK, LTD.,
v.
MADHAVI.

Full Bench, but before making the reference we will deal with the appellant-bank's objection to the finding of the Subordinate Judge that the property was tarwad property.

It is common ground that the property was bought by the mother and her five sons and daughters, all of whom were majors. The mother and the eldest son having died, the surviving sons, Kunhunni and Kunhiraman, and their sister, Mathu, conveyed the property to their sister Parvathi who has married the fourth defendant. The deed of conveyance set out the circumstances under which the property was purchased and that it was purchased as their joint property. The mother and her sons and daughters constituted a tawazhi and the father had given the money for the purchase. There can be no doubt that the Subordinate Judge was fully justified in holding that the property belonged to the tarwad.

The question which we refer to a Full Bench is this :

"When an order is passed on a claim petition in these words, 'Petition not pressed. It is dismissed.' does the order require the petitioner to file a suit under Order XXI, rule 63, within a year from the date of the order if he wishes to re-open the matter?"

We do not propose to discuss the authorities which have been referred to us in the course of the argument. It is sufficient to say that they appear to disclose a need for an authoritative decision of this Court on the question.

The appeal came on for hearing before the Full Bench constituted as above.

ON THE REFERENCE:—

M. C. Sridharan for appellant.—If the order on the claim petition, namely, "Petition not pressed. It is dismissed." is an "adverse order" within Order XXI, rule 63, of the Code of Civil Procedure, then the suit for declaration is out of time under article 11 of the Indian Limitation Act, since it was not filed within twelve months of the date of the order. Rule 63 does not state that the order, in order to be effective, must have been made after due investigation under the preceding rules. In *Venkataratnam v. Ranganayakamma*(1) it was held by the Full Bench that even an order made without due investigation

(1) (1918) I.L.R. 41 Mad. 985 (F.B.).

was an "adverse order" within rule 63 and as such was conclusive unless set aside within twelve months from the date of the order. All the other High Courts in India have approved of the correctness of this decision. But some of the later decisions in Madras have wrongly drawn a distinction. They require reconsideration. In *Lingama Naidu v. Official Receiver, Madura*(1) a Bench of this Court held that Order XXI, rule 63, had no application to a case which had not been disposed of on the merits. In *Ayya Pattar v. Attupurath Mankkal Karnavan*(2) no investigation was asked for and the order was merely that it be "recorded". In *Lakshmi Ammal v. Kadiresan Chettiar*(3) and *Abdul Kadir v. Somasundaram Chettiar*(4) the Court had no jurisdiction to investigate. In *Seetaramayya v. Subrahmanyam*(5) there was no adjudication at all. In fact the order was without effect. The following decisions require reconsideration as running contrary to *Venkataratnam v. Ranganayakamma*(6), namely *Kumara Goundan v. Thevaraya Reddi*(7), *Lakshminarasamma v. Navugotla Pydanna*(8), *Kandasami Mudaliar v. Sivagurunatha Mudaliar*(9), *In re Naranappa*(10), *Manicka Mudali v. Abdul Karim Sahib*(11), *Saharabi v. Ali*(12) and *President, Co-operative Credit Society, Kaikaran v. Narasimha Rao*(13). The following cases of the other High Courts have approved of the correctness of the decision in *Venkataratnam v. Ranganayakamma*(6), namely, *Nagendra Lal Chowdhury v. Fani Bhusan Das*(14), *Haripada (Berman) v. Surendra Nath Samantha*(15), *Trimbak Tumbdu v. Siparu Chaturdas*(16), *Nawal Kishore v. Khiyali Ram*(17), *Maung Pya v. Ma Hla Kyu*(18), *Gobardhan Das v. Makundi Lal*(19) and *Subedar v. Ramprit*(20).

D. A. Krishna Warier for *K. Kuttikrishnan Menon* for respondents 1 to 5.—Rules 58 and 63 appear under the chapter headed "Investigations of objections". The order contemplated by Order XXI, rule 63, must refer to an "order against"

- | | |
|---------------------------------|---------------------------------------|
| (1) (1928) 110 I.C. 511. | (2) 1919 M.W.N. 805. |
| (3) (1921) 41 M.L.J. 198. | (4) (1922) I.L.R. 45 Mad. 827, 835. |
| (5) (1934) I.L.R. 58 Mad. 936. | (6) (1918) I.L.R. 41 Mad. 985 (F.B.). |
| (7) (1924) 48 M.L.J. 616. | (8) A.I.R. 1925 Mad. 265. |
| (9) (1934) 41 L.W. 500. | (10) (1935) 41 L.W. 578. |
| (11) (1935) 42 L.W. 710, 713. | (12) (1922) 44 M.L.J. 141. |
| (13) (1940) 2 M.L.J. 402. | (14) (1918) I.L.R. 45 Cal. 735. |
| | (15) A.I.R. 1922 Cal. 164 (F.B.). |
| | (16) (1932) I.L.R. 57 Bom. 213. |
| (17) (1920) I.L.R. 11 Lah. 369. | (18) (1923) I.L.R. 1 Ran. 481. |
| (19) (1923) I.L.R. 45 All. 438. | (20) A.I.R. 1929 Pat. 116. |

CANNANORE
BANK, LTD.
v.
MADHAVI.

CANNANORE
BANK, LTD.,
v.
MADHAVI.

any person under any of the preceding rules, namely, rules 58 to 62. Rule 58 says that the Court shall investigate. Both the rules 58 and 63 use the word "preferred". Only the order passed under proviso to rule 58 is contemplated. Rule 63 cannot be taken out of its setting and made to apply to a case not coming under rules 58 to 62. Investigation of claim petitions is obligatory except in the one case when the petition is made after undue delay. If an order is passed without investigation, it cannot come under Order XXI, rule 63. If a petitioner wants to withdraw his claim petition, then the Court has to pass an order dismissing the petition since no other mode of disposal is contemplated by the Code. Such an order cannot be construed as an order "against" the person within rule 63. See *Seetaramayya v. Subrahmanyam*(1). A comparison of the wording of the corresponding sections of the Codes of 1859 and 1882 on the one hand and that of the Code of 1908 on the other makes it clear that there is justification in the decisions of the Madras High Court subsequent to *Venkataratnam v. Ranganayakamma*(2) for holding that a rule of procedure which curtails the period of limitation from twelve years to twelve months should be confined to orders made after due investigation of claims.

Other respondents were not represented.

Cur. adv. vult.

LEACH C.J. The OPINION of the Full Bench was delivered by LEACH C.J.—In order to give the answer to the question referred it is necessary to decide what is meant by an adverse order under Order XXI, rule 63, of the Code of Civil Procedure. That rule states that where a claim or an objection is preferred the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of a suit the order shall be conclusive. The order referred to in the rule is an order passed on an application which falls within the purview of rule 58. That rule provides that where a claim is preferred to, or an objection is made to the

(1) (1934) I.L.R. 58 Mad. 936.

(2) (1918) I.L.R. 41 Mad. 985 (F.B.).

CANNANORE
BANK, LTD.,
v.
MADHAVI.
—
LEACH C.J.

attachment of, property attached in execution of a decree on the ground that it is not liable to attachment, the Court shall proceed to investigate the claim or objection, provided that it may refuse to investigate when it considers that the claim or objection was designedly or unnecessarily delayed.

In *Venkataratnam v. Ranganayakamma*(1) WALLIS C.J. and OLDFIELD and SESHAGIRI AYYAR JJ. held that an order refusing to investigate a claim to attached property on the ground that there was delay in the filing of it was an order passed against the claimant within the meaning of rule 63 and by reason of article 11 of the Limitation Act the order became final unless a suit was filed within twelve months to set it aside. In that case an application for the removal of an attachment was made, but it was filed at a late stage and the District Munsif refused to enter into an investigation. His order was couched in these words :—

"As this petition was filed late, this claim is ordered to be notified to the intending bidders."

This did not satisfy the petitioner and a fresh application was filed for the removal of the attachment. The order on this occasion was :

"The allegations of the Zamindarini will be notified to the bidders with the remark that the Zamindarini did not take steps for her claim being enquired into during the last ten months."

The Full Bench held that this order amounted to a rejection of the claim on the ground that it had been filed too late and therefore was an adverse order within rule 63, though there was no investigation and consequently no decision on the merits.

It is admitted that the judgments in that case have received the approval of all the High Courts in India,

(1) (1918) I.L.R. 41 Mad. 985 (F.B.).

CANNANORE
BANK, LTD.,
v.
MADHAVI.
—
LEACH C.J.

but there are numerous decisions of this Court where a distinction has been drawn, in some cases, wrongly. The test is whether the order is "against" the claimant or the decree-holder, but that does not mean that the order must involve an adjudication on the merits after investigation. Even an order of dismissal for default will fall within the rule; so long as it remains in force it is obviously adverse to the claimant. But if the person objecting to the attachment does not ask for his claim to be investigated and the order on the petition is merely that it be recorded, it cannot be said that this is an order "against" him. In such a case the application will not fall within rule 58; see *Ayya Pattar v. Attupurath Mankkal Karnavan*(1). Again the petition may contain a prayer not contemplated by rule 58, or it may have been presented after the Court has sold the attached property and therefore the Court has no longer jurisdiction to entertain it. The dismissal of such a petition can scarcely be regarded as an adverse order; see *Abdul Kadir v. Soma-sundaram Chettiar*(2). The position is not different if the claim is for an inquiry which is not contemplated by the rule, or the Court while dismissing a petition expressly states that the rights of the petitioner are not prejudiced by the order; see *Seetaramayya v. Subrahmanyam*(3). It is not an adverse order if the petition is dismissed because the power to investigate is in another Court; see *Lakshmi Ammal v. Kadiresan Chettiar*(4). But the position is very different where the application clearly falls under rule 58, the Court has jurisdiction and it passes an order dismissing the petition.

(1) 1919 M.W.N. 805.

(3) (1934) I.L.R. 58 Mad. 936, 937.

(2) (1922) I.L.R. 45 Mad. 827.

(4) (1921) 41 M.L.J. 198.

CANNANORE
BANK, LTD.,
v.
MADHAVI.
—
LEACH C.J.

We will now refer to the cases which in our opinion have been wrongly decided. The first is *Kumara Goundan v. Thevaraya Reddi*(1) where the order passed on the claim petition was in these words:—

"The contest is practically between the two claimants and the suit is inevitable. On the ground that the claims have been preferred too late and the delay is not satisfactorily explained, I disallowed the claim."

RAMESAM and VENKATASUBBA RAO JJ. held that this was not an order falling within rule 63, but we consider that they erred in so doing. This case clearly fell within the decision in *Venkataratnam v. Ranganayakamma*(2).

In *Lakshminarasamma v. Navugotla Pydanna*(3) COUTTS-TROTTER C.J. and RAMESAM J. held that where the order on a claim petition was "Not pressed, dismissed", it was not an order against the claimant within the meaning of rule 63. The basis of this decision was apparently the assumption that the claimant wished to abandon his claim and to have it treated as if it never had been made. If the petitioner had in fact asked to be allowed to withdraw the petition and the Court had acquiesced in the course, it might very well be that the order would not be an adverse order within the meaning of the rule, but we do not agree that because a claimant says to the Court that he does not press the petition and consents to an order of dismissal it is not an adverse order. In such circumstances it would in our opinion clearly be an order against him within the meaning of rule 63, provided, of course, that the application was one which fell within rule 58. COUTTS-TROTTER C.J. stated that he had always been of the opinion that in the case of the withdrawal of

(1) (1924) 48 M.L.J. 616.

(2) (1918) I.L.R. 41 Mad. 985 (F.B.).

(3) A.I.R. 1925 Mad. 265.

JAMNABAI
BANK, LTD.,
v.
MADHAVI.
LEACH C.J.

a petition it was a mistake for the Judge to endorse on it "dismissed" and that it was quite sufficient to record on it "withdrawn". With great respect, the Code of Civil Procedure does not contemplate such an order. It only contemplates the allowing or the refusal of a petition, and strictly speaking the order should be one of dismissal. Where the petitioner informs the Court that he wishes to withdraw his petition the Court may allow him to do so and by the use of appropriate language in the dismissal order make it quite clear that it is not intended to be an adverse order. We can see no reason why the claim petition should not be withdrawn if the claimant wishes to withdraw it, but the order passed in such circumstances should be worded so as not to attract the operation of article 11 of the Limitation Act.

In *Lingama Naidu v. Official Receiver, Madura*(1) a claim petition had been filed by the appellant who subsequently applied to be allowed to withdraw it, stating that he would file a regular suit. Thereupon the District Munsif passed an order dismissing the petition. KUMARASWAMI SASTRIAR and DEVADOSS JJ. held that this order did not fall within rule 63 and they expressed the opinion that the decision of the Full Bench in *Venkataratnam v. Ranganayakamma*(2)

"should be confined to cases where the disposal has been either on investigation or refusal to investigate on the ground that the claim is filed too late".

We consider that this opinion of the effect of the decision of the Full Bench is erroneous. Moreover the views expressed by the learned Judges are in conflict with the wording of the rule. The rule applies to all orders which are "against" claims preferred under rule 58.

(1) (1928) 110 I.C. 511.

(2) (1918) I.L.R. 41 Mad. 985 (F.B.).

CANNANORE
BANK, LTD.,
v.
MADHAVI.
LEACH C.J.

The last case to which our attention has been drawn is that of *President, Co-operative Credit Society, Kaikaran v. Narasimha Rao*(1) which was decided by a Division Bench consisting of my learned brother KRISHNASWAMI AYYANGAR J. and myself. Although the principle underlying rule 63 was correctly stated, on further consideration my learned brother and I are of the opinion that the order passed thereon is open to objection and our learned brother, HAPPELL J., shares this opinion. A mortgagee presented a petition asking that properties which had been attached should be sold subject to his mortgage. According to the petition, it was filed under rule 58. The order passed on it was this :

"The mortgage is said to be collusive. Its existence and decree-holder's allegation about it will be notified at the time of the sale which comes on 27th February 1933."

The decision was that this order did not fall within rule 63, but, in the light of the further arguments which we have heard today, we consider that the case fell within *Venkataratnam v. Ranganayakamma*(2) and therefore was wrongly decided. The order amounted in effect to a refusal of the claim, as the petitioner's prayer which was in terms of rule 62 was not granted.

The order which has given rise to this reference is in these words :—

"Petition not pressed. It is dismissed."

If the petition is a petition which falls within rule 58 and the petitioner has not sought permission to withdraw it without prejudice to his rights, it is obviously an order which is against him. The Court is not, however, able to answer the question because the facts are not before it. But assuming that the facts are that the petitioner personally or through his Advocate

(1) (1940) 2 M.L.J. 402.

(2) (1918) I.L.R. 41 Mad. 985 (F.B.).

merely stated that he did not press the petition, the order dismissing it would be an adverse order, and we answer the question referred in this sense.

The costs of the reference will be made costs in the appeal.

G.R.

APPELLATE CIVIL—FULL BENCH.

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

VELAGALA SRIRAMAREDDI AND ELEVEN OTHERS,
PETITIONERS,

v.

KARRI SRIRAMAREDDI, MINOR, BY CERTIFICATED
GUARDIAN, MR. G. BHIMA RAO, RESPONDENT.*

Madras Agriculturists Relief Act (IV of 1938)—Judgment in appeal delivered after coming into force of the Act—Application for scaling down of the debt under the Act after delivery of judgment—Incompetency—Procedure to be followed by appellate Court where application for scaling down of the debt under the Act made before delivery of judgment.

In an appeal in which judgment is delivered after the coming into force of the Madras Agriculturists Relief Act (IV of 1938) no application for scaling down of the debt under the Act can be entertained after the judgment is pronounced.

The procedure to be followed by appellate Court, in a case where an application for the scaling down of the debt under the Act is made before the judgment is pronounced, pointed out.

Somasundaram Chettiar v. Karuppan Chettiar(1) over-ruled.

* Civil Miscellaneous Petitions Nos. 4772, 4773, 4774 and 4775 of 1941.
(1) (1939) 51 L.W. 606.

PETITIONS praying that in the circumstances stated in the affidavit filed therewith the High Court may be pleased to issue an order directing the scaling down under the provisions of Madras Act IV of 1938 of the debt under the decree which would be passed in accordance with the judgment of the High Court in Appeal Suits Nos. 349 and 297 of 1938, preferred against the decree of the Court of the Subordinate Judge of Ellore in Original Suit No. 61 of 1936.

The petitions came on for hearing and the Court (BURN and KING JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—

After hearing arguments on these miscellaneous petitions we have found it necessary to refer to a Full Bench the question whether the case of *Somasundaram Chettiar v. Karuppan Chettiar*(1) has been correctly decided.

There is no doubt about the facts. The plaintiff (a minor in Original Suit No. 61 of 1936 on the file of the Subordinate Judge of Ellore) sued to recover money due on a mortgage. The learned Subordinate Judge gave him a decree for part of the amount claimed. In Appeal Suit No. 297 of 1938 the plaintiff appealed from this decree in so far as it disallowed part of his claim. In Appeal Suit No. 349 of 1938 defendants 1 to 12 in the suit, who are members of the family of defendants 1 to 4 (the mortgagors), appealed against the decree, claiming that the suit should have been entirely dismissed. On 21st August 1941 we allowed Appeal Suit No. 297 with costs and dismissed Appeal Suit No. 349 with costs. Civil Miscellaneous Petition No. 4772 is an application by the appellants in Appeal Suit No. 349 of 1938 in which they pray that this Court "may be pleased to give appropriate directions for scaling down of the debt under the decree which would now be passed in accordance with the judgment of this Hon'ble Court in the above appeal and Appeal Suit No. 297 of 1938, under the provisions of the Madras Agriculturists Relief Act (IV of 1938) and pass such other order or orders as this Hon'ble Court may deem fit in the circumstances of the case." Civil Miscellaneous

(1) (1939) 51 L.W. 606.

SRI RAMAREDDI v. SRI RAMAREDDI. Petition No. 4773 is a similar application by the same parties, the first twelve respondents, in Appeal Suit No. 297. Civil Miscellaneous Petition Nos. 4774 and 4775 are applications to stay the drafting of the decrees in Appeal Suits Nos. 349 and 297 of 1938 pending disposal of the other two applications for scaling down the decree debt.

It may be noted, though it is not important for the purpose of these applications, that on 19th August 1941 the same parties (appellants in Appeal Suit No. 349) filed an application to scale down the decree in Original Suit No. 61 of 1936 on the file of the Sub-Court, Ellore, under the provisions of sections 8 and 19 of Madras Act IV of 1938. This petition we dismissed on 21st August 1941, the day on which we pronounced judgment in the appeals, on the ground that this Court had no jurisdiction to scale down the Sub-Court's decree.

When these applications came on for hearing on 29th August, the learned Counsel for the petitioners contended that they were agriculturists entitled to the benefits of Madras Act IV of 1938, and that the decree to be passed by the High Court had to be scaled down in accordance with the provisions of sections 7 and 8 of that Act. The learned Counsel for the respondent (minor plaintiff) contended that these applications, filed after the judgment had been pronounced and after the passing of Madras Act IV of 1938, were not maintainable since section 19 of Madras Act IV of 1938 applied only to decrees passed before the commencement of the Act. The respondent also did not admit that the applicants were agriculturists entitled to the benefits of Madras Act IV of 1938. The objections of the respondent appear to us to have considerable weight and we put to Mr. Govindarajachari on behalf of the applicants another point, namely, that the decrees to be issued in the appeals must follow the judgments. Mr. Govindarajachari then quoted to us the case of *Somasundaram Chettiar v. Karuppan Chettiar*(1). So far as the facts appear from the report that case was in essence similar to this. The only difference is that in that case the plaintiff's suit was dismissed by the trial Court, and consequently there was no decree of any kind against the defendants. The plaintiff's appeal was allowed and then for the first time a decree had to be passed against the defendants. At that point (apparently after the

judgment in the appeal had been pronounced) an application was made on behalf of the fourth respondent under sections 7 and 8 of the Madras Agriculturists Relief Act to scale down the debt. The learned Judges held that the application was one which ought to be admitted and which must be enquired into. The order which they made was as follows: "In accordance with the usual practice, the application will be remitted to the Court below for disposal according to law after due enquiry, and the decree in the appeal will be subject to the final order thereon." This decision was based upon the consideration of the fact that it was only after the judgment was pronounced in the appeal that any necessity could arise for making an application to scale down the debt. The learned Judges said it was not reasonable to expect a party to put in an application which might never be necessary, and it could not, they thought, be said that the omission to make an application before the judgment was pronounced debarred the petitioner from making the application as early as possible after the judgment was pronounced, and before the decree was actually drawn up. They thought that it would be going against the spirit of the Act to dismiss applications for relief which the Legislature meant to give to debtors on such a purely technical ground as the fact that there was no particular provisions made in the Act for making applications for scaling down under sections 7 and 8 of the Act.

It does not appear from the judgment that the learned Judges considered the provisions of section 33 and Order XX, Civil Procedure Code. Section 33 says: "The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow." Order XX, rule 6, provides that the decree shall agree with the judgment. Rule 7 of Order XX provides that the decree shall bear date the day on which the judgment was pronounced and rule 3 of Order XX provides that the judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review. These rules of Order XX do not apply to this High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, but they do apply to this High Court in the exercise of its appellate jurisdiction. With all respect to the learned

(1) (1939) 51 L.W. 608.

350 THE INDIAN LAW REPORTS [1942]

SRI RAMAREDDI Judges who decided the case of *Somasundaram Chettiar v. Karuppan Chettiar*(1), it appears to us that in view of these provisions of the Civil Procedure Code it is not permissible, after the High Court has pronounced judgment, to refer to a Subordinate Court for disposal an application for the scaling down of the debt which is the subject of the High Court's judgment. It has never been suggested that the rules of Order XX which we have quoted are other than mandatory. We can see no escape from the conclusion that once the judgment of the High Court has been pronounced, the decree must be in accordance with the judgment, and if the judgment declares that a certain amount is due from the judgment-debtors, no Subordinate Court can be allowed to hold an enquiry and to say as a result of that enquiry that something less than the amount found due by the High Court in its judgment, shall be embodied in the decree as the amount due from the defendants. It is also, we think, with respect, contrary to all principle to allow that the decree of this Court shall be modified in accordance with the decision of a Subordinate Court.

It is of course clear that the only decrees which can be scaled down under the provisions of Madras Act IV of 1938 are decrees passed prior to the commencement of the Act (*vide* section 19). It has been expressly stated also in the decision in *Kotayya v. Venkata Punnayya*(2). In that judgment it has been pointed out that anyone who wishes to claim the benefits of Madras Act IV of 1938 in a suit which is pending, must put forth his claims before the decision is pronounced, and the learned Judges have expressed the view (with which we respectfully associate ourselves) that "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". The plea on behalf of the applicants is that while the decree of the lower Court was in force (that being a decree for a sum much less than was claimed by the plaintiff) they had no necessity to apply for the scaling down of the debt. That may very well be true, but it cannot affect rule 3 of Order XX which says that the only way to get a judgment modified is by an application for review.

(1) (1939) 51 L.W. 606.

(2) (1940) 2 M.L.J. 202.

Our attention has been drawn to the decision in *Perianna v. Sellappa*(1). The principal question there decided was that it was not the intention of the Legislature to limit the relief under Madras Act IV of 1938 to cases where a person was personally liable, and that a purchaser of the equity of redemption, if he himself was an agriculturist, could claim the benefits of the Act. It is not however clear from the report whether any question was reserved in the judgment with regard to the liability of the judgment-debtors, and the report does show that the terms of the decree to be finally passed were settled by the learned Judges of this Court, and were not left to the determination of a Subordinate Court. That case therefore gives no support to the "practice" which is said to exist of sending down such application as this to Subordinate Courts for disposal and of modifying this Court's decrees in accordance with the findings of such Subordinate Courts. Such a practice appears to us, with all respect, to be contrary to all principle and, if it exists, we are of opinion that it should be stopped. We may also refer to the case of *Kannabhiran Pillai v. Govindaswami Pillai*(2) where WADSWORTH J. held that an application made to a lower Court to scale down the appellate Court's decree was not maintainable. It appears in that case that the appellate Court in its judgment had made a reservation in the following words: "This judgment will not preclude the defendants from applying to the lower Court for scaling down the debt under the provisions of Madras Act IV of 1938 if they are entitled to have such relief." WADSWORTH J. expressed the view that in that case the proper procedure was for the petitioner to apply to the appellate Court to have the decree brought in accordance with the judgment by embodying a direction to the trial Court to deal with the application for relief under Act IV of 1938 and amend the decree according to its decision. We have already stated our objections to the view that a Subordinate Court can be permitted to amend a decree of this Court.

With reference to the applications to stay the drafting of the decrees in the appeals we are of opinion that we have no power to order such stay. Judgment having been pronounced the decree must follow and, as was observed by the learned Judges in *Kedar Nath Goenka v. Maharaja Chandra Mauleshwar*

(1) I.L.R. [1939] Mad. 218.

(2) (1940) 2 M.L.J. 473.

~~SRIRAMAREDDI~~ *Prashad Singh Bahadur*(1), after the judgment has been pronounced and it has been signed and sealed, no power is left in the Court to alter it or add to it or subtract anything from it; and the judgment having been pronounced a decree must be prepared in accordance with it.

Since we are clearly of opinion that the decision in *Somasundaram Chettiar v. Karuppan Chettiar*(2) requires consideration, we refer to a Full Bench the question whether it has been correctly decided.

The Civil Miscellaneous petitions came on for hearing before the Full Bench constituted as above.

ON THE REFERENCE:—

V. Govindarajachari and P. Satyanarayana Raju for petitioners.

[Counsel read the order of reference to the Full Bench and proceeded:]

Somasundaram Chettiar v. Karuppan Chettiar(2) was correctly decided. Application under the Madras Agriculturists Relief Act (IV of 1938) was not thought of when the judgment was delivered. It was conceived only afterwards. The benefits intended to be conferred by the Act should not be denied to such a case.

[LEACH C.J.—Should not the decree be in conformity with the judgment? There is no reservation in the judgment about the possibility of a reduction of the amount decreed.]

There are two other cases which have a bearing on this question. In *Perianna v. Sellappa*(3) the judgment was allowed to lie over until the inquiry under Madras Act IV of 1938 was concluded. In *Gopalan v. Lakshminarasamma*(4) no application had been made when the judgment was delivered. But mention was made of the same.

V. Viyyanna for the respondents was not called upon.

LEACH C.J. The OPINION of the Full Bench was delivered by LEACH C.J.—The question which has been referred is whether *Somasundaram Chettiar v. Karuppan Chettiar*(2) was rightly decided by this Court. The judgment was

(1) (1932) I.L.R. 11 Pat. 532.
(3) I.L.R. [1939] Mad. 218.

(2) (1939) 51 L.W. 606.
(4) I.L.R. [1940] Mad. 382.

pronounced by PANDRANG ROW and KRISHNASWAMI AYYANGAR JJ. sitting as a Divisional Bench. After the judgment had been pronounced an application was made on behalf of the fourth respondent by his mother, who was his guardian for an order under sections 6, 7 and 8 of the Madras Agriculturists Relief Act scaling down the debt. The Act had not been pleaded at any stage before the appeal was heard and decided. The reason was that, when the suit was dismissed by the trial Court, the Act had not come into force, and the claim was allowed only when it came before this Court on appeal. On the footing that it would be contrary to the spirit of the Agriculturists Relief Act not to give the judgment-debtor the benefit of the provisions of the Act the learned Judges passed this order:

“We are therefore of opinion that the application is one which ought to be admitted and which has to be enquired into. In accordance with the usual practice the application will be remitted to the Court below for disposal according to law after due enquiry, and the decree in the appeal will be subject to the final order thereon.”

In making this reference BURN and KING JJ. have expressed strong dissent with regard to the propriety of this course. They have pointed out that once a judgment has been delivered the consequent decree must be drawn up in accordance with the terms of the judgment and no Subordinate Court has power to pass an order which will affect the decree. We consider that there is great force in the criticisms which the learned Judges have made with regard to the course adopted in *Somasundaram Chettiar v. Karuppan Chettiar*(1). The learned Judges obviously had no power to make any order which affected the judgment which they had delivered unless passed on an application for review and there was no application for review.

(1) (1939) 51 L.W. 606.

^{v.}
SRIRAMAREDDI They added something to their judgment which is prohibited by the Code of Civil Procedure, and we
LEACH C.J. have no hesitation in holding that the course adopted in that case is contrary to law.

If the mother of the fourth respondent in *Somasundaram Chettiar v. Karuppan Chettiar*(1) had raised the question before judgment was pronounced and signed, the position might perhaps have been different. It has been the practice of some learned Judges of this Court, where an application for scaling down has been made before judgment has been delivered, to direct that an inquiry into the application should be conducted by the trial Court and the amount awarded in the judgment should be deemed to be subject to the finding on the application. It is not necessary to decide whether this practice is lawful or not, but to avoid any question arising in future, we consider that the proper course will be to reserve the final order until the application for scaling down has been decided. All questions arising in the appeal other than the question of scaling down can be decided and the decree left open until a report has been received from the trial Court, the application for scaling down being remitted to that Court for inquiry and report. If this procedure is followed the final decree of this Court will state exactly what the judgment-debtor has to pay, bearing in mind all that he is entitled to under the Agriculturists Relief Act. But if the application is not made before the judgment is delivered, it will be too late for a judgment-debtor to raise the question. The judgment in such circumstances will be the final judgment and the decree must be drawn up in accordance therewith.

The costs of this reference will be costs in the matters which have occasioned it.

(1) (1939) 51 L.W. 606.

[Civil Miscellaneous Petitions Nos. 4772 and 4773 ^{v.} SRIRAMAREDDI of 1941 came on for hearing before the Bench after SRIRAMAREDDI. the expression of opinion by the Full Bench and the Court (BURN and KING JJ.) made the following order:—

In view of the decision of the Full Bench on the reference made by us, these petitions must be dismissed, with costs (one set)].

G.R.

APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Happell.*

K. K. A. PONNUCHAMI GOUNDAR (PLAINTIFF),
PETITIONER,

1941,
October 15.

v.

MUTHUSAMI GOUNDAR AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Indian Partnership Act (IX of 1932), sec. 69—Registration of firm—Condition precedent to its right to institute suit—Suit filed before registration—Registration subsequent to suit—Defect not cured—Suit, dismissal of.

Under section 69 of the Indian Partnership Act the registration of a firm is a condition precedent to its right to institute a suit and a Court has no jurisdiction to proceed with the trial of a suit when the condition precedent has not been fulfilled. Registration of the firm subsequent to the date of institution of the suit cannot remedy the defect and the Court is bound to dismiss it.

Subramania Mudaliar v. The East Asiatic Co., Ltd.(1), *Firm of Syed Ibrahim Sahib v. Gurulinga Aiyar*(2) and *Girdharilal Son & Co. v. Kappini Gowder*(3) approved.

Varadarajulu Naidu and Kuppuswami Naidu & Co. v. Rajamanika Mudaliar(4) overruled.

* Civil Revision Petition No. 916 of 1940.

(1) (1936) 71 M.L.J. 663.

(2) (1937) 2 M.L.J. 717.

(3) (1938) 2 M.L.J. 44.

(4) (1937) 2 M.L.J. 273.

PONNUGHAM
v.
MUTHUSAMI.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Palni, dated 15th February 1940 in Small Cause Suit No. 263 of 1939.

S. V. Venkatasubramanyam for petitioner.

K. S. Ramamurthi for respondents.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—Section 69 (2) of the Partnership Act states that no suit to enforce a right arising from a contract shall be instituted in a Court by or on behalf of a firm against a third party, unless the firm is registered and the persons suing are or have been shown in the register of firms as partners in the firm. The question which arises in this petition is whether the registration of a firm after it has filed a suit can cure the defect.

In this case, an unregistered partnership instituted a small cause suit in the Court of the District Munsif of Palni. It had applied for registration before filing the plaint, but the application had not been granted. In fact it was not granted until over a month had elapsed after the filing of the plaint. In these circumstances, the District Munsif dismissed the suit with costs. The reported cases disclose a difference of opinion, but the majority of the judgments are to the effect that subsequent registration of the firm does not entitle the Court to proceed with the suit and that the only course open to it is to dismiss it.

The question has been considered on different occasions by four Judges of this Court, namely, by MENON J. in *Subramania Mudaliar v. The East Asiatic Co., Ltd.*(1), STODART J. in *Firm of Syed Ibrahim Sahib v. Gurulinga Aiyar*(2), HORWILL J. in *Varadarajulu*

(1) (1936) 71 M.L.J. 663.

(2) (1937) 2 M.L.J. 717.

Naidu and Kuppuswami Naidu & Co. v. Rajamanika Mudaliar(1) and VENKATARAMANA RAO J. in *Girdharilal Son & Co. v. Kappini Gowder*(2). MENON, STODART and VENKATARAMANA RAO JJ. formed the opinion that subsequent registration did not remedy the defect. On the other hand, HORWILL J. held that it did. MENON, STODART and VENKATARAMANA RAO JJ. considered that the wording of the section compelled the Court to dismiss a suit filed by an unregistered firm. VENKATARAMANA RAO J., in addition to relying on the wording of the section, drew attention to the fact that the Privy Council in *Bhagchand Dagadusa v. Secretary of State for India*(3) had pointed out that section 80 of the Code of Civil Procedure is explicit and mandatory. Section 80 of the Code of Civil Procedure has very much in common with section 69 of the Partnership Act. It says that no suit shall be instituted against the Secretary of State for India in Council, or against a public officer for an act purporting to be done by him in his official capacity, until the expiration of two months next after notice in writing has been given. The Privy Council also observed that section 80 imposes a statutory and unqualified obligation upon the Court, and section 69 (2) of the Partnership Act does the same. VENKATARAMANA RAO J. relied further on the decisions of this Court with regard to section 28 (2) of the Provincial Insolvency Act. That section prevents a suit being filed against an insolvent without the leave of the insolvency Court, and in *Ghouse Khan v. Bala Subba Rowther*(4) and *Davood Mohideen v. Sahabdeen*(5) this Court held that a subsequent leave

PONNUGHAM
v.
MUTHUSAMI.
LEACH C.J.

(1) (1937) 2 M.L.J. 273.

(2) (1938) 2 M.L.J. 44.

(3) (1927) I.L.R. 51 Bom. 725 (P.C.).

(4) (1927) I.L.R. 51 Mad. 833.

(5) I.L.R. [1937] Mad. 841.

PONNUCHAMI
v.
MUTHUSAMI:
LEACH C.J. would not cure the initial defect and validate the institution of a suit.

In expressing the contrary opinion, HORWILL J. in *Varadarajulu Naidu and Kuppuswami Naidu & Co. v. Rajamanika Mudaliar*(1) observed:

"It is a well established principle that the Court can take notice of events that happen subsequent to the filing of the suit and that any irregularities or deficiencies in the cause of action that may exist on the date of the filing of the plaint can be overlooked if, on some date subsequent to the filing of the plaint and before the suit comes up for trial, those irregularities or deficiencies are rectified by the plaintiff or by process of law."

Whatever may be the principle which applies to the rectification of irregularities and deficiencies in the cause of action, we are of the opinion that it cannot be applied here.

The conclusion of HORWILL J. that subsequent registration will put the suit on a proper basis receives support, however, from the judgment of the Calcutta High Court in *Radha Charan v. Matilal*(2) and that of the Nagpur High Court in *Jakiuddin v. Vithoba*(3). These cases were decided by Judges sitting alone. In the Calcutta case it was said that, when registration had been effected, the suit might be treated as though the plaint had been received and the suit instituted on the day following the day of registration. The Patna High Court expressed dissent from this opinion in *Firm Laduram Sagarmal v. Jamuna Prasad Chaudhuri*(4) where HARRIES C.J. observed that he knew of no provision of law which permits a Court to treat the plaint as having been filed on a date subsequent to the date upon which it was actually filed, and we know of no such provision. It has been pointed out

(1) (1937) 2 M.L.J. 273.
(3) A.I.R. 1939 Nag. 301.

(2) (1937) 41 C.W.N. 534.
(4) (1938) I.L.R. 18 Pat. 114.

to us that a Bench of this Court expressed the opinion in *Ramakrishna Nadar v. Ponnaya Thirumalai Vandaya Thevar*(1) that a defect in a suit filed under the provisions of Order XXXIII, rule 15, of the Code of Civil Procedure could be remedied after the suit had been instituted and that, in such circumstances, it should be treated as having been instituted on that date. Order XXXIII, rule 15, states that an order refusing to allow a person to sue as a pauper shall be a bar to a subsequent application of a like nature by him in respect of the same cause of action, but he shall be at liberty to institute a suit in the ordinary manner, provided he first pays the costs incurred by Government and by the opposite party opposing his application for leave to sue as a pauper. The wording of Order XXXIII, rule 15, is not the same as the wording of section 69 (2) of the Partnership Act. Order XXXIII, rule 15, gives liberty to institute a suit in certain circumstances. Section 69 (2) says that no suit shall be instituted in certain circumstances, which is more emphatic and the circumstances are very different. Therefore we do not regard *Ramakrishna Nadar v. Ponnaya Thirumalai Vandaya Thevar*(1) as having application here.

The Allahabad High Court in *Danmal Parshotamdas v. Baburam Chhotelal*(2), the Patna High Court in *Firm Laduram Sagarmal v. Jamuna Prasad Chaudhuri*(3), the Lahore High Court in *Krishan Lal-Ram Lal v. Abdul Ghafur Khan*(4) and *Chhagan Lal v. Firm Mangal Sain*(5) have all held that subsequent registration of the firm will not allow the suit to proceed. All these cases except the second Lahore case were decided by Division Benches.

(1) (1935) 60 M.L.J. 791. (2) (1935) I.L.R. 58 All. 495.
(3) (1938) I.L.R. 18 Pat. 114. (4) (1935) I.L.R. 17 Lah. 275.
(5) A.I.R. 1938 Lah. 767.

PONNUCHAMI
v.
MUTHUSAMI:
LEACH C.J.

ROMMORAM
v.
MUTHUSAMI,
LEACH C.J.

The great weight of authority is in favour of the opinion that registration will not put the suit on a proper basis and that the Court's duty is to dismiss it. We consider that the majority opinion is correct. A suit is instituted when the plaint is filed in a Court of competent jurisdiction. Section 69 says that a suit by a firm shall not be instituted until the firm has been registered. The registration of the firm is a condition precedent to the right to institute the suit, and the Court has no jurisdiction to proceed with the trial when the condition precedent has not been fulfilled.

For the reasons given, we consider that the District Munsif acted lawfully in dismissing the suit. It follows that the petition must be dismissed with costs.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao.

THANGATHAMMAL (PETITIONER), APPELLANT,

v.

VEERAMA REDDIAR (RESPONDENT), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), ss. 73 and 47—Judgment-creditor who had attached property of judgment-debtor becoming heir of latter—Realization of attached property by another creditor—Right to rateable distribution of said judgment-creditor (heir) in sale-proceeds—"Principle of retainer"—Scope and applicability of—Merger—Doctrine of—Right of said judgment-creditor under sec. 47 of the Code of Civil Procedure.

T filed a suit against her brother R and attached before judgment a property belonging to the latter. She obtained a

decree and filed a petition for execution. The attachment and the execution petition were pending at all material times. Subsequent to the decree R died and T became his heir and representative. After R's death V obtained a decree against T as heir and representative of R in respect of a debt due by R. In execution of the decree V attached the above-mentioned property which belonged to R and sold the same and the sale proceeds were deposited into Court. T applied under section 73 of the Code of Civil Procedure for rateable distribution out of the above sale proceeds by virtue of her being a holder of the decree against R.

Held: Under section 47 of the Code of Civil Procedure T was entitled to claim that the amount payable to her under the decree should be paid first out of the sale proceeds and the balance only should be available for V's decree. Since she had chosen only to ask for a rateable distribution, her claim to that limited extent was perfectly justified. But before a rateable distribution could be ordered, an enquiry had to be held as to whether R left any other estate besides the property that had been sold, so that if it was found that there were other assets of R which could cover the value of T's debt, to that extent it must be deemed to be satisfied and only for the balance T could claim rateable distribution. If there were no other assets of R, then T must be allowed to participate in the sale proceeds along with V.

Held further: The principle of retainer could not be considered to be a peculiarity of English law. It is founded on a general principle of jurisprudence, namely, where it is the same hand that has to receive and pay, he cannot sue himself and the law must infer satisfaction of the debt on the ground that the debt must be deemed to have been paid from and out of the assets in the hands of the representative, whether he be executor or heir. The fact that the heir is a limited owner would not make any difference in the application of the principle. The principle is founded on common justice.

APPEAL against the order of the Court of the Subordinate Judge of Trichinopoly, dated 14th November 1938, and made in Appeal Suit No. 50 of 1938 (Appeal Suit No. 361 of 1937, District Court) preferred against the order of the Court of the District Munsif

THANGA
THAMMAL
v.
VEERAMA

1941,
September 28.

* Appeal Against Appellate Order No. 157 of 1939.

THANGATH-
ANNAL
v.
VEERAMA.

of Turaiyur, dated 15th October 1937, and made in Execution Application No. 404 of 1937 in Small Cause Suit No. 340 of 1936.

T. V. Ramanatha Ayyar and *T. S. Venkatarama Ayyar* for appellant.

K. V. Sesha Ayyangar for respondent.

Cur. adv. vult.

JUDGMENT.

VENKATA-
RAMANA RAO J.

VENKATARAMANA RAO J.—This appeal raises a question of some difficulty. The question is whether the appellant is entitled to rateable distribution by virtue of her being the holder of a decree in Original Suit No. 334 of 1934 on the file of the District Munsif of Thuraiyur against one Ramasami Pillai, from and out of the sale proceeds of property realised in execution of a decree in Small Cause Suit No. 340 of 1936 on the file of the said Court. The said Ramasami Pillai was the brother of the appellant. The decree in Original Suit No. 334 of 1934 was obtained by the appellant against the said Ramasami Pillai who died subsequent to the decree, and the appellant became his heir and representative. The decree in Small Cause Suit No. 340 of 1936 was obtained by the respondent against the appellant as the heir and representative of the said Ramasami Pillai in respect of a debt due by him. The respondent in execution of his decree attached the immovable property which belonged to Ramasami Pillai. The property was sold and the sale proceeds were deposited into Court. The appellant as the decree-holder in Original Suit No. 334 of 1934 applied for rateable distribution. From the affidavit filed by her it appears that she obtained an attachment before judgment of the said property in her suit and

THANGATH-
ANNAL
v.
VEERAMA.
—
VENKATA-
RAMANA RAO J.

the said attachment was subsisting on the date of sale. The attachment must therefore have been obtained during the lifetime of Ramasami and after the decree it would enure to her benefit under Order XXXVIII, rule 11, Civil Procedure Code. She has stated in her affidavit that she filed an execution petition and the same was pending on the date of her application for rateable distribution. The learned District Munsif allowed rateable distribution to her; but his order was reversed by the learned Subordinate Judge of Trichinopoly. In the course of the order, the learned Subordinate Judge observes thus:

“As soon as Ramaswami Pillai died, the petitioner-respondent (the appellant) became his heir and legal representative. In other words, in the decree which the petitioner-respondent obtained against Ramasami Pillai she became both the judgment-creditor and the judgment-debtor. The result is, I think, a total merger. . . That merger, I think, has taken place as soon as Ramasami Pillai died and he died long before petitioner-respondent filed the petition, Execution Application No. 404 of 1937, from which this appeal arose. So on the date that petition was filed petitioner's decree was not in existence as it has become merged long before that date and thereby ceased to exist. . . So it follows that she was not entitled to apply for rateable share.”

This appeal is against the said decision and the question is whether the view of the learned Subordinate Judge is tenable. Mr. Ramanatha Iyer on behalf of the appellant contends that the doctrine of merger on which the lower appellate Court relied is not applicable because the appellant, when she succeeded to the estate of Ramasami Pillai as his heir, took only a limited interest analogous to that of a widow's interest under the Hindu law and further, the doctrine of merger should not be allowed to operate when there are also other creditors of the deceased besides

THANGATH-
AMMAL
v.
VEERAMA.
—
VENKATA-
RAMANA RAO J.

the appellant. Mr. K. V. Sesha Ayyangar on behalf of the respondent contends that, where a debtor and creditor happen to be the same person, the doctrine of merger will operate and the only remedy of the creditor who succeeds as heir to the debtor, if at all, is to file a suit for administration and get her rateable share of the debt and the remedy by way of rateable distribution is not open to her because the decree by reason of the merger was no longer executable. In order to test the soundness of these contentions it is necessary to examine the legal effect of a creditor succeeding as heir to his debtor under the Hindu law by which the parties are governed. Under the Hindu law when a person dies, his property vests in his heir irrespective of his will. But the heir takes the property subject to the obligation of paying the debts of the deceased. Dealing with the right of an heir under the Muhammadan law their Lordships of the Privy Council in *Nawab Mirza Mohammad Kazim Ali Khan v. Nawab Mirza Mohammad Sadiq Ali Khan*(1) remarked thus :

"That the right of an heir under the Muhammadan law is a share in the estate after debts and valid legacies have been provided for is undeniable. . . but in providing that the heir takes a share in the *net estate* after deduction of the debts of the deceased, the Muhammadan law is in line with other laws including the Hindu law." (The italics are mine.)

Therefore the debt due to an heir is also one of the debts which will have to be deducted in finding out the net residue taken by an heir. Can it therefore be said that, when a Hindu heir to whom the deceased was indebted succeeds to his property, only the net balance after deduction of such a debt is taken by the heir? SPENCER J. seems to think that only the net

balance would vest in him; *vide* the observations in *Sami Aiyar v. Ramaswami Chettiar*(1). In English law, where the creditor of the deceased happens to be his executor, what is known as the principle of retainer is applied. What is "retainer" is thus explained by COTTON L.J. in *In re Compton. Norton v. Compton*(2) :

"What is retainer? It is this, that an executor having a claim against the testator's estate is not to be put in a worse position than any other creditor, who by suing and obtaining a judgment against the executor could obtain priority, while the executor not being able to sue himself could not obtain priority. The right of retainer applies to that which the executor has in his hands, or which has been paid into Court while he was executor, and which but for that payment would have come into his hands. The word 'retainer' speaks for itself. When the personal representative is also a creditor of the estate he may retain out of the assets which he has got in his possession, the amount of the claim for which he cannot sue, and when money has been paid into Court during the life of the executor, the Court does not withdraw from the executor his right in respect of that money. The Court treats that payment into Court as in effect a payment into the executor's own hands."

In *In re Baker. Nichols v. Baker*(3) LINDLEY L.J. stated the origin of the principle thus :

"A man cannot sue himself, and out of that the law developed the right of an executor to retain a debt due to him from the testator."

He further explained it in *In re Rhoades. Ex parte Rhoades*(4) thus :

"The older common law authorities go far to shew that if an executor was a creditor of his deceased testator and had assets in his hands sufficient to pay his debt—such debt was treated as extinguished. Sufficient assets to pay his own debt and properly applicable thereto being in the executor's hands, such assets were treated without more as applied by him to such payment. Blackstone says so distinctly. His

THANGATH-
AMMAL
v.
VEERAMA.
—
VENKATA-
RAMANA RAO J.

(1) (1938) I.L.R. 13 Luck. 494, 502 (P.C.).

(1) (1922) 44 M.L.J. 171, 174.
(3) (1890) 44 Ch. D. 262, 272.

(2) (1885) 30 Ch. D. 15, 19.
(4) [1899] 2 Q.B. 347, 352.

THANGATH-
AMMAL
v.
VEERAMA.
—
VENKATA-
RAMANA RAO J.

words are 'So much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose'. Plowden goes further, and says that the property in the assets is changed."

On this principle it has been held that if the assets in his hands were insufficient to pay his debt he is entitled to retain the whole of it in satisfaction of his debt. In English law it is also well settled that an executor can assert the right of retainer until distribution of the estate; it is not lost even by a decree for the administration of assets, *Stahlschmidt v. Lett*(1); and LINDLEY L.J. in *In re Rhoades. Ex parte Rhoades*(2) points out when a right can be asserted by the executor and when it is lost:

"It is quite plain from these authorities that the executor's right to retain assets in his hands was, as against him, treated as enforced as soon as he could properly enforce it. It would be very strange if it were held that he had lost his right because he had done nothing to assert it before there was any occasion to do so. It is only when some one seeks to take assets out of the executor's possession that it becomes necessary for him to assert his right of retainer; and, if he asserts it then, his right must be protected, unless, of course, he has released it or done something to deprive himself of it."

What happened in that case was that the executrix after collecting a sum of £1,100 paid the amount to the trustee in bankruptcy. The testator was indebted to her in the sum of £600. It was held that only the balance of £1,100 less the sum of £600 vested in the trustee in bankruptcy and she was entitled to be paid the £600. The same principle was applied before the Land Transfer Act to the case of an heir to whom the testator owed a specialty debt, the foundation of the rule being that he cannot sue himself, *vide* the observations of COTTON L.J. in *In re Illidge. Davidson*

(1) (1853) 1 Sm. & Giff. 415; 65 E.R. 182.

(2) [1899] 2 Q.B. 347, 352.

THANGATH-
AMMAL
v.
VEERAMA.
—
VENKATA-
RAMANA RAO J.

v. Illidge(1). The question is how far these principles can be applied to Hindu law and whether there is anything in that law which precludes the application of those principles. In a very early case, *Banarsi Das v. Maharani Kuar*(2), a question arose as to the legal effect of one of several joint judgment-debtors acquiring only a partial interest in the decree by right of inheritance. It was there held that the effect was not to extinguish the judgment-debt in its entirety, which could only happen if he acquired the whole debt, but so much only as the judgment-debtor had acquired. MAHMOOD J. in the course of the judgment remarked thus:

"We are prepared to hold that, when on account of death a creditor becomes heir to a debtor or a debtor becomes heir to a creditor, and thus the two opposite characters of debtor and creditor become united in the same person, the obligation to pay money may be regarded as extinguished. But this rule, even though applied in its full scope to judgment-creditors and judgment-debtors, falls short of showing that when the debtor inherits the rights of only one of his joint creditors the effect is to extinguish the entire judgment-debt. The rule, no doubt, owes its origin to the *confusio* of the Roman law."

In *Kudhai v. Sheo Dayal*(3) the same learned Judge affirmed this principle. The principle of these decisions was followed in our High Court; *vide Sami Aiyar v. Ramaswami Chettiar*(4) and *Sankaralingam v. Arumugam*(5). In *Sami Aiyar v. Ramaswami Chettiar*(4) the question arose thus. There was a decree for mesne profits in favour of the plaintiffs against the first defendant in the suit out of which the appeal, with which the learned Judges were dealing, arose. The first defendant died subsequent to the

(1) (1884) 27 Ch. D. 478, 481.

(2) (1882) I.L.R. 5 All. 27.

(3) (1888) I.L.R. 10 All. 570.

(4) (1922) 44 M.L.J. 171.

(5) I.L.R. [1939] Mad. 73.

THANGATH-
AMMAL
v.
VEERAMA.
—
VENKATA-
RAMANA RAO J.

decree and his mother the second defendant succeeded to his property as his heir. Subsequently the second defendant surrendered the property to the plaintiffs. During the course of the litigation a person stood surety for the payment of the mesne profits and executed a surety bond. The question was whether the plaintiffs could recover the amount of the mesne profits from the surety. The learned Judges held that he could not on the ground that, the plaintiffs having become the heirs of the first defendant, the debt must be deemed to have been paid out and extinguished and, as the principal obligation became extinguished, the surety's obligation also became extinguished. VENKATASUBBA RAO J. in the course of the judgment made the following observations :

"The plaintiffs became the legal representatives of their debtor and they were therefore entitled to execute the decree against themselves to the extent of his property which had come to their hands and the plaintiffs must accordingly be deemed to have obtained satisfaction of their decree. The circumstance that the plaintiffs did not actually take out execution against themselves and recover the sum in execution is immaterial and I am therefore satisfied that the principal obligation was in this case extinguished."

SPENCER J. observed thus :

"What they must be deemed to have got in succession by the first defendant's untimely death and his mother's release deed was the balance of his estate after wiping out his debt to them."

In *Sankaralingam v. Arumugam*(1) VENKATASUBBA RAO J. had to deal with a case where a decree-holder became an heir of one of the judgment-debtors. After observing that Order XXI, rule 16, Civil Procedure Code, would not in terms apply, he remarked

(1) I.L.R. [1939] Mad. 73.

that the principle which that section would embody was that

"where the decree-holder's right and the judgment-debtor's liability became united in one and the same individual, it stands to reason that the decree should be treated as satisfied".

But a distinction should be made between a partial and a complete satisfaction and the decree must only be treated as satisfied *pro tanto*, that is, to the extent of his share. This was the view taken in the early Allahabad cases and also in the recent decision of that Court reported as *Asia Bibi v. Malik Aziz Ahmad*(1). But in *Chidambaram Pillai v. Thangathammal*(2) SPENCER J. took the view that where a creditor was a limited owner like a Hindu widow there would be no extinguishment. In that case one N died leaving a widow and a daughter. The widow succeeded to the estate of N and she was also a creditor of her husband. The widow died subsequently leaving a will by which she assigned that debt to the plaintiff. The plaintiff brought a suit to recover the amount from the daughter who succeeded to the estate of her father after the widow's death; held, he was entitled. The ground on which the learned Judge put it was that the principle of English law of retainer which applies to executors would not apply to Hindu widows as such, that the question of merger was one of intention and that it was not for the advantage of a widow to pay off her stridhanam debt out of the income of her husband's estate as she was entitled to enjoy the whole of the income of the estate.

This principle of retainer cannot be considered to be a peculiarity of English law. It is founded on a general principle of jurisprudence, namely, where it

THANGATH-
AMMAL
v.
VEERAMA.
—
VENKATA-
RAMANA RAO J.

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

(2) (1918) 16 L.W. 678.

THANGATH-
AMMAL
v.
VEERAMA.
—
VENKATA-
RAMANA RAO J.

is the same hand that has to receive and pay, one cannot sue himself and the law must infer satisfaction of the debt on the ground that the debt must be deemed to have been paid from and out of the assets in the hands of the representative whether he be the executor or heir. The fact that the heir is a limited owner will not make any difference in the application of the principle. The principle is founded on common justice. In *Attorney-General v. Jackson*(1) Lord ATKIN refers to the case of *Woodward v. Lord Darcy*(2) for the reason underlying this principle and states thus :

“The reason for it is to be found in the report in Plowden of the opinions of the Judges of both the King’s Bench and the Common Pleas in the case of *Woodward v. Lord Darcy*(2) given in 1547 after discussion in several previous terms. The explanation is that without the right the executor would be bound to pay the other debts of the testator and to leave the testator’s debt to himself unpaid.”

In *Woodward v. Lord Darcy*(2) the scope of the principle is thus explained in a passage which in spite of its length I shall quote as it is informing and instructive :

“If the execution of the administration should extinguish the debt, this would be derogatory to testaments, and to the souls of testators. To testaments, for that executors would refuse rather than lose their debts, and without an executor a will is null and void : and to the souls of testators, for that if the executor takes upon him the administration, which is an act of charity, then thereby the just debt due from the testator to the executor, would remain for ever unpaid, which would be dangerous for the soul of the testator. So that such a law would induce a man to omit charity and friendship, or if he did execute it, he would be ungratefully requited with the loss of a just debt due to him, and would be forced to pay all the other debts of the testator, and to leave

(1) [1932] A.C. 365, 370. (2) (1557) 1 Plowden 184 ; 75 E.R. 282.

the testator’s debt due to himself unpaid. But our law is not so unreasonable or uncharitable, for the executor may retain assets to pay himself, notwithstanding he may not bring an action to recover if, for true it is that the action is gone by the act of administration. But the reason why the action is lost for ever is, because in judgment of law he is satisfied before, for if the executor has as much goods in his hands as his own debt amounts to, the property of those goods is altered and vested in himself, that is, he has them as his own proper goods in satisfaction of his debt, and not as executor. So that there is a transmutation of property, by the operation of law, without suit and execution, for inasmuch as Windham here could not have an action against himself as executor, nor have execution against himself as executor, the operation of the law is equivalent to a recovery and execution for him, and the property is as strongly altered as it could be by recovery and execution. So that the reason why the action is gone is, because he has full satisfaction by the alteration of the property. And although the debt was a chose in action, yet it is not so in him as executor, for his action is totally gone for the reason aforesaid, in which respect the chose in action is become converted into a chose in possession, and a satisfaction executed. Wherefore Windham might well retain goods to satisfy his own debt.”

No doubt WRIGHT J. in *In re Gilbert. Ex parte Gilbert*(1) doubted whether it was the law that the property in the assets was absolutely altered without something showing assent or appropriation by the executor. LINDLEY L.J. seemed to approve of it and Lord ATKIN, in referring to *Woodward v. Lord Darcy*(2), did not express any doubt about it. Whether in the case of a creditor-executor the principle of alteration of property should be held to be applicable or not, I do not see why it should not be applied to the case of a property vesting in an heir. However the basis on which the debt is said to be extinguished is clear, that is, so much of the property as is available in his hands must be deemed to have been appropriated

(1) [1898] 1 Q.B. 282. (2) (1557) 1 Plowden 184 ; 75 E.R. 282.

THANGATH-
AMMAL
v.
VEERAMA.
—
VENKATA-
RAMANA RAO J.

THANGATH-
AMMAL
v.
VEERAMA.
—
VENKATA-
RAMANA RAO J.

and only the net balance of the estate must be deemed to have vested in him. So that, if any other creditor brings a claim for his debt, he will be entitled to assert the right of retainer and plead that the creditor can only claim payment from and out of the balance of the assets in his hands after deduction of his debt. I do not see there is anything in the Hindu law which precludes the application of this principle. In fact this principle was applied in the Indian decisions referred to above. In *Tamiz Bano v. Nand Kishore*(1), dealing with a case of a dower debt ASHWORTH J. expressed the view, in which MUKERJI J. concurred, that this principle would apply to India; *vide* the observations of ASHWORTH J. at pages 650 and 651. As remarked in *Woodward v. Lord Darcy*(2) it would be unreasonable and uncharitable that an heir should forego his debt and that the other creditors should be paid. So far as I am able to see there is nothing in the Hindu law which says that the moment an heir succeeds to his debtor, he foregoes his debt. The appellant in this case is entitled to say that it is only the net balance of the sale proceeds of the house that will be available for the payment of the debt of the respondent if the suit property was the only property left by the deceased Ramasami. But she claims rateable distribution. The question is can she claim it? In order that a decree-holder may claim rateable distribution the following requisites are necessary:— (i) he must have made an application to the Court which holds the assets before their receipt for the execution of his decree, (ii) it must be a decree for the payment of money, (iii) it must be against the same judgment-debtor, and (iv) he must not have obtained satisfaction of it. In this case the decree-holder has applied for the

(1) (1927) I.L.R. 49 All. 645. (2) (1557) 1 Plowden 184; 75 E.R. 282.

THANGATH-
AMMAL
v.
VEERAMA.
—
VENKATA-
RAMANA RAO J.

execution of the decree before the receipt of the assets and it is pending. It is a decree for payment of money. Though her decree was obtained against Ramasami and the decree of the respondent was obtained against her as the legal representative of Ramasami, it must be held to be against the same judgment-debtor. In regard to the question of satisfaction her case is that no satisfaction of the decree has been entered up and the decree must be deemed to be subsisting. The contention of Mr. Sesha Ayyangar is, though the execution application is still pending, no order can issue thereon because the appellant cannot have execution against herself. This again brings in the theory of satisfaction because the ground on which execution is denied is that she being the same hand to receive and to pay, the debt due to her must be deemed to have been paid from and out of the assets in her hands and therefore it must be deemed to have been satisfied. As pointed out in *Williams on Executors* this remedy arises from the mere operation of law. (Vol. 1, Eleventh Edition, page 797.) In the language of the learned Judges in *Woodward v. Lord Darcy*(1)

“the operation of the law is equivalent to a recovery and execution”.

The question whether the decree has been satisfied is one which has to be gone into. If Ramasami had left assets other than the property which was sold sufficient to satisfy the decree debt of the appellant, her claim must be disallowed. But if the only asset that he left was the property which was sold, so much of the property that would be necessary to satisfy her debt must be deemed to have been appropriated for her debt and only the balance will be available for payment to the respondent. Though the contention

(1) (1557) 1 Plowden 184; 75 E.R. 282.

THANGATH-
AMMAL
v.
VEERAMA.
—
VENKATA-
RAMANA RAO J.

of Mr. Sesha Ayyangar may be right in so far as section 73 may not apply because the decree must be held to have been satisfied and therefore execution cannot issue, still she is entitled to urge her claim under section 47, Civil Procedure Code, and prevent the respondent from appropriating the whole of the sale proceeds for satisfaction of his debt. The fact that she has chosen to claim rateable distribution should not stand in the way of her getting this limited relief which she has claimed. In this connection I would like to refer to *Veerasokkaraju v. Papiiah*(1) which appears to me to be a case in point. The facts in that case were as follows. A succeeded to the property of his mother B. C, a creditor of B, obtained a decree against A for the amount payable from and out of the assets of the mother in his hands. C then attached in execution of his decree certain jewels in the possession of A. A admitted liability of the jewels to attachment but claimed a lien on the sale proceeds of the jewels to the extent of Rs. 1,562; Rs. 361 paid by him to redeem two of the jewels which had been pledged by the mother; Rs. 110 lent to the mother for remaking jewel No. 11; Rs. 1,091 paid by him in discharge of debts contracted by the mother. The District Judge took the view that A's contention that the assets in his hands must be taken to be what was left after he had satisfied his own claims against the mother's estate was unsound and he therefore disallowed the claim. On appeal, SUBRAMANIA AYYAR and DAVIES JJ. held that A was entitled to be paid out of the sale proceeds the sums which he proves he is entitled to. In regard to the debt owing to him they remarked thus :

"In regard to the Rs. 110 said to have been advanced to the mother in her lifetime, the appellant A has a right to pay

(1) (1902) I.L.R. 26 Mad. 792.

himself out of the assets *as he cannot sue himself.*" (The italics are mine.)

It will thus be seen that the learned Judges in that case applied the principle of retainer. They set aside the order of the District Judge and remanded the case for enquiry as to whether A in fact discharged the debt of the mother and if so, to what extent. Therefore, if the *ratio decidendi* of this case were to be applied to the present case, it follows that the appellant could have justly claimed that the amount payable to her under the decree should be paid first out of the sale proceeds and the balance only should be available for the respondent's decree. It was open to her to prefer this claim under section 47, Civil Procedure Code, being a party to the decree. Since she has chosen only to ask for a rateable distribution, her claim to this limited extent is perfectly justified. But before a rateable distribution can be ordered, an enquiry must be held as to whether Ramasami left any other estate besides the property that has been sold, so that if it is found that there were other assets of the judgment-debtor which would cover the value of the appellant's debt, to that extent it must be deemed to be satisfied and only for the balance she could claim rateable distribution; if there were no other assets of the judgment-debtor, she must be allowed to participate in the sale proceeds along with the respondent.

I therefore set aside the decision of the learned Subordinate Judge and remand the petition of the appellant to the learned District Munsif of Thuraiyur for disposal in the light of the observations contained in this judgment. I direct each party to bear his or her costs throughout.

G.R.

THANGATH-
AMMAL
v.
VEERAMA.
—
VENKATA-
RAMANA RAO J.

APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice Kunhi Raman.

1941,
October 31.

KRISHNASWAMY REDDIAR *alias* RAJAH CHIDAM-
BARA REDDIAR (PLAINTIFF), PETITIONER,

v.

VENUGOPALA REDDIAR BY HIS AGENT V. A. LAKSH-
MINARASIMHA AYYAR AND TWO OTHERS (DEFENDANTS),
RESPONDENTS.*

Government of India Act, 1935, ss. 46 (2), 292 and 293—India and Burma (Existing Laws) Act, 1937, sec. 1—Government of India (Adaptation of Indian Laws) Order, 1937, paragraphs 1, 9, 10 and 11—Interpretation Act, 1889 (52 and 53 Vic. ch. 63), sec. 38 (b), (c), (d) and (e)—Code of Civil Procedure (Act V of 1908), ss. 16, 17 and 20—Suit for partition of movable and immovable properties situate both in Madras Presidency and Burma, filed in 1932 in Court in Madras Presidency—Burma ceasing to be part of British India in 1937—Competency of Court in Madras Presidency to continue hearing of suit for partition in respect of properties in Burma—Jurisdiction.

In 1932 K filed a suit in the Court of the Subordinate Judge of Trichinopoly against V and two others who resided in Rangoon, Burma, praying *inter alia* for the recovery of possession of certain properties movable and immovable or in the alternative for partition of these and other specified properties and allotment to the plaintiff of his share therein. A large part of the properties, movable and immovable, was situated in Burma, the others being within the jurisdiction of the Court of the Subordinate Judge of Trichinopoly. On 1st April 1937 the Government of India Act, 1935, came into operation and under section 46 (2) of the Act, Burma ceased to be part of India. The suit was contested and was pending in the Court at Trichinopoly till 16th November 1938 when the defendants filed a petition praying for leave to file an additional written statement raising the contention that the Court ceased to have jurisdiction in respect of the properties situated in Burma. Leave

* Civil Revision Petition No. 1354 of 1940.

was granted and the Subordinate Judge held on a preliminary issue that he had no jurisdiction to try the suit regarding the properties situated in Burma. On a revision petition to the High Court against this order,

held: The Subordinate Judge of Trichinopoly could continue to try the suit and pass a decree affecting the properties situated in Burma also.

The right to continue in a Court in British India a suit properly filed in that Court before 1st April 1937 has not been taken away by the Government of India Act, 1935, and the combined effect of the India and Burma (Existing Laws) Act, 1937, section 1, sub-sections 1 and 2, the Government of India (Adaptation of Indian Laws) Order, 1937, paragraphs 1, 9, 10 and 11 and the Interpretation Act, 1889 (52 and 53 Vic. ch. 63), section 38 (b), (c), (d) and (e) is expressly to preserve to the Courts in British India their jurisdiction in regard to matters pending in these Courts before 1st April 1937.

Statutory provisions and case law reviewed and discussed.

PETITION under section 115 of Act V of 1908 and section 224 of the Government of India Act, 1935, praying the High Court to revise the order of the Court of the Subordinate Judge of Trichinopoly, dated 14th August 1940 and made in Original Suit No. 55 of 1932.

K. S. Sankara Ayyar for petitioner.

Advocate-General (Sir A. Krishnaswami Ayyar) and *K. G. Srinivasa Ayyar* for first and second respondents.

Third respondent was not represented.

Cur. adv. vult.

JUDGMENT.

MOCKETT J.—It is unnecessary to set out the complicated facts which are the basis of the suit, the subject of this civil revision petition. The following statement of the essential facts is sufficient. The plaintiff filed Original Suit No. 55 of 1932 in the Court of the Subordinate Judge of Trichinopoly

KRISHNASWAMI
v.
VENUGOPALA.

MOCKETT J

KRISHNASWAMI
v.
VENUGOPALA. against the defendants, who both reside in Rangoon.
MOCKETT J. The prayer in the plaint is as follows :—

“(a) For a decree directing the defendants to deliver the properties in schedule C, parts I, II and III, together with profits from date of suit and declaring that the plaintiff is solely and absolutely entitled to the assets described in schedule C, part IV.

(b) In case the plaintiff is held not entitled to that relief, for a decree directing the division of the properties in schedules A, B and C into one-fourth, three-eighths and three-eighths shares allotting schedules A and B to the plaintiff and charity and adding so much property from schedule C as may be necessary to make them a just moiety of three-fourths and one-fourth respectively of the entire estate.

(c) For a decree that the plaintiff is entitled to the trusteeship of the charity and to the management of the properties attached thereto described in schedule B together with what may be added to them on the just ascertainment of one-fourth share for the charities.”

It is common ground at the bar that a large part of the properties concerned are immovable properties in Burma, the others being within the jurisdiction of the Court of the Subordinate Judge of Trichinopoly. Paragraph 20 of the plaint states :

“The cause of action arose at Srirangam, Tiruvanakoil, Manakal, etc., villages in the Trichinopoly District, within the jurisdiction of this Court, in February 1932 when Raja Ramnatha Reddi died and when plaintiff became aware of the unfair allotment to Krishnaswami Reddi's share out of Chidambara Reddiar's estate.”

This plea is technically defective as it does not allege how and where the cause of action arose in terms of sections 16, 17 and 20 of the Code of Civil Procedure. It is however obvious from a reading of the plaint that part of the cause of action arose in Trichinopoly and part in Burma. The defendants never suggested otherwise, and under section 21 of the Code of Civil Procedure they would not have been permitted to

take this technical point of pleading as to jurisdiction at the trial had events followed their normal course. The defendants did in fact take an objection relating to court-fee, as a result of which, the petitioner, in the words of his affidavit filed in Interlocutory Application No. 1280 of 1938, “paid a very heavy additional court-fee of Rs. 7,910, rendered payable in respect of properties situate in Burma, on 11th January 1938”. As an important question concerning jurisdiction is before us I am noticing the above, but actually it has not been contended before us that, had it not been for the following circumstances, this suit was not properly brought in the Court of the Subordinate Judge of Trichinopoly.

On 1st April 1937 the Government of India Act, 1935, came into operation. Section 46, sub-section 2 is as follows :—

“Burma shall cease to be part of India.”

On 16th November 1938, six years after the plaintiff had filed his suit in Trichinopoly, the defendants filed a petition praying for leave to file additional written statement. The affidavit in support of that petition alleges (i) that the properties are situate partly in British India within the local limits of this Court's jurisdiction and partly in British Burma which formed part of British India when this suit was instituted, and (ii) that out of the suit properties certain named items in the schedules are situate in Burma. Paragraph 4 is as follows :—

“Under the Government of India Act, 1935, section 46 (2), Burma including British Burma has ceased to be part of India including British India from 1st April 1937. This Court being a British Indian Court has, therefore, ceased to have jurisdiction over the said properties in British Burma from the said date. I am advised that there has come into existence a total want and absence of jurisdiction in this Court in respect

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J.

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J.

of the said pro-notes by reason of the said enactment and that a decree passed by this Court in respect of the properties in Burma will be a nullity."

Leave to file the additional written statement was granted. Paragraph 2 of that statement alleges :

"There has come into existence from 1st April 1937 a total want and absence of jurisdiction in this Court in so far as the said properties are concerned by reason of the separation of Burma from India."

An additional issue No. 33 directly raising the jurisdiction of the Court was framed as follows :—

"Has this Court now jurisdiction in respect of the properties situate in Burma included in the plaint (C) schedule in view of section 46 (2) of the Government of India Act, 1935 ?"

The suit was rightly posted for arguments on this issue, because, in the words of the learned Judge in paragraph 2 of his judgment,

"it was said that a decision on this point will save a lot of oral evidence in the case as the bulk of the properties claimed in this suit are situated in Burma and questions have been raised regarding the ownership of those properties".

The learned Judge has decided that he had no jurisdiction to try this suit regarding the movables and immovables situated in Burma. If that decision is right, the plaintiff must commence proceedings again in Burma regarding the property in Burma. The issues in that suit will be, as far as I can judge from a perusal of them, identical with those raised affecting the Indian property and remaining within the learned Judge's jurisdiction. They involve a decision *inter alia* as to the fact and validity of certain adoptions, the validity of a will, partition deed and trust deed, and questions of construction of the documents. Against that decision this civil revision petition has been filed. It unquestionably raises an

important question of jurisdiction and can be entertained by us under section 115 of the Code of Civil Procedure. Sir Alladi Krishnaswami Ayyar, on behalf of the respondents, did not suggest that it is not a proper case in which we should decide the point in revision. I think it right to state that, although it might be possible to say that this suit should proceed and that the point of jurisdiction should be taken on appeal, it would be a very grave hardship on the petitioner to do so. Immense expense might be incurred for obtaining the necessary evidence from Burma, which might possibly be thrown away were the final decision as to jurisdiction to be against the plaintiff in the appeal. As it seems to us that our decision in this civil revision petition will be final so far as the question of jurisdiction is concerned, we have thought it convenient and proper to decide it now.

The point that we have to decide may be stated in this way. Has the jurisdiction of the Court of the Subordinate Judge of Trichinopoly, as from 1st April 1937, entirely ceased to exist in so far as a suit filed therein before that date affects immovable property in Burma ? The respondents contend that the answer should be "yes"; the petitioner contends that the jurisdiction of the Courts, relating to matters pending before 1st April 1937, has been saved or at least has not been specifically taken away and that the Subordinate Judge can continue to try the suit and can pass a decree affecting the immovable property in Burma. It is a basic principle of private international law that no British Court will entertain a suit affecting immovable property in a foreign country, nor will a foreign judgment adjudicating on the title to immovable property within British jurisdiction receive recognition in a British Court. This well-known principle has been

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J.

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J. treated as axiomatic before us and it is unnecessary to quote authority for it. The decisions of the highest Courts are unanimous. I am more than content to adopt the statement on the subject by Professor Dicey in the Fifth Edition of his work on the Conflict of Laws, at page 203, which reads as follows :—

“Subject to the exceptions hereinafter mentioned, the Court has no jurisdiction to entertain an action for the determination of the title to, or the right to the possession of, any immovable property situated out of England.”

The exceptions do not apply in this case. The respondents have therefore relied on this general principle. They contend that on and after 1st April 1937, so far as the jurisdiction of his Court was concerned, the Subordinate Judge had no more right to pass a decree relating to immovable property in Burma than he had to order delivery to the plaintiff of a house in Bangkok. The petitioner's contention however is that this general principle, formidable as it may seem, is not applicable to the special circumstances before us. Mr. K. S. Sankara Ayyar has argued that, when a supreme Legislature thinks it proper to separate territories subservient to it into different entities for purposes of rule and administration, there is nothing startling in the proposition that when doing so it should have, for the purpose of tiding over the inevitable dislocation and inconvenience that may result, preserve in part the *status quo* preceding the day on which the separation takes place so as to prevent that inconvenience and possible injustice to the subjects affected wherever they may be, and he argues that the Legislature would only if it were unavoidable interfere with actions at law in course of trial. Counsel pursues this argument by pressing the contention that an interpretation upon the various enactments

should be given, if possible, so as to ensure so reasonable a result. The ultimate decision must rest on a consideration of the Government of India Act and other legislation, such consideration being according to the appropriate canons of construction.

The first provisions for consideration are sections 292 and 293 of the Government of India Act. They correspond with sections 148 and 149 of the Government of Burma Act, except of course that in the Burma Act the word “Burma” is substituted for “British India”. Section 292 of the Government of India Act is as follows :—

“Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority.”

The effect of this section is that the existing law of India continues to operate. It is hardly necessary therefore to say that the Code of Civil Procedure continues in force subject to alteration, repeal or amendment. Section 293 is as follows :—

“His Majesty may by Order in Council to be made at any time after the passing of this Act provide that, as from such date as may be specified in the Order, any law in force in British India or in any part of British India shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of this Act and, in particular, into accord with the provisions thereof which reconstitute under different names, governments and authorities in India and prescribe the distribution of legislative and executive powers between the Federation and the provinces : Provided that no such law as aforesaid shall be made applicable to any Federated State by an Order in Council made under this section. In this

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J.

section the expression 'law' does not include an Act of Parliament, but includes any ordinance, order, bye-law, rule or regulation having in British India the force of law."

Under this section the Government of India (Adaptation of Indian Laws) Order, 1937, was made by his Majesty in Council. Clause 2 (1) states that the expression "Indian law" means a law as defined in section 293 of the Act. Sub-clause 2 is as follows:—

"The Interpretation Act, 1889, applies for the interpretation of this Order as it applied for the interpretation of an Act of Parliament."

The meaning of this sub-clause is clear. Just as the Interpretation Act affects the construction of Acts of Parliament, so equally can it be called in aid in construing the meaning of this Order. Clause 9 of the Order states:

"The provisions of this Order which adapt or modify Indian laws so as to alter the manner in which, the authority by which, or the law under or in accordance with which, any powers are exercisable, shall not render invalid any notification, order, commitment, attachment, bye-law, rule or regulation duly made or issued, or anything duly done, before the commencement of this Order; and any such notification, order, commitment, attachment, bye-law, rule, regulation or thing may be revoked, varied or undone in the like manner, to the like extent and in the like circumstances as if it had been made, issued or done after the commencement of this Order by the competent authority and under and in accordance with the provisions then applicable to such a case."

Clause 10 states:

"Save as provided by this Order, all powers which under any law in force in British India, or in any part of British India, were immediately before the commencement of Part III of the Government of India Act, 1935, vested in, or exercisable by, any person or authority shall continue to be so vested or exercisable until other provision is made by some Legislature or authority empowered to regulate the matter in question."

It has not been contended that the word "authority" does not include a Court. I consider that it

must include a Court. The word seems to me all-comprehensive. According to the Oxford Dictionary it includes "power", "right to enforce obedience", "delegated power" and "person having authority".

Clause 11 states:

"Nothing in this Order shall affect the previous operation of, or anything duly done or suffered under, any Indian law, or any right, privilege, obligation or liability already acquired, accrued or incurred, under any such law"

The India and Burma (Existing Laws) Act, 1937, also requires consideration. It is an Act to explain and amend sections 292 and 293 of the Government of India Act. Section 1, sub-sections 1 and 2 read:

"1. (1) For the purposes of sections 292 and 293 of the Government of India Act, 1935, which provide for the existing laws of British India to continue in force therein after the date of the commencement of Part III of the said Act, subject to the power of His Majesty in Council to make such adaptations and modifications in any such law as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of the said Act,

(i) A law passed or made before the said date by a Legislature or other competent authority in British India, and not previously repealed, is, for the removal of doubts, hereby declared to be a law in force immediately before that date, notwithstanding that it, or parts of it, may not then be in operation, either at all or in particular areas;

(ii) any such law which immediately before the said date has extra-territorial effect as well as effect in British India shall, subject to any such adaptations and modifications as aforesaid, continue to have extra-territorial effect;

(iii) the power of His Majesty in Council to make in an existing Indian law such adaptations and modifications as aforesaid shall be deemed to include power to declare any such law, or any part thereof, to be repealed, if it appears to His Majesty in Council that its continuance is unnecessary or inexpedient in view of the provisions of the said Act;

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J.

(iv) nothing in the said sections shall be construed as continuing any temporary Act in force beyond the date fixed for its expiration.

(2) Paragraphs (i) to (iv) of the preceding sub-section shall apply also in relation to sections 148 and 149 of the Government of Burma Act, 1935 (being the sections of that Act corresponding to the said sections 292 and 293) with the following adaptations :—

(a) References to British India and to an Indian law shall be construed respectively as references to Burma and to a Burma law ;

(b) for the words 'in view of the provisions of the said Act' there shall be substituted the words 'in view of the separation of India and Burma'."

Section 1 (1) (ii) of the above Act is expressed in the clearest terms.

The Interpretation Act of 1889, section 38, sub-section 2 enacts :

"Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not

(a) revive anything not in force or existing at the time at which the repeal takes effect ; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed ; or

(c) affect any right, privilege, obligation or liability acquired, accrued, or incurred under any enactment so repealed ; or

(d) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed ; or

(e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid ; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

It is argued for the petitioner that the intention of the Legislature to be derived from a combined reading of the above Acts and Order indicate an intention generally to preserve the rights and liabilities of subjects engaged in litigation in British India before the passing of the Government of India Act. That the general intention of the Legislature was to preserve the rights of parties and not to affect legal proceedings in being before 1st April 1937 seems to me clear. Clause 10 of the Order in Council continues the powers exercised by any person or authority under any law in force in British India or in any part of British India immediately before the commencement of Part III of the Government of India Act, 1935, which appears to be the date selected as the dividing line between the old and the new regime. I do not think that the provisions of Part III are relevant. Part III came into operation on 1st April 1937 by the Government of India (Commencement, etc.) Order, 1936. Clause 11 of the Government of India (Adaptation of Indian Laws) Order states that nothing in the Order shall affect the previous operation of, or anything duly done or suffered under, any Indian law, or any right, privilege, obligation or liability already acquired, accrued or incurred under any such law, or any penalty, forfeiture, or punishment incurred in respect of any offence already committed against any such law. As to the interpretation of the Act, the Interpretation Act of 1889 is obviously of great importance. The Government of India Act, 1935, repealed the Government of India Act of 1915 wholly, and virtually the whole of the Acts of 1916 and 1919.

Section 223 of the Government of India Act specifically provides that the jurisdiction in the existing High Courts shall be the same as immediately before

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J.

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J.

1st April 1937. The learned Advocate-General argued as follows. The effect of section 38, sub-section 2, of the Interpretation Act, 1889, is that the repeals under the Government of India Act, 1935, shall not affect any right, etc., acquired or accrued under any enactment so repealed and similarly it shall not affect any legal proceeding or remedy in respect of any such right, and this means that only any rights expressly given under the repealed Acts are preserved. The legal proceeding must be directly traceable to the Act repealed. It only affects legal proceedings and the remedies given by the repealed Act, for example, suits against the Secretary of State. If this argument is sound it would follow that a suit filed in British India against the Secretary of State before 1st April 1937 involving immovable property in Burma could be continued in British India notwithstanding the apparent conflict of jurisdiction involved by the coming into force of section 46 (2) of the Government of India Act, 1935. I am asked to hold that nothing under any Act repealed by the Government of India Act, 1935, has any relation to the suit, the subject of this civil revision petition. I am unable to accept this contention. In the Act under which the High Court has its existence and exercised its jurisdiction, section 101 was, among other sections, repealed. But the Code under which the High Courts referred to in section 219 of the Government of India Act, 1935, are to function and under which the Courts subordinate to the High Courts function, is to continue in force in British India until altered, repealed or amended by a competent Legislature. It is hardly necessary to state that an appeal in the suit before me would ordinarily lie to the High Court of Madras. There is no express reference to existing suits in which the jurisdiction of

India and Burma may clash; there is no express provision for such a position. So we have, as argued by the respondents, the implications of private international law as a result of section 46 of the Government of India Act on the one hand and on the other a number of provisions, all in my opinion pointing in the same direction, the preservation of rights and positions generally existing before 1st April 1937. It is necessary to consider the principles governing construction in the special circumstances of this case. A number of authorities have been cited, and it is convenient first to refer to the decision of the Judicial Committee in *Colonial Sugar Refining Company v. Irving*(1). The question there involved was whether the right of appeal from the Supreme Court of Queensland to His Majesty in Council had been taken away by the Australian Commonwealth Judiciary Act, 1903, and Lord MACNAGHTEN, at page 372, says this :

“As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that, if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is: Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regular procedure. In principle, their Lordships see no difference between abolishing an appeal

(1) [1905] A.C. 369.

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J.

altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

This is a clear pronouncement by the Judicial Committee on how legislation affecting a party's rights already accrued should be approached. Equally clear is SULAIMAN J. in *The United Provinces v. Atiga Begum*(1):

"Undoubtedly, an Act may in its operation be retrospective and yet the extent of its retrospective character need not extend so far as to affect pending suits. Courts have undoubtedly leaned very strongly against applying a new Act to a pending action, when the language of the statute does not compel them to do so. It is a well recognized rule that statutes should, as far as possible, be so interpreted, as not to affect vested rights adversely, particularly when they are being litigated. When a statute deprives a person of his right to sue or affects the power or jurisdiction of a Court in enforcing the law as it stands, its retrospective character must be clearly expressed. Ambiguities in it should not be removed by Courts, nor gaps filled up in order to widen its applicability. It is a well established principle that such statutes must be construed strictly, and not given a liberal interpretation."

There are no decisions on facts corresponding exactly with those before us; but there are decisions of this High Court relating to the effect of transfer of territorial jurisdiction on decrees already passed. *Ramier v. Muthukrishna Ayyar*(2) is such a case. The facts were that the respondents obtained a final mortgage decree on 20th January 1916 in the District Munsif's Court of Melur in respect of properties part of which were situated within its jurisdiction and part within the jurisdiction of the District Munsif's Court of Madura. In February 1920 the jurisdiction of these

(1) [1940] F.C.R. 110, 163.

(2) (1932) I.L.R. 55 Mad, 801 (F.B.).

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J.

Courts was rearranged, with the result that the suit properties came within the jurisdiction of the District Munsif of Madura Taluk. An application for execution was filed on 27th July 1927 in the latter Court without applying for the transfer of the decree from the Melur Court which continued to exist. The question was whether the Madura Court could execute the decree. The Full Bench held that it could not, without the decree having been transmitted from the Melur Court, and that the Melur Court retained jurisdiction to execute the decree even after the transfer of territorial jurisdiction. RAMESAM J. who delivered the judgment of the Bench says at page 814:

"It seems to me that, unless the language of the notification is plain, directions as to future regarding pending business cannot be implied."

The Full Bench referred with approval to the decision of PHILLIPS and VENKATASUBBA RAO JJ. in *Chokkalinga Pillay v. Velayudha Mudaliar*(1). In that case there was a suit on a mortgage properly brought in the Court of the Subordinate Judge of Kumbakonam, but at the time of the passing of the decree the jurisdiction of this Court had been transferred to Mayavaram. Nevertheless the Kumbakonam Court passed the final decree and the objection was taken that the decree was absolutely void. PHILLIPS J. observed at page 451:

"The jurisdiction of a Court consists in its powers to entertain suits and, when once a suit has been properly entertained, it is difficult to understand how that jurisdiction is removed unless it is specifically so done by the order of a competent authority. Once a suit has been entertained, the remaining proceedings taken therein are not taken by reason of any particular territorial jurisdiction, but in the exercise of the powers vested in the Court to try suits generally and

(1) (1924) 47 M.L.J. 448.

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J.

consequently the only time at which the territorial jurisdiction comes into operation is at the time of filing a suit. Once the Court has seisin of the case, it has jurisdiction to try it to its conclusion, unless there is any reason for holding that that jurisdiction has been removed."

In *Ramakrishna Chetty v. Subbaraya Iyer*(1) BENSON and SUNDARA AYYAR JJ.'s discussion of general principles is of assistance. The facts are not relevant, but at page 103 the learned Judges observed :

" It is at the same time a well established principle that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation will not be given to a statute so as to affect, alter or destroy any vested right. See section 6, clause (c) of the Indian General Clauses Act and section 8, clause (c) of Madras Act I of 1891. For to do so would result in great injustice, and it will be presumed that the Legislature did not intend to deprive any person of a right previously vested in him. The general rule that statutes relating to processual law have a retrospective operation is as much subject to this important qualification as statutes dealing with substantial rights."

And at page 106 the rule, as stated by JESSEL M.R. in *In re Joseph Suche & Co., Limited*(2), is relied on. This statement of the Master of the Rolls is :

" I so decide because it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them."

In *Girdharilal Son & Co. v. Kappini Gowder*(3) VARADACHARIAR J. on a reference under clause 36 of the Letters Patent, there being a difference of opinion between PANDRANG ROW J. and VENKATARAMANA RAO J., had to consider whether section 69, clause 2, of the Indian Partnership Act was applicable to a suit filed after the passing of the Act to a promissory note executed before the passing of the Act. PANDRANG

(1) (1912) L.L.R. 38 Mad. 101.

(2) (1875) 1 Ch. D. 48.

(3) (1938) 2 M.L.J. 44.

Row J. took the view that section 74 expressly saved the suit, VENKATARAMANA RAO J. taking a different view. VARADACHARIAR J. agreed with PANDRANG ROW J. Section 74 of the Indian Partnership Act enacts :

" Nothing in this Act or any repeal effected thereby shall affect or be deemed to affect

(a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or (b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act."

The learned Judge came to this decision after considering whether section 74 expressly saved the suit from the operation of section 69 and, if section 74 had no such operation, whether on general principles the Court ought to hold that section 69 does not operate to enforce the cause of action which had accrued prior to the date of the coming into force of the Act. It will be observed that this case does not deal with an action but with a cause of action. The learned Judge decided the case on the ground that section 74 was directly applicable. But he discusses at pages 72 to 75 the implications of the words " processual law " and quotes with approval the warning of HOLLOWAY J. in *G. Lee Morris, Esquire v. Sambamurthi Rayar*(1) as to the danger of confounding processual provisions with those which under that fictitious appearance are really provisions of material or substantive law. The High Court of Patna in *Babui Dineshwari Kuer v. Ram Narain Singh*(2) has taken a different view to this High Court on the effect of the transfer of jurisdiction from one Court to another. MOHAMAD NOOR and SAUNDERS JJ. held that, where

(1) (1871) 6 M.H.C.R. 122, 126.

(2) (1936) L.L.R. 15 Pat. 704.

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J.

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J.

a preliminary decree for possession of land and mesne profits had been passed by a Court, which later ceased to have territorial jurisdiction over the area after the notification of the Government transferring the area to the territorial jurisdiction of a newly established Court, application for ascertainment of mesne profits should be made to the latter Court as the former Court entirely ceased to have any jurisdiction over the area concerned. The Madras decisions are of course binding upon me but, were it otherwise, I would, with respect, prefer the Madras view. My attention has been drawn to a judgment of PANDRANG Row and KING JJ. in Appeal Against Order No. 613 of 1938. A decree was passed by a Court in British Burma. On 15th March 1937 the Court ordered the transmission of the decree to the District Court of Ramnad in this Presidency. It was received on 25th March 1937. The application for execution was made in the Court of the Subordinate Judge of Sivaganga on 14th June 1937 and a further application to execute was made on 6th January 1938. It was objected that after 1st April 1937 the Madras Courts had no jurisdiction to execute the decree passed by a Court in Burma although that decree had been transmitted by the Burma Court before 1st April 1937. The learned Judges held that the contention that jurisdiction was lost appeared to them not to take notice of paragraph 10 of the Government of India (Adaptation of Indian Laws) Order, 1937, dated 18th March 1937. After setting out the paragraph they observe :

“ This provision appears clearly to contemplate that powers which were exercisable by any authority such as a Court before the Act came into force should continue to be exercised or to be exercisable even thereafter unless some other provision was made by a competent authority regarding the subject matter of the jurisdiction.”

The learned Judges point out that no other provision had been made and they observe :

“ It seems to us that both the words and the policy of paragraph 10 of the Adaptation Order referred to above contemplated that the Court to which decrees were transmitted for execution before 1st April 1937 should continue to execute those decrees even after 1st April 1937 on applications presented to it for execution subsequent to 1st April 1937.”

With that decision I am in respectful agreement.

The learned Advocate-General has urged that, if the view maintained by the petitioner is upheld, a strange position arises under section 10 of the Code of Civil Procedure, the explanation to which states that the pendency of a suit in a foreign Court does not preclude the Courts in British India (British Burma) from trying a suit founded on the same cause of action, and he has referred us to the Full Bench judgment of the High Court of Rangoon in *Arunachallam v. Valliappa*(1). The question before the Full Bench was whether a Court in Burma had power to stay a suit filed after 1st April 1937, when the matters in issue were before a Court in British India in a suit filed before that date. The Full Bench held that section 2 (5) and section 10 of the Code of Civil Procedure as amended related to a matter of procedure and therefore on well-established principles affected existing proceedings and that therefore the Court in Burma had not the power to grant a stay of the suit in India. No argument was addressed on the topic before us now, that is, whether the Indian Court continued to have jurisdiction at all. The facts in the Indian suit, a partition suit, are not set out. The decision related to the power of the Court in Burma to stay the suit and rested entirely on whether this was a

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J.

(1) A.I.R. 1938 Ran. 130 (F.B.).

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J.

matter of procedure, which it was held to be. It seems to me to leave wholly untouched the much wider question now before us. ROBERTS C.J. in his judgment discusses the English authorities which distinguish the position when matters of procedure and rights of action are concerned and he cites with approval the statement of JESSEL M.R. to which I have referred above. It is argued that there is nothing to prevent a suit being filed now with regard to this identical matter in Burma. The answer to that objection must, I think, be that the right to continue this action remains in the Madras Court; alternatively that may be a position for which provision has not been made in the Act. Whether execution of any decree can be done directly or whether it will be necessary to sue as on a foreign judgment is not for us now to decide, nor do I think it in any way affects our decision. In arriving at a decision in this case it is not possible to draw on decisions from similar facts. The matter has not been discussed before on facts similar to those before us. I am not aware that the Courts in England at any time had jurisdiction to deal with real property in Southern Ireland. A consideration of the provisions and rules of the Supreme Court in England are of no assistance. Apart from the common right of appeal to the House of Lords, the jurisdiction of the Courts of England and Scotland is distinct. Order XI, rule 1, of the Rules of the Supreme Court makes provision for the issue of writs beyond the jurisdiction. There is no provision exactly corresponding to section 17 of the Code of Civil Procedure. Order XI, rule 1, by implication, prohibits the issue of a writ out of the jurisdiction unless, in the case of land, the whole subject-matter is situate within the jurisdiction.

The difficulty or apparent difficulty arises in this case from the fact that a supreme Legislature has thought fit to make these far-reaching changes over territories subservient to it. It is not a case of cession of territory to a foreign State. It is a rearrangement within the Empire. The supreme rule remains. The British Legislature had absolute authority within its own territorial limits to dispose of the rights of its subjects and all property within its limits, the law of *eminent domain*, a phrase of public international law. The British Legislature cannot legislate with regard to the rights of Britons in the Courts of, e.g., Thailand, and when it is argued that the foundations of private international law and indeed common sense are shaken when it is suggested that a British Court might just as well pass a decree affecting land in Thailand, I think the argument is founded on a fallacy. This is not a case of the British Legislature passing an Act purporting to affect foreign territory. The Act affects its own territory. I again must emphasise that the British Legislature can do just what it thinks fit with regard to the jurisdiction of the Courts subservient to it over territories subservient to it and there is nothing to me in the least startling in the contention of the petitioner. I must confess to being more surprised at the result of the respondents' argument that the petitioner who has been rightly prosecuting his suit in a Court for several years should be held now to be in the wrong Court. The Government of India Act could have contained an express provision to the effect that suits previously within the jurisdiction of Burma and Indian Courts affecting immovable property in either country should continue within the jurisdiction of those Courts exactly as if the Act had not been passed. Such a

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J.

KRISHNASWAMI
v.
VENUGOPALA.
MOORETT J.

provision would have been purely for the purpose of what I will describe as winding up the old order, such process continuing for the convenience of the subject for a time after the introduction of the new order. One of the decisions I have to make in this case is whether that has in fact been done by the various provisions of law to which reference has been made. The learned Advocate-General's chief argument is that this is a case of processual law only and therefore the canons of construction above cited are not relevant, and naturally much has been made of the fact that the Code of Civil Procedure provides for the bringing of a suit in one jurisdiction relating to land in another. I am unable to accept that argument. The Code of Civil Procedure is not confined to procedure. The Judicial Committee in *Nilkanth Balwant v. Vidya Narasinh*(1) describes the Code thus :

" The provisions of the Code are regulations dealing with the jurisdiction and governing the procedure of the Courts in British India. . . . "

Their Lordships held that the Code gave a British Indian Court jurisdiction to try suits relating to immovable property within the jurisdiction of another British Indian Court, if part of the immovable property, the subject of the suit, was within its own jurisdiction, but that it did not give jurisdiction over land in Kolhapur State. It is therefore from the Code that the Court of the Subordinate Judge of Trichinopoly derives its jurisdiction. So far as the procedure governing trial is concerned, it is also derived from the Code. But jurisdiction and procedure are distinct, and I hold that the former, i.e., jurisdiction, does not come under the description of processual matter. It seems to me that Lord MACNAGHTEN'S

(1) (1930) I.L.R. 54 Bom. 495, 502 (P.C.).

KRISHNASWAMI
v.
VENUGOPALA.
MOORETT J.

statement of the law in *Colonial Sugar Refining Company v. Irving*(1) is entirely applicable to the facts in this petition. I see no reason to distinguish in principle between the action with which we are concerned now and the appeal with which their Lordships of the Judicial Committee were concerned. The reports of the arguments of the distinguished Counsel who appeared before the Board show that no attempt was made to make any such distinction. Mr. Asquith, Counsel for the petitioner, argued that the alteration made by this section was one of procedure and did not affect private rights and therefore took effect with reference to " pending actions ", and Mr. Cohen for the appellants contended that there was no section in the Commonwealth Act which gave power to deprive any Court of the jurisdiction which it was exercising at the time the Act was passed. No doubt Burma is now in the position of a foreign country for many purposes when considering its relations with India. But that position is only of recent creation and long after the institution of this suit. There is no question that the petitioner had a right to file this suit in the Court of the Subordinate Judge of Trichinopoly in 1932, and I find it difficult to agree that a matter of procedure only is affected when a supreme Legislature is said to take away from a litigant a right to have heard in a Court convenient to him a suit relating to another part of a territory under the same Legislature. If that view is correct, then I think that the whole trend and meaning of the many detailed provisions to which reference was made is that the object and intention was to retain to Courts the jurisdiction which they held before 1st April 1937 in regard to litigation then properly before them. It has been impossible

(1) [1905] A.C. 369.

KRISHNASWAMI
v.
VENUGOPALA.
MOCKETT J.

for the learned Counsel for the respondent to point to any provision in the Act which expressly takes away that jurisdiction. The most that has been argued is that it is done by implication or "by necessary intendment", the implication and intendment to be derived from section 46 of the Government of India Act, 1935.

For the reasons I have given I hold (i) that the combined effect of the India and Burma (Existing Laws) Act, 1937, section 1, sub-sections 1 and 2, the Government of India (Adaptation of Indian Laws) Order, 1937, paragraphs 1, 9, 10 and 11, and the Interpretation Act, 1889, 52 and 53 Vic. ch. 63, section 38 (b), (c), (d) and (e), is expressly to reserve to the Court of the Subordinate Judge of Trichinopoly jurisdiction to try the suit, the subject of this civil revision petition, and (ii) that the petitioner had a right to file his suit in the above Court and the right to continue it has not been taken away expressly by the Government of India Act, 1935. Accordingly I consider that this civil revision petition should be allowed with costs here and below so far as the hearing on the preliminary issue is concerned and the learned Subordinate Judge will therefore proceed with the hearing of this suit. As this judgment involves a substantial question of law as to the interpretation of the Government of India Act, 1935, a certificate will issue in accordance with the provisions of section 205 of that Act. There will be an interim stay of hearing until 5th January 1942. If by then an appeal to the Federal Court has not been lodged, the proceedings will continue. Otherwise the stay will continue pending the decision of the Federal Court.

KUNHI
RAMAN J.

KUNHI RAMAN J.—An interesting question of constitutional law arises for decision in this civil

revision petition. The suit out of which the petition arises was filed in the Court of the Subordinate Judge of Trichinopoly in 1932 and it was registered as Original Suit No. 55 of 1932. Unfortunately, it has had a chequered career. Had the trial proceeded in the normal course, the suit would have been disposed of prior to 1st April 1937, and the plaintiff would not have had to face the contentions which were urged in the Court below and which are now urged before this Court on behalf of the defendants. We are told that, as the result of a certain order in an interlocutory application which became the subject matter of a civil revision petition in this Court in 1935 and as the result of a dispute as to the proper court-fee payable in the lower Court, the suit became ready for trial only in 1940, eight years after it was instituted in the lower Court. In the interval, the Government of India Act, 1935, was passed and, according to section 46 (2) of that Act, it was declared that Burma shall cease to be part of India. This provision came into force from 1st April 1937 under the Government of India Act (Commencement, etc.) Order, 1936. The subject matter of the suit included not only properties situated in British India within the local limits of the jurisdiction of the lower Court, but also immovable and movable properties in British Burma. Therefore, on the coming into force of section 46 (2) of the Government of India Act, 1935, the defendants raised an additional plea that the lower Court had ceased to have jurisdiction to proceed with the trial of the suit so far as it related to the properties situated in British Burma. The lower Court has arrived at the conclusion that the defence raised on this point is well-founded and has answered the question as to whether it has jurisdiction to try the suit or not in the negative.

KRISHNASWAMI
v.
VENUGOPALA.
KUNHI
RAMAN J.

KRISHNASWAMI
v.
VENUGOPALA.
—
KUNHI
RAMAN J.

The plaintiff has come to this Court challenging the correctness of this view.

The main question for determination is whether the separation of British Burma from British India from 1st April 1937 by the Government of India Act, 1935, will affect actions pending on that date. The petitioner's learned Advocate argues that, in view of the statutory provisions and judicial decisions relied on by him, in the absence of an express provision that pending actions shall be affected by the new enactment and in the absence of any special provision made for the procedure relating to such actions, the new Act cannot affect prejudicially suits instituted prior to 1st April 1937 and which were pending on that date. This conclusion is based on the assumption which, it seems to me, is fully warranted in view of the pronouncement of the Judicial Committee of the Privy Council on that question, that it is a question of substantive law that is concerned in the present case and not merely a question of procedure or adjective law. The right of a party to institute a suit or to file an appeal in a particular Court must, in view of the decision of the Privy Council reported as *Colonial Sugar Refining Company v. Irving*(1), be regarded as a substantive right and not merely a matter of procedure or processual law. If the right involved is not of this nature but affects only a rule of procedure, then there cannot be any doubt as to the retrospective effect of section 46 (2) of the Government of India Act, 1935. But if, on the other hand, the right affected concerns a rule of substantive law, as I feel no doubt it does in the present case, then different considerations must prevail and the newly enacted

(1) [1905] A.C. 369.

statute cannot *prima facie* be presumed to be retrospective in its effect.

KRISHNASWAMI
v.
VENUGOPALA.
—
KUNHI
RAMAN J.

It must be stated that in the present case, at the time when the suit was instituted in the lower Court, there was no doubt whatsoever that it had jurisdiction to entertain the suit and try it. It is by the coming into force of section 46 (2) of the Government of India Act, 1935, on 1st April 1937, that it has become possible for the defendants to contend that the lower Court has no jurisdiction to go on with the trial of the suit.

It is argued by the petitioner's learned Advocate that the suit in the present case, which was properly instituted on the date the plaint was filed in the lower Court, could be continued as if the Government of India Acts, 1915 and 1919, which were in force on the date of its inception still continued to be in force, especially in view of section 38 of the Interpretation Act, 1889, and clauses 10 and 11 of the Government of India (Adaptation of Indian Laws) Order, 1937. This is because no other provision has been made by the "Legislature or authority empowered to regulate the matter in question" for the continuance of an action like the suit in the present case which was properly instituted in the Court below in accordance with the law in force on the date of such institution.

The petitioner's learned Advocate does not question the rules of private international law which are relied on by the learned Advocate-General on behalf of the respondents. He argues that the question in the present case turns entirely on the interpretation of the Government of India Act, 1935, and the other enactments and rules relied on by him which have all been dealt with in what I may with respect refer to as the exhaustive judgment just pronounced by my learned

BRINHASWAMI
v.
VENUGOPALA
K. **K. RAMESH**
RAMAN J.

brother. Learned Counsel argued that the jurisdiction that was admittedly vested in the lower Court on the date the suit was filed has not been taken away by legislation and that therefore it must be held that the lower Court has power to continue the trial and dispose of the suit pending there.

The learned Advocate-General argues that the scope of section 292 of the Government of India Act, 1935, is not so wide as contended on behalf of the petitioner but that the expression "competent authority" occurring in this section must be construed as referring to an authority with reference to British India alone and not to any higher or different authority. He also argues that the Interpretation Act can only be applied in interpreting Acts of Parliament and not any other Acts or rules arising as the result of an Act of Parliament. According to him, sections 292 and 293 of the Government of India Act do not affect the present case. The legal proceeding contemplated by these sections must, he argues, be directly traceable to the Act repealed; in other words, it can only apply to legal remedies given directly by the Acts of Parliament. It can have no reference to a right or proceeding under an Act passed in pursuance of a Parliamentary statute.

There are no authorities directly in point. I am not satisfied that there is any warrant for construing the provisions of these statutes in such a restricted manner. I am in complete agreement with the view taken by my learned brother on the statutory provisions relating to the subject and the cases cited at the bar and I do not therefore wish to discuss them again in my judgment.

I agree to the order proposed by my learned brother.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth and Mr. Justice Patanjali Sastri.

DOSAPATI RAMAYYA (DEFENDANT), PETITIONER,

v.

PATTAM ANJAYYA (PLAINTIFF), RESPONDENT.*

Indian Limitation Act (Act IX of 1908), ss. 19 and 20—Payment generally towards debt and endorsement of such payment in general terms—Such open payment not saving limitation under sec. 20—But endorsement valid as acknowledgment under sec. 19—Limitation saved if acknowledgment expressly pleaded.

An endorsement on a promissory note in the following words, "Paid on 15th September 1938 towards this promissory note Rs. 2", though it may not save limitation under section 20 of the Indian Limitation Act, can be deemed to be a sufficient acknowledgment of the debt so as to save limitation under section 19 of the Act, when it is expressly pleaded in the plaint as an acknowledgment saving limitation.

Where there is a bond or a promissory note under which it can be seen by the words and the tenor of the document and the endorsements of payment that a considerable sum is due and the debtor makes towards that bond or note a payment which is clearly less than the balance due, accompanying the payment with an endorsement to the effect that it is towards the debt on the bond or towards the note, it is legitimate to read the words of that endorsement together with the substance of the document upon which the endorsement is made, and infer from the circumstances the fact that the writing of such endorsement is an acknowledgment of the subsistence of the debt after the payment endorsed.

Rama Shah v. Lal Chand(1) distinguished.

Jaganadha Sahu v. Rama Sahu(2) and *Venkatakrishniah v. Subbarayudu*(3) followed.

* Civil Revision Petition No. 146 of 1941.

(1) (1940) I.L.R. 21 Lah. 470 (P.C.). (2) (1914) 17 M.L.T. 80.
(3) (1916) I.L.R. 40 Mad. 698.

RAMAYYA
v.
ANJAYYA.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Repalle in Small Cause Suit No. 340 of 1939.

S. Sitaraman for *V. Rangachari* for petitioner.

Y. G. Krishnamurthi for respondent.

WADSWORTH J. WADSWORTH J.—This civil revision petition is preferred by the defendant against a decree in a small cause suit based on a promissory note. Two questions were raised in revision, one relating to the scaling down of the decree under Madras Act IV of 1938 and the other relating to limitation. On the first point, it seems to us clear that the two earlier payments amounting to Rs. 125 must be treated as unappropriated payments available in reduction of principal as on 1st October 1937, so that the decree should have been one for Rs. 75 with interest at six and one-fourth per cent from 1st October 1937, credit being given as on 15th September 1938 to the payment of Rs. 2.

Turning to the more difficult question relating to limitation, it is common ground that the suit filed on 11th November 1939 would have been barred by limitation unless limitation was saved by the endorsement of Rs. 2 on 15th September 1938. The promissory note was for a sum of Rs. 271-8-6 and the previously endorsed payments were for an amount of Rs. 125. Quite clearly therefore, at the time when this payment of Rs. 2 was made, a very considerable balance was due on the note. It is argued that the decision of the Privy Council in the case of *Rama Shah v. Lal Chand*(1) governs the present case. The endorsement was in the following words:—

“Paid on 15th September 1938 towards this promissory note Rs. 2.”

(1) (1940) I.L.R. 21 Lah. 470 (P.C.).

The original Telugu word translated as “towards” is “kintha” which literally means “under”. Now, the Privy Council decided in the case just referred to that where a debtor pays a sum as a part payment of an interest bearing debt, without indicating whether the payment is towards interest or principal, in order to obtain a fresh period of limitation under section 20 of the Limitation Act, it is incumbent upon the creditor to appropriate the sum paid towards the principal before the expiration of the prescribed period of limitation. This decision is clearly authority for the view that an unappropriated payment, such as the payment of Rs. 2 in the present case, cannot avail the creditor under section 20 of the Limitation Act as a payment towards interest as such or towards principal saving limitation, and all previous decisions which took a contrary view must be deemed to have been overruled.

It is, however, contended for the respondent that, though this endorsement may not save limitation under section 20, it can be deemed to be a sufficient acknowledgment of the debt so as to save limitation under section 19. Their Lordships of the Privy Council, in the case just quoted, though they referred to section 19 in order to discuss its relation to section 20, were not dealing with a case in which there was any pleading that the writing would be a sufficient acknowledgment under section 19, even though the payment was not a payment falling under section 20, and their Lordships do not consider whether such an alternative plea would have been open to the creditor in the case before them, had it been taken. We are therefore of opinion that the decision in *Rama Shah v. Lal Chand*(1) is authority neither for nor against the

(1) (1940) I.L.R. 21 Lah. 470 (P.C.).

RAMAYYA
v.
ANJAYYA.
WADSWORTH J.

RAMAYYA
v.
ANJAYYA.
WADSWORTH J. view that, when there is a part payment endorsed in such terms as to make it ineffective for the purpose of section 20 of the Limitation Act, it may by implication amount to such an acknowledgment as would save limitation under section 19.

Now, there is a clear line of authority of this High Court for the view that when, as in the present case, there is a bond under which it can be seen by the words and the tenor of the document and the endorsements of payment that a considerable sum is due and when the debtor makes towards that bond a payment which is clearly less than the balance due, accompanying that payment with an endorsement to the effect that it is towards the debt in the bond or towards the note, it is legitimate to read the words of that endorsement together with the substance of the document upon which the endorsement was made and infer from the circumstances the fact that the writing of this endorsement is an acknowledgment of the subsistence of the debt after the payment endorsed. No doubt, a contrary view was taken in the very early case of *Lutchumanan Chetty v. Mutta Iburaki Marakkayer*(1). That decision was followed by the first Court in a case which came on appeal before a Bench; vide *Jaganadha Sahu v. Rama Sahu*(2). The learned Judges, who had to deal with a simple endorsement that a certain sum was paid in respect of the promissory note, held following the decision, at page 79 of the same volume, *Visvanatha Santhasingaro v. Ramchandra Mardraja Deo*(3), that the endorsement signed by the promisor contained a sufficient acknowledgment of liability under the promissory note. This decision was followed by a single Judge in *Ramakrishna*

(1) (1869) 5 M.H.C.R. 90.

(2) (1914) 17 M.L.T. 80.

(3) (1914) 17 M.L.T. 78, 79.

Chetty v. Venkatasubbiah Chetty(1), and it has been followed more recently in *Venkatakrishniah v. Subbarayudu*(2). It is true that in the last case there was an additional circumstance that the debtor endorsed two successive payments on the same day, the first of which must necessarily have been made with a knowledge that a balance was due, but the learned Judges expressly approved the earlier decisions and purported to follow the same principle. The decision in *Venkatakrishniah v. Subbarayudu*(2) has also been followed in Bombay in *Tayerali v. Garabad Sadu*(3). Against this line of authority, the only Madras decision to the contrary quoted before us, besides the early case of *Lutchumanan Chetty v. Mutta Iburaki Marakkayer*(4) already referred to, is a very brief judgment in *Lakshminarasimham v. Bharata Mahanty*(5) which does not set forth the precise nature of the endorsement and does not contain any detailed discussion of the question.

No doubt, where the matter is *res integra*, it might be contended that the endorsement of payment towards the promissory note on which, according to the tenor of the document, much more than the amount paid was outstanding at the time of payment, would not necessarily imply an acknowledgment that the debt continued to subsist after the payment. It might be argued that the payment was made without a calculation of the balance due or it might be argued that the document might have been otherwise discharged by unendorsed payments. But it does not seem to us, in view of the authorities just cited, that these general arguments are now open to us. We are bound by the previous decisions and we must hold that

(1) (1914) 17 M.L.T. 139.

(2) (1916) I.L.R. 40 Mad. 698.

(3) A.I.R. 1939 Bom. 252.

(4) (1869) 5 M.H.C.R. 90.

(5) (1910) 9 M.L.T. 216.

RAMAYYA
v.
ANJAYYA.
WADSWORTH J.

RAMAYYA v. ANJAYYA. WADSWORTH J. the suit in the present case was not barred by limitation, having regard to the endorsement of 15th September 1938, which was expressly pleaded in the plaint as an acknowledgment saving limitation.

The result, therefore, is that the civil revision petition is allowed to the extent that the decree will be modified as already indicated. The petitioner is entitled to half his costs in revision.

N.S.

APPELLATE CRIMINAL.

Before Mr. Justice Horwill.

1941,
August 8.

IN RE PALAYAN (ACCUSED), PETITIONER.*

Code of Criminal Procedure (Act V of 1898), sec. 350—Transfer of Magistrate—Accused's request to recall prosecution witnesses for fresh examination under proviso (a) of section—Some witnesses cross-examined—Request later not to examine the rest—Whether accused could do so—Discretion of Magistrate to examine witnesses under sub-sec. (1) of section, if could be exercised then.

The accused in the case, on a transfer of the Magistrate, invoked the provisions of proviso (a) to section 350 of the Code of Criminal Procedure and asked the Magistrate to recall the prosecution witnesses for fresh examination. After cross-examining certain witnesses, the Counsel for the accused requested the Magistrate not to examine the remaining witnesses. But the Magistrate decided that it was not open to the accused to say after some of the witnesses were examined, that the other witnesses need not be examined, and that for a proper appreciation of the evidence all the witnesses should be examined again. On revision,

held (i) that even though in the first instance the accused might demand a re-examination of witnesses, he could change

* Criminal Revision Case No. 675 of 1941 (Criminal Revision Petition No. 635 of 1941).

his mind and say that he wishes only certain witnesses to be examined.

In re Vudigalapudi Gadu(1) and *Veerappa v. Emperor*(2) followed.

(ii) that under section 350 (1) of the Code of Criminal Procedure, the Magistrate could exercise his discretion of examining all the witnesses again even after the accused had exercised his right under proviso (a) to section 350.

The Magistrate before examining the other witnesses in the case against the wishes of the accused should consider whether he himself feels the need to examine them.

Veerappa v. Emperor(2) explained and distinguished.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Chief Presidency Magistrate, Egmore, Madras, dated 29th July 1941 and passed in Calendar Case No. 924 of 1941.

Lobo for petitioner.

K. V. Ramaseshan for Crown Prosecutor (*P. Govinda Menon*) for the Crown.

ORDER.

HORWILL J.—The petitioner was an accused in Calendar Case No. 926 of 1941 on the file of the Chief Presidency Magistrate, Egmore. Upon a transfer of the Magistrate, the petitioner invoked the provisions of proviso (a) to section 350 of the Code of Criminal Procedure and asked the Magistrate to recall the prosecution witnesses for fresh examination. The learned Counsel for the petitioner found, after cross-examining certain prosecution witnesses, that they were saying more than they had before, and he thought that it was not in the interests of his client to examine any more prosecution witnesses. He therefore asked

PALAYAN,
In re.

HORWILL J.

(1) (1924) 20 L.W. 916.

(2) 1935 M.W.N. 179.

PALAYAN,
In re.
HOBWILL J.

the Magistrate not to examine the remaining witnesses. The Magistrate insisted and said :

" It is not open to the accused to say after some of the witnesses were examined, that the other witnesses need not be examined. Even if he does not want the other witnesses to be examined, the Court can in the interests of proper appreciation of evidence and in the interests of justice examine all the witnesses again. I therefore decide that all the witnesses will be summoned and heard again."

It is argued on behalf of the petitioner that both the reasons given by the learned Magistrate are not valid.

Two decisions of this Court, *In re Vudigalapudi Gadu*(1) and *Veerappa v. Emperor*(2), make it clear that even though in the first instance the accused may demand a re-examination of witnesses, he can change his mind and say that he wishes only certain witnesses to be examined.

The other question is whether, after the accused has said that he does not wish to examine all the witnesses, it is open to the Magistrate to examine them. The argument of the learned Counsel for the petitioner is that once proviso (a) to section 350 (1), Criminal Procedure Code, has been invoked, the Magistrate has lost his power to summon witnesses under section 350 (1). I should be reluctant to hold so unless the wording of section 350, Criminal Procedure Code, itself made that clear. Although a Magistrate might be content to decide the whole of the case on the record, yet there are obvious disadvantages in deciding the case partly on the record and partly on the witnesses heard by him ; and a Magistrate might well be desirous, for a proper appreciation of the case by himself, to hear all the witnesses again if he is obliged to examine some of them. I do not find anything

(1) (1924) 20 L.W. 916.

(2) 1935 M.W.N. 179.

PALAYAN,
In re.
HOBWILL J.

in section 350, Criminal Procedure Code, which prohibits him from exercising his discretion of examining all the witnesses again merely because the accused has exercised his right under proviso (a) to section 350. The judgment of BURN J. in *Veerappa v. Emperor*(1) has been quoted in support of this contention ; but I do not think that BURN J. was of that opinion. The purport of his judgment is that the accused has a right to say that no more witnesses should be examined ; but that his right to stop a further examination of witnesses is subject to a limitation, that limitation being the privilege of the Magistrate under section 350 (1) of the Code of Criminal Procedure to examine all. In the particular case before him, there was nothing on the record to show whether the Magistrate had invoked his privileges under section 350 (1) or not ; and so the learned Judge dismissed the revision case on the ground that it was not

" certain that the learned Magistrate committed any error when he re-heard the prosecution witnesses when the accused did not want him to re-hear."

The petition is therefore dismissed. I would like to add that the Magistrate before examining the other witnesses in the case against the wishes of the accused should consider whether he himself feels the need to examine them. Only if he does, should he re-summon and re-hear them.

V.V.C.

(1) 1935 M.W.N. 179.

APPELLATE CRIMINAL.

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

IN RE V. BHUVARAHYA IYENGAR (ACCUSED),
PETITIONER.*

Defence of India Act (XXXV of 1939), rule 130-A (b)—
Intra vires.

Rule 130-A (b) of the rules framed under the Defence of India Act (XXXV of 1939) is *intra vires* the Central Government. The power given by sub-section 3 of section 2 of the Act to make rules with regard to the arrest and trial of persons implies the power to make rules with regard to the custody of the accused pending trial. But even if it does not, the scope of the general powers conferred by sub-section 1 of section 2 remains unaffected.

In respect of offences which come within the rules framed under the Defence of India Act, that Act governs all other statutory provisions and, therefore, the provisions of the Code of Criminal Procedure with regard to bail do not apply in such cases.

Where, in the first information report and the charge-sheet, grave charges were alleged against the petitioner by a responsible police officer and, at the stage at which the applications for bail were made, it was impossible for the Court to be satisfied that there were reasonable grounds for believing that the petitioner was not guilty of a contravention of the rules framed under the Defence of India Act,

held, that the petitioner was not entitled to be released on bail.

PETITION praying that in the circumstances stated in the affidavit in support, the High Court may be pleased to issue an order directing the release of the petitioner herein on bail pending the criminal case sought to be filed against the petitioner in the Court of the Joint Magistrate, Negapatam.

* Criminal Miscellaneous Petition No. 1162 of 1941.

K. Bashyam Ayyangar and J. R. Gundappa Rao for petitioner.

BHUVARAHYA
IYENGAR,
In re.

Advocate-General (Sir A. Krishnaswami Ayyar) and Public Prosecutor (V. L. Ethiraj) for the Crown.

The ORDER of the Court was delivered by LEACH C.J.—On 1st October 1941 the petitioner delivered a speech at a meeting held in open air at Negapatam and in the course of it made statements which it is alleged constituted offences specified in the rules framed under the Defence of India Act. A police officer was present at the meeting and it is said that he made notes of the petitioner's statements. On the 16th October the police filed in the Court of the Joint Magistrate of Negapatam a first information report in which the statements alleged to have been made by the petitioner on this occasion were set out. Immediately after the report had been presented the petitioner was arrested and a charge-sheet prepared in which it was alleged that the petitioner had committed offences under rule 34 (6) (e), (g), (k) and (p) read with rule 38 (1) (a). Rule 38 (1) (a) states that no person shall, without lawful authority or excuse, do any prejudicial act. Sub-rule (6) of rule 34 indicates what is meant by a "prejudicial act." Clause (e) of that sub-rule says that it is a prejudicial act to bring into hatred or contempt, or to excite disaffection towards, His Majesty or the Crown Representative or the Government established by law in British India or in any other part of His Majesty's dominions. Clause (g) states that it is a prejudicial act to cause fear or alarm to the public or to any section of the public. Clause (k) provides that it is a prejudicial act to influence the conduct or attitude of the public or of any section of the public in a manner likely to be prejudicial to the defence of British India or to the efficient prosecution of war. Clause (p) says that it is a prejudicial

LEACH C.J.

BHUVARAH
IYENGAR,
In re.
LEACH C.J.

act otherwise to prejudice the efficient prosecution of the war and the defence of British India, or the public safety or interest. The statements alleged to have been made by the petitioner would appear to come within these rules.

On the 20th October the petitioner applied for bail, but his application was rejected by the Joint Magistrate by reason of the provisions of rule 130-A and the Sessions Judge agreed with the Joint Magistrate when a similar application was made to him. The petitioner asks this Court in the exercise of its revisional powers to set aside the orders of the Joint Magistrate and the Sessions Judge and grant him bail.

The basis of the petition is the allegation that rule 130A (b) is *ultra vires* the Central Government. The rule reads as follows :—

“Notwithstanding anything contained in the Code of Criminal Procedure, 1898, no person accused or convicted of a contravention of these Rules shall, if in custody, be released on bail or on his own bond, unless—

(a) The prosecution has been given an opportunity to oppose the application for such release, and

(b) where the contravention is of any such provision of these Rules as the Central Government may by notified order specify in this behalf, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention.”

If clause (b) contains a valid provision the Court must be satisfied that there are reasonable grounds for believing that the accused is innocent before releasing him on bail. It is said that this provision contravenes the fundamental principle of English law that a person is presumed to be innocent until it is proved that he is guilty and that the Defence of India Act and the rules framed thereunder do not permit of a departure from the provisions of the Code of Criminal Procedure with regard to bail applications.

With regard to the first contention it is to be observed that neither the Act nor the rules indicate any attempt to depart from the principle of English justice that a person is presumed to be innocent until he has been proved to be guilty. Rule 130-A merely indicates that, where a person is accused of an offence under the rules, the Court may not liberate him on bail pending the trial, except when it has reasonable ground to believe that he is innocent. When the Court comes to decide the case it must acquit the accused if the prosecution has failed to establish the charge.

Examination of section 2 and section 3 leaves no doubt in our minds that rule 130-A is *intra vires*. Sub-section 1 of section 2 states that the Central Government may, by notification in the official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community. Sub-section 2 says that without prejudice to the generality of the powers conferred by sub-section 1, the rules may provide for, or may empower an authority to make orders providing for, all or any of certain specified matters. The fact that the specified matters do not include bail applications does not mean that the Central Government cannot make rules with regard to bail applications if it considers that in the public interest it is necessary to do so. The general power conferred by sub-section 1 is left entirely unaffected by what is stated in sub-section 2. Moreover, sub-section 3 (1) of section 2 says that the rules made under sub-section (1) may further provide for the arrest and trial of persons contravening any of the rules. This provision in itself appears to be wide

BHUVARAH
IYENGAR,
In re.
LEACH C.J.

BHUVARAH
IYENGAR,
In re.
LEACH C.J.

enough to cover rule 130-A without any recourse to sub-section 1. If power is given to make rules with regard to the trial, does this not imply power to make rules with regard to the custody of the accused pending trial? But even if it does not, the scope of the general powers conferred by sub-section 1 remains unaffected.

Mr. Bashyam Ayyangar has laid great stress on section 14 which reads as follows:—

“Save as otherwise expressly provided by or under this Act, the ordinary criminal and civil Courts shall continue to exercise jurisdiction.”

This section has been inserted because power is given to the Provincial Government in Chapter III, which embraces sections 8 to 13, to constitute special tribunals to try offences under the rules framed by the Central Government by virtue of its powers under the Defence of India Act. Special tribunals have not been set up and all offences under the Defence of India Act are still tried in the ordinary criminal Courts. That does not, however, mean that trials in the ordinary criminal Courts are not subject to the special provisions of the Act. Section 3 states that a rule made under section 2, or an order made under such a rule, shall have effect notwithstanding anything inconsistent therewith is contained in an enactment other than the Defence of India Act or in an instrument having effect by virtue of an enactment other than the Act. In respect of offences which come within the rules framed under the Defence of India Act, that Act governs all other statutory provisions and therefore the provisions of the Code of Criminal Procedure with regard to bail do not here apply if rule 130-A is *intra vires*, which we hold it to be.

It is conceded that in placing the Defence of India Act in the statute book the Central Legislature acted within its powers. Therefore the Joint Magistrate and the Sessions Judge acted in accordance with law in rejecting the petitioner's applications for bail. In the first information report and the charge-sheet grave charges are alleged against the petitioner by a responsible police officer and at the stage at which the applications for bail were made it was impossible for the Magistrate or the Sessions Judge to be satisfied that there were reasonable grounds for believing that the petitioner was not guilty of a contravention of the rules, and that is the position now. Therefore the petitioner is not entitled to ask the Court to release him on bail. In these circumstances the petition will be dismissed.

V.V.C.

BHUVARAH
IYENGAR,
In re.
LEACH C.J.

PRIVY COUNCIL.

RAJA VELUGOTI SARVAGNA KUMARA KRISHNA
YACHENDRA BAHADUR VARU, APPELLANT,

v.

RAJA RAJESWARA RAO AND ANOTHER, RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Hindu law—Maintenance—Impartible estate—Right of junior members of holder's family to maintenance—“Purusha santhathi”, meaning of.

Junior male members of the family of the holder of an impartible estate, not being sons or brothers of the holder,

J.C.*
1941,
October 16.

* Present:—Lord ATKIN, Lord RUSSELL of KILLOWEN
and Sir GEORGE RANKIN.

RAJA KRISHNA
YACHENDRA
v.
RAJA RAJES-
WARA RAO.

are not entitled under Hindu law, apart from proof of special custom or contract in that behalf, to maintenance out of the estate.

The words *purusha santhathi* in the deed of 1889 under consideration in the case mean legitimate sons and do not include the sons of a Sudra by a permanently kept concubine.

An illegitimate son is not an *aurasu* son as that word is used in Hindu Law.

Case-law reviewed.

CONSOLIDATED APPEALS (Nos. 38 and 39 of 1940) from a decree of the High Court (February 10, 1939) which varied a decree of the Subordinate Judge of Nellore (March 18, 1936).

The respondents, who were illegitimate sons of a Sudra, sued the holder of an impartible estate, of whose family their deceased father was an undivided member, for maintenance, claiming under a deed of arrangement entered into by their grandfather and his sons which provided for maintenance for "purusha santhathi", and, in the alternative, by custom and under Hindu law.

The Subordinate Judge found that custom was not proved and that they were not entitled to maintenance under Hindu law, but that they were under the deed as the term "purusha santhathi" as used therein would include illegitimate offspring and such a construction was not repugnant to Hindu law.

On appeal the High Court agreed with the Subordinate Judge in finding that custom was not proved, differed from him in the interpretation of "purusha santhathi", holding that the term was applicable only to legitimate sons, differed from him also on the question of the right to maintenance under Hindu law,

and, relying on *Collector of Gorakhpur v. Ram Sundar Mal*(1), awarded maintenance.

The Judgment of the High Court is reported as *Maharaja of Venkatagiri v. Raja Rajeswara Rao*(2).

The material terms of the deed of arrangement are set out and the facts are fully stated in the judgment of the Judicial Committee.

Sir Herbert Cunliffe K.C. and *P. V. Subba Row* for appellant.—We contend that the illegitimate sons here are not entitled to maintenance either under the deed, or under Hindu law or by custom. So far as custom is concerned, there are concurrent findings that no custom entitling them to maintenance has been proved. Maintenance is limited to sons and brothers of the holder of an impartible estate: *Rama Rao v. Rajah of Pittapur*(3). That was the law till *Shiba-prasad Singh v. Prayagkumari Debee*(4) and there is nothing in that case which conflicts with the earlier decision and nothing in *Collector of Gorakhpur v. Ram Sundar Mal*(1) which in terms over-rules those decisions. Both these cases have been considered in the latest decision, *Commissioner of Income-tax, Punjab v. Krishna Kishore*(5). We submit that the High Court has erred in interpreting the *Gorakhpur* case(1) as altering the law. The learned Judges were agreed that, before that case, the respondents, whether legitimate or illegitimate, could not have claimed maintenance under Hindu law. On the construction of the deed, we submit that the High Court was right. It is almost impossible to suppose that illegitimate sons were in the contemplation of the parties to the deed. If we are wrong on the construction of the deed, then we would submit that the deed is void as purporting to create an estate unknown to Hindu law.

D. N. Pritt, S. Hyam and *Sen Gupta* for respondents.—We submit that the rule of concurrent findings would not

(1) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.

(2) I.L.R. [1939] Mad. 622.

(3) (1918) L.R. 45 I.A. 148; 158; I.L.R. 41 Mad. 778.

(4) (1932) L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399.

(5) (1941) I.L.R. 23 Lah. 1 (P.C.).

RAJA KRISHNA
YACHENDRA
v.
RAJA RAJES-
WARA RAO.

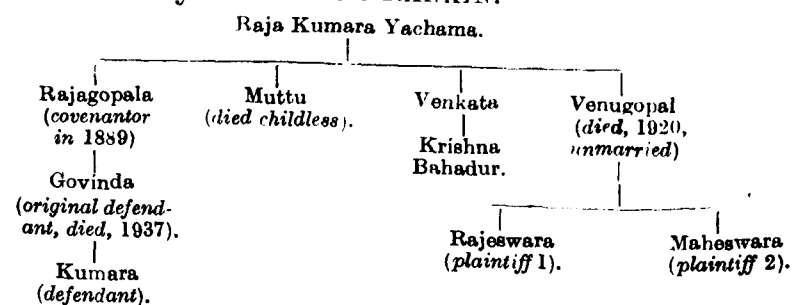
apply to the question of custom and we would be entitled to go into the evidence but, on a consideration of what has been said about it in the Courts below, we do not think we should trouble the Board with it. So far as the Hindu law is concerned, there is no escape from the decisions referred to by my learned friend. There remains the question of the construction of the deed. On the construction of the deed, we submit that the learned Subordinate Judge was right and we adopt his finding. Illegitimate sons have rights in Hindu law, including a right of succession in certain circumstances: *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Sing*(1). There is nothing improbable in their being provided for.

S. Hyam followed.—“Aurasa” should be interpreted in its literal sense as including “natural son”.

The appellants were not called on to reply.

SIR GEORGE
RANKIN.

The JUDGMENT of the Judicial Committee was delivered by Sir GEORGE RANKIN.—



The questions in this case arise within a Sudra family of which the defendant, the Raja of Venkata-giri, is the head. He is the present holder of the impartible estate which goes by that name, having succeeded to his father in 1937 while the present suit was pending in appeal before the High Court of Madras. The estate is admittedly joint family property though impartible. The two plaintiffs are the illegitimate sons of one Venugopal, younger brother of Rajagopala

RAJA KRISHNA
YACHENDRA
v.
RAJA RAJES-
WARA RAO.
SIR GEORGE
RANKIN.

the defendant's grandfather, who was a previous holder of the impartible estate. The plaintiffs' mother, though not married to Venugopal, cohabited with him in a manner exclusive and continuous so as to be a *dasi* within the meaning of the text of the Mitakshara (chapter I, section 12, verse 2) which confers certain rights of inheritance upon the sons of Sudras if born of such a union. The meaning and effect of this passage in the Mitakshara were much considered by the Board in *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Sing*(1) and *Vellaiyappa Chetty v. Natarajan*(2), but no disputable matter has to be decided thereunder in the present case. The claim of the plaintiffs is threefold. First, they say that by the terms of a deed, dated 8th April 1889, they are entitled between them to an allowance of Rs. 1,000 per month payable by the defendant as holder of the impartible estate. As their second string, they claim that by custom maintenance is payable to them as junior members of the family. Thirdly, they say that apart from the deed and apart from any custom they have the right to be paid maintenance out of the impartible estate as a matter of Hindu law. They brought their suit on 4th July 1932 in the Court of the Subordinate Judge of Nellore, who found in their favour as regards their claim under the deed but rejected their other grounds of claim (18th March 1936). On appeal the High Court of Madras (LEACH C.J. and KRISHNASWAMI AYYANGAR J.) held against them on the deed and on the custom, but decided that they had a good claim by the Hindu law to maintenance out of the impartible estate and fixed the amount at

(1) (1890) L.R. 17 I.A. 128; I.L.R. 18 Cal. 151.

(2) (1931) L.R. 58 I.A. 402; I.L.R. 55 Mad. 1.

(1) (1890) L.R. 17 I.A. 128; I.L.R. 18 Cal. 151.

RAJA KRISHNA
YACHENDRA
v.
RAJA RAJES-
WARA RAO.
—
SIR GEORGE
RANKIN.

Rs. 250 per month for each plaintiff (10th February 1939).

The evidence adduced to prove the alleged custom was held by both Courts to be insufficient: even if the question be any longer open before the Board, it was not contended that the evidence is of such strength as to make it reasonable that their Lordships should be invited to disagree with the concurrent findings of the Courts in India. Hence custom as a ground of claim goes out of the case.

The claim under the deed of 1889 depends upon the question whether the plaintiffs are within the words *purusha santhathi* (male descendants) as they occur in a clause which provides that on the death of Venugopal his male descendants shall in perpetuity be paid the amount of the allowance of Rs. 1,000 which had by the deed been made payable to him for life.

It is unnecessary to set out the deed at length or to describe in detail the circumstances in which it came to be entered into; just as it is unnecessary that their Lordships should endeavour to set forth the various considerations which may bear more or less effectively upon the problem whether—apart from any cases of adoption—words meaning “son”, “family”, “descendants”, and so forth are to be taken as restricted to persons of legitimate birth. At the time of the deed Raja Kumara Yachama was alive and Venugopal was a minor. It appears that the Raja had in 1878 made over the estate and much other property to his eldest son, Rajagopala; but that in 1889 the younger sons, Muttu and Venkata, had been minded to claim that the estate was partible, and had been persuaded by their father to recognise the impartibility of the estate on being given certain money and jewellery and on a proper allowance being provided in perpetuity for each

RAJA KRISHNA
YACHENDRA
v.
RAJA RAJES-
WARA RAO.
—
SIR GEORGE
RANKIN.

of the three junior branches. The Raja of Bobbili having acted as mediator and fixed the amount of the allowance to each branch at Rs. 1,000 per month, the deed of 8th April 1889 gives the sum of Rs. 1,000 per month to each of the three younger brothers for life and then sets forth in detail the persons who are to become entitled to the allowances thereafter. The operative clause so far as regards Venugopal's branch, when stripped of certain verbiage and of a clause with reference to widows, is as follows:—

“After the life of the said Sri Venugopala Krishna Yachendrulu, his *purusha santhathi*, shall, in perpetuity, be paid the same allowance amount, that is, at the rate of Rupees One thousand (Rs. 1,000) per month, in the aforesaid manner. But, if, at any time, in any one of the branches of the said Sri Muttukrishna Yachendrulu, Sri Venkatakrisna Yachendrulu and Sri Venugopala Krishna Yachendrulu, there be more than one male member, such males, and their *purusha santhathi* shall take the said allowance amount of Rupees one thousand in proportion to their respective shares, in the same manner as they would respectively take their other properties separately by way of inheritance according to the Hindu law. Moreover, if in any of the aforesaid three branches of our family any male should die without *purusha santhathi*, either by way of *aurasa* or by way of adoption, the allowance amount that was being received by the person who so died without *purusha santhathi* shall go to the *gnatis* (agnates) who are nearest to him in his own branch according to Hindu law Further, should any of the said three branches of our family become extinct by the total absence of *purusha santhathi* either by way of *aurasa* or by way of adoption, the allowance being paid to that branch shall be stopped”

Both of the learned Judges of the High Court have held that if the clause to which the plaintiffs make their appeal is considered in the light of its immediate context it becomes clear that as words are used in this deed a man is said to die “without *purusha santhathi*” if he die leaving neither a legitimate nor an adopted son.

RAJA KRISHNA
YACHENDRA
v.
RAJA RAJES-
WARA RAO.
—
SIR GEORGE
RANKIN.

Their Lordships are in agreement with this view which makes an end of the plaintiffs' claim upon the deed. That an illegitimate son is not an *aurasa* son as that word is used in Hindu law seems to their Lordships to be elementary. The learned Judges of the High Court both say that this was not disputed before them and their Lordships do not find that the learned trial Judge had been of any different opinion. The Court translator appended to his version of the deed a glossary of terms which is to the same effect. No weight can be attributed to any suggestion that in a Telugu deed of 1889, regulating the legal rights of a Hindu family in respect of an impartible raj in Madras, the word *aurasa* includes natural sons because the etymology of the Sanskrit word *aurasa* shows its original root meaning as "produced from the breast". *Aurasa* has always been used to import the highest class of son—the son begotten by the man himself on his lawful wife; of lower kinds once recognised, several were not sons in any physical sense, e.g., the *putrika putra* or son of an appointed daughter [Mayne's Hindu Law and Usage, Sixth Edition, 1900, sections 67-8, pages 79, 80]. Their Lordships think that the deed of 1889 provides its own guide to the meaning of the words *purusha santhathi* and that in the language of the deed Venugopal's branch became extinct on his death.

The interesting question which remains is whether the plaintiffs are entitled to maintenance from the impartible estate on the ground that it is the *prima facie* right at law of all junior male members of the family to be maintained out of impartible estate which is family and not separate property. The answer made by the defendant to this claim is that junior male members have no such right save by custom and that, apart altogether from any question of legitimacy, the

plaintiffs not being sons or brothers of any holder of the impartible estate can succeed only by proving a special custom, which they have failed to do. For this view of the law the defendant relies upon a line of decisions of the Board—the *Second Pittapur* case(1), the *Jeypore* case(2), *Bajinath's* case(3), the *Dhalbhum* case(4) and *Shibaprasad Singh's* case(5). The plaintiffs' reply is that this line of decisions was abandoned or deflected by the judgment of the Board in the *Gorakhpur* case(6) which, as he contends, established the right to maintenance as belonging to all junior male members of the family by virtue of their interest as co-owners. This interesting and difficult question has recently (4th July 1941) been determined by the Board in another case [*Commissioner of Income-tax, Punjab v. Krishna Kishore*(7)] in a sense unfavourable to the plaintiffs whose learned Counsel recognised that it would be neither reasonable nor useful to ask the Board to give a contrary decision in the present case. Their Lordships on this part of the case agree with the learned Subordinate Judge who negatived this ground of claim.

Their Lordships have read the Subordinate Judge's judgment and both judgments in the High Court with high appreciation and have been struck by the skill and care with which the various questions have been elucidated and by the ability with which they have been discussed. But the plaintiff's suit must fail.

Their Lordships will humbly advise His Majesty that the appeal of the defendant should be allowed, the

RAJA KRISHNA
YACHENDRA
v.
RAJA RAJES-
WARA RAO.
—
SIR GEORGE
RANKIN.

- (1) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.
- (2) (1919) 24 C.W.N. 226; A.I.R. 1919 P.C. 126.
- (3) (1921) L.R. 48 I.A. 195; I.L.R. 43 All. 228.
- (4) (1927) L.R. 54 I.A. 289; I.L.R. 54 Cal. 955.
- (5) (1932) L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399.
- (6) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.
- (7) (1941) I.L.R. 23 Lah. 1 (P.C.).

RAJA KRISHNA
YACHENDRA
v.
RAJA RAJES-
WARA RAO.
—
SIR GEORGE
RANKIN.

appeal of the plaintiffs dismissed, the decrees of the Indian Courts set aside, and the suit dismissed. The plaintiffs must pay the defendant's costs of both Courts in India and of these appeals save that the defendant must pay to the plaintiffs their costs in the trial Court of the issue numbered 5 which relates to the paternity of the plaintiffs, with a set-off in India in respect of these costs.

Solicitor for the appellant : *Harold Shepherd.*

Solicitors for respondents : *Barrow, Rogers & Nevill.*
C.S.S.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice Mockett
and Mr. Justice Kuppuswami Ayyar.*

1941,
December 15.

IN RE AN ADVOCATE.*

Advocate—Charges—Inquiry by Tribunal consisting of three members—One of them dying without signing report—Invalidity of report—R. 7 of rules framed by Madras High Court under Bar Councils Act mandatory—Indian Bar Councils Act (XXXVIII of 1926), sec. 12.

The direction in Rule 7 of the Rules framed under the Bar Councils Act that all the members of the Tribunal shall sign their findings is mandatory. If a member of the Tribunal dies before the report has been completed, that is, drawn up and signed, the Tribunal ceases to be properly constituted and the report by the surviving members cannot be taken into consideration. A fresh Tribunal will have to be constituted and the case investigated *de novo*.

NOTICE under section 12 (3) of the Indian Bar Councils Act, dated 12th November 1941, and issued by the

* Referred Case No. 41 of 1941.

High Court to an Advocate, calling upon him to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court for professional misconduct. AN ADVOCATE.
In re.

V. V. Srinivasa Ayyangar for *V. C. Gopalaratnam* for respondent.—There is a preliminary objection to the report of the Tribunal being considered. The Tribunal constituted to inquire into the charges against the Advocate consisted of three members. But one of the members died before the report was signed. Rule 7 of the rules relating to the procedure to be followed by Tribunals requires that the findings of the Tribunal shall be signed by all its members, and that rule is mandatory. The report in this case, therefore, cannot be considered and a fresh inquiry should be made by another Tribunal. [Section 12 of the Indian Bar Councils Act (XXXVIII of 1926) and rule 7 of the rules framed thereunder by the Madras High Court were referred to.]

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

The JUDGMENT of the Court was delivered by LEACH C.J.—The respondent is an Advocate of this Court. Two charges of professional misconduct have been framed against him. These have been investigated by a Tribunal constituted under the Bar Councils Act. The Tribunal having considered the evidence drew up its report, but unfortunately one of the members, Mr. T. S. Venkatesa Ayyar, died before the document was ready for signature. In these circumstances, the learned Counsel for the respondent has taken a preliminary objection that the report is not one which this Court can consider, having been signed only by two members of the Tribunal. He says that a new Tribunal will have to be constituted and the case investigated *de novo*. LEACH C.J.

Rule 7 of the rules relating to the procedure to be followed by Tribunals or District Courts in cases

AN ADVOCATE, referred to them for inquiry under the Bar Councils
In re.

LEACH C.J.

Act reads as follows :—

“(1) The Tribunal or Court, having heard the evidence for the complainant and the respondent, shall report to the High Court its finding on each charge that has been framed, giving reasons for its finding.

(2) The findings of the Tribunal, if unanimous, shall be signed by all the members of the Tribunal. If the members of the Tribunal differ in their findings or any of them, all the findings shall be reported to the High Court, being signed respectively by the members whose findings they are. The reasons for the findings shall be reported to the High Court in one report if the members of the Tribunal are unanimous and in separate reports if their findings differ, provided that, whether their findings are unanimous or not, any member may record the reasons for his findings separately and the record so made shall be forwarded to the High Court with the other report or reports of the Tribunal in the case.”

The direction that all the members of the Tribunal shall sign their findings is mandatory. Moreover, if a member of the Tribunal dies before the report has been completed, that is, drawn up and signed, the Tribunal ceases to be properly constituted. In these circumstances we cannot take into consideration the report before us and another Tribunal will have to be constituted to investigate the charges.

V.V.C.

APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and
 Mr. Justice Happell.*

T. K. NALLAMUTHU PILLAI AND NINE OTHERS,
 APPELLANTS,

v.

R. K. THIRUMALAI AYYANGAR AND
 NINE OTHERS, RESPONDENTS.*

1941,
 October 24.

Water rights—Irrigation—Lands in foreshore of irrigation tank subject to submersion of water from tank from time immemorial during several weeks in the year—Land owners putting up bunds to prevent submersion, resulting in interference with customary supply of water to ryots in ayacut of tank—Right of ryots to mandatory injunction against land owners for removal of such bunds—Principles of English common law—Inapplicability.

From time immemorial certain lands in the neighbourhood of an irrigation tank were subject to submersion of water from the tank for several weeks in the year after the tank had filled as the result of the rains. The appellants and their predecessors accepted tenancies of these lands knowing that they would be completely submerged for part of the year. The appellants put up bunds to prevent the submersion of these lands, which had the effect of causing some of the water in the tank to escape over the weir and lessening materially the supply of water which the ryots in the ayacut of the tank were accustomed to receive. Some of the ryots cultivating lands within the ayacut filed a suit for a mandatory injunction requiring the appellants to remove the bunds which they had erected and claimed that they were entitled by prescription and custom to prevent the appellants from interfering with the spread of the water in the tank. The appellants relied on English common law and contended that under that law an owner of land had always the right to prevent his land from being submerged.

* Letters Patent Appeal No. 45 of 1940.

NALLAMUTHU
v.
THIRUMALAI.

Held : The principles of the English common law did not apply to the case.

Submersion of lands on the foreshore of a tank when it is full is no uncommon occurrence and is a feature of the recognized irrigation system in India. Interference with the customary supply of water from a tank to the ryots cultivating within its ayacut amounts to interference with rights recognized by law and is therefore subject to the injunction of the Court.

Seshadri Aiyangar v. Narasimhachari(1) approved.

J. D. Robinson v. Ayya Krishnama Chariyar(2) distinguished.

APPEAL under clause 15 of the Letters Patent against the judgment and decree of WADSWORTH J. dated 23rd July 1940 and passed in Second Appeal No. 542 of 1937 preferred to the High Court against the decree of the Court of the Subordinate Judge of Tuticorin in Appeal Suit No. 16 of 1934 preferred against the decree of the Court of the District Munsif of Sri-vaikuntam in Original Suit No. 445 of 1927.

K. V. Sesha Ayyangar for *J. S. Vedamanickam* for appellants.

Advocate-General (*Sir A. Krishnaswami Ayyar*) and *K. R. Rama Ayyar* for respondents 1 to 4.

R. Sivarama Iyer for *Government Pleader* (*K. Kuttikrishna Menon*) for fifth respondent.

Other respondents were not represented.

Cur. adv. vult.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The parties to this appeal are ryots cultivating lands in the neighbourhood of the Kadamba tank in the Tinnevely District. The tank which is a large one is fed from a river through a channel flowing into the tank at its northern extremity.

(1) (1931) 36 L.W. 408.

(2) (1872) 7 M.H.C.R. 37.

NALLAMUTHU
v.
THIRUMALAI.
LEACH C.J.

A bund running from north to south causes the water to spread during the monsoon season to a line beyond the boundaries of the lands cultivated by the appellants. It is admitted that from time immemorial these lands have been submerged for several weeks in the year after the tank has filled as the result of the rains. The withdrawal of water from the tank for the purpose of the cultivation of the lands falling within the ayacut causes the water to recede gradually from the appellants' lands and when this has happened they are fit for cultivation. The appellants and their predecessors have accepted tenancies of these lands knowing that they would be completely submerged for part of the year. In 1898 the appellants' predecessors erected bunds to prevent the submersion. This caused some of the water in the tank to escape over the weir and lessened the supply which the ryots in the ayacut were accustomed to receive. They naturally objected to the erection of these bunds and as the result of their objection the revenue authorities caused them to be demolished. Notwithstanding the action of the revenue authorities similar bunds were erected in 1899, 1904, 1907 and 1924. Except in the year 1924 the revenue authorities stepped in immediately and caused the protective earthworks to be demolished. In 1924, however, the revenue authorities refused to interfere as they considered that the bunds erected by the appellants were merely field ridges and the loss of water was inconsiderable. The question was not finally decided until 29th March 1927 when the Board of Revenue agreed with the subordinate revenue officers that no substantial loss had been suffered by the ryots in the ayacut as the result of the erection of the bunds. The Board's order caused the respondents 1 to 4 who are ryots cultivating

NALLAMUTHU
v.
THIRUMALAI.
LEACH C.J.

lands within the ayacut to file the suit out of which this appeal arises. There are concurrent findings of the Courts below that the bunds are more than field ridges and that the respondents have in consequence suffered material diminution in their customary supply of water. It is now clear that the Board was misinformed.

The suit was filed in the Court of the District Munsif of Srivaikuntam. The plaintiffs claimed that they were entitled by prescription and custom to prevent the appellants interfering with the spread of the water in the tank. The District Munsif found against the plaintiffs and dismissed the suit. On appeal, the Subordinate Judge held that the District Munsif was wrong and issued a mandatory injunction requiring the appellants to remove the bunds which they had erected. The appellants then appealed to this Court. The appeal was heard by WADSWORTH J. who agreed with the Subordinate Judge, but gave a certificate which has permitted the present appeal to be filed under clause 15 of the Letters Patent.

Much has been said in the course of the litigation with regard to rights which are recognized by the English common law, and in this Court the learned Advocate for the appellants has contended that an owner of land has always the right under the common law of England to prevent his land being submerged. Assuming this to be so, it is, however, manifest that principles which can be applied in England are not always applicable here. The conditions in England are very different from the conditions in this country and the Court must have regard to the principles which have been applied in India when questions have arisen affecting the rights of ryots to their customary supply of water for the purpose of cultivation. In

NALLAMUTHU
v.
THIRUMALAI.
LEACH C.J.

many parts of the Madras Presidency the storage of water in tanks is essential if crops are to be raised, and agriculture provides the means of livelihood for the vast majority of the population. The application of English rules of law was fully discussed by WALLACE J. in *Seshadri Aiyangar v. Narasimhachari*(1) where he stated that the whole system of tank irrigation and the rights of ryots to water for irrigation has no counterpart in England and no place in the English common law, the law on such matters being determined in India by custom and customary right. He pointed out that it would generally be found that the system is so self-contained that any attempt to alter it on behalf of an individual who may have a private grievance is almost certain to react to the detriment of the ryots as a body. He also drew attention to the fact that submersion of lands on the foreshore of a tank when it is full is no uncommon occurrence and is a feature of the recognized irrigation system. With these remarks we find ourselves in full agreement.

It cannot be denied that, if the appellants are allowed to prevent the Kadamba tank reaching its full capacity during the rains, the plaintiffs and other ryots in the ayacut will suffer because the water which would otherwise spread over the appellants' lands will be forced over the weir and lost so far as the ayacut is concerned. The action of the appellants in reality amounts to interference with the bed of the tank because their lands for several weeks in the year form part of the bed of the tank. As the result of the construction of this tank generations ago the ryots of the ayacut have become entitled to have their lands irrigated from it and anyone who interferes with

(1) (1931) 36 L.W. 408.

NALLAMUTHU
v.
THIRUMALAI.
LEACH C.J.

their customary supply is interfering with rights recognized by law and therefore is subject to the injunction of the Court. The action of the appellants in erecting these bunds has resulted in a material loss of water to which the ryots-respondents are entitled. That is the overriding factor and the plea that the appellants are merely protecting their own property cannot be accepted. The appellants agreed to become tenants of these lands possessing full knowledge that for a part of the year they would be submerged and they have no real grievance quite apart from the principles which govern the case.

In the course of the arguments the learned Advocate for the appellants laid great stress on *J. D. Robinson v. Ayya Krishnama Chariyar*(1), but when the judgment in that case is fully understood it will be seen that it does not help the appellants in any way. There a tank used for the irrigation of the lands of the plaintiffs obtained part of its water from rain falling on the lands of certain of the defendants. The bund of the tank threw back the waters flowing into it on to the lands of these defendants and remained there until the water in the tank fell sufficiently to allow it to drain off. These defendants, through the agency of the Government, constructed a channel which prevented the water overflowing their lands, but conducted it back to the tank without loss to the plaintiffs who, however, claimed to have the former state of affairs restored on the ground that they had a prescriptive right to throw back the water on to the defendants' lands and to keep it there until required for use. This contention was rejected. In the course of the judgment it was said that water not running in

(1) (1872) 7 M.H.G.R. 37.

NALLAMUTHU
v.
THIRUMALAI.
LEACH C.J.

a defined stream is the absolute property of the owner of the land of which it forms part, and before it has reached a defined stream he may drain it off or put it to what purpose he pleases, the decisions in *Rawstron v. Taylor*(1) and *Broadbent v. Ramsbotham*(2) being referred to. That may perhaps have been the right principle to apply in that case as the construction of the channel did not cause interference with the rights of others, but here there is interference with the rights of others and the principle there relied on is inapplicable.

Inasmuch as the appellants by their action have interfered with the rights of the plaintiffs-respondents we hold that the plaintiffs-respondents are entitled to the reliefs granted, which means that the appeal fails. Consequently it will be dismissed with two sets of costs, one set to be paid to the plaintiffs-respondents and one set to the Secretary of State who has been made a party to the suit and has opposed the appeal.

N.S.

(1) (1855) 25 L.J. Ex. 33.

(2) (1856) 25 L.J. Ex. 115.

APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Happell.*

1941,
October 10.

R. KAILASA AYYAR (FIRST PLAINTIFF), PETITIONER,

v.

PAYYALUR GRAMAM VANCHI PATTAR'S SON,
SUNDARAM PATTAR AND SEVEN OTHERS (DEFENDANTS
1 TO 7 AND SECOND PLAINTIFF), RESPONDENTS.*

*Transfer of Property Act (IV of 1882), ss. 67 (d) and 100—
Right of one of several co-mortgagees to recover his share
of mortgage—Other co-mortgagees to be made defendants on
refusal to be plaintiffs—Suit to be valued and court-fee paid
on full amount due under mortgage—Same principle appli-
cable to charges—Court Fees Act (VII of 1870), sec. 7 (i)—
Suits Valuation Act (VII of 1887), sec. 8.*

V was the manager of a chit fund. The subscriptions were to be paid to him and, as security for the discharge of his obligations to the subscribers, he created a charge on certain immovable properties. R was a subscriber to the chit fund and he became entitled to withdraw from the fund Rs. 3,032. K was another subscriber to whom a sum of Rs. 1,429 was due. R died without receiving payment of the amount due to him, and after his death the amount of Rs. 3,032 was divided under a partition decree between the sons of R, including the plaintiff who got a two-fifth share therein. Except K and R's sons, all subscribers had been paid and the properties of V remained charged in respect of the total amount of Rs. 4,461 due to them. The plaintiff filed a suit in the Court of the Subordinate Judge of Palghat against the legal representatives of V who had died, impleading also as defendants his brothers and K, for recovery of his two-fifth share by the enforcement of the charge. The plaintiff prayed for a decree for Rs. 1,212-6-4, the amount of his own share in the Rs. 3,032, and stamped his plaint accordingly. As the amount claimed was less than Rs. 3,000, the Subordinate Judge returned the plaint to be

* Civil Revision Petition No. 1271 of 1939.

presented in the Court of the District Munsif, Alathur. The District Munsif found on an issue raised regarding court-fees and jurisdiction that the plaint should be valued in accordance with the full amount due under the document creating the charge and ordered the plaint to be returned for presentation to the Court having jurisdiction, namely, the Court of the Subordinate Judge. The plaint was re-presented without any amendment and tender of additional court-fee to the Subordinate Judge who refused to accept it. On revision,

held: that the plaintiff should value his suit at Rs. 4,461 and pay court-fees on that amount and that the proper Court to try the suit, on payment of proper court-fee, was the Court of the Subordinate Judge of Palghat.

One of several co-mortgagees who are in the position of tenants-in-common can sue to recover his own share of the mortgage, provided he makes his co-mortgagees defendants if they refuse to join him as plaintiffs. But he must value the suit according to the full amount due under the mortgage and pay court-fee thereon. The same principle applies to charges on immovable properties.

Sunitibala Debi v. Dhara Sundari Debi Chowdhurani(1) applied and followed.

Peer Ammal v. Nalluswami Pillai(2) approved and followed.

Seth Bansiram Jashamal v. Gunnia Naga Aiyar(3) dissented from.

PETITION under sections 115 and 151 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of South Malabar at Palghat, dated 8th February 1939, and made on the returned plaint in Original Suit No. 27 of 1936 on the file of the said Court of the Subordinate Judge of South Malabar at Palghat.

N. R. Sesha Ayyar for petitioner.

K. Subba Rao for third respondent.

Other respondents were not represented.

Cur. adv. vult.

(1) (1919) I.L.R. 47 Cal. 175 (P.C.).

(2) (1937) 2 M.L.J. 666.

(3) (1930) 59 M.L.J. 928.

KAILASA
v.
SUNDARAM.
—
LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—This civil revision petition raises the question whether a co-mortgagee when suing to recover his individual share in the mortgage must value his suit according to the full amount due under the deed, or whether he may value it according to his own share. The question has arisen in other cases in this Court and there is a conflict of opinion. It is certainly one of some difficulty. In the present case there is a charge on immovable properties and not a mortgage, but the same principle admittedly will apply.

In the year 1919 one Vanchi Pattar organized a chit fund of which he constituted himself the manager. The subscriptions were to be paid to him and as security for the discharge of his obligations to the subscribers he created a charge on certain immovable properties. Rama Pattar, the father of the petitioner and of the fourth and fifth respondents, subscribed to the fund on behalf of his family which was then joint. Eventually the family became entitled to withdraw from the fund Rs. 3,032, but Rama Pattar died without receiving payment. After his death his sons separated and under the decree passed in a partition suit the petitioner became entitled to two-fifths, the fourth respondent to two-fifths and the fifth respondent to one-fifth of the Rs. 3,032. With two exceptions all subscribers to the fund have now been paid. The two exceptions are Rama Pattar's family and one P. M. Krishna Ayyar.

In 1936 the petitioner filed a suit in the Court of the Subordinate Judge of South Malabar at Palghat to recover his two-fifth share of the Rs. 3,032 by the enforcement of the charge created by Vanchi Pattar who is now dead. The defendants were the first and

second respondents who are the sons of Vanchi Pattar, the third respondent, who is the alienee of the properties, the petitioner's brothers and P. M. Krishna Ayyar. The amount due to P. M. Krishna Ayyar was Rs. 1,429 and therefore, at the time the suit was filed, the properties remained charged in respect of a total sum of Rs. 4,461. The petitioner prayed for a decree for Rs. 1,212-6-4, the amount of his own share in the Rs. 3,032, and stamped his plaint accordingly. As the amount claimed was less than Rs. 3,000, the Subordinate Judge held that he had no jurisdiction to try the suit and returned the plaint to the petitioner to enable him to present it to the Court of the District Munsif of Alatur. In accordance with the decision of the Subordinate Judge, the petitioner presented the plaint to the District Munsif who accepted it but, in consequence of a plea raised by the third respondent in his written statement, the District Munsif framed an issue on the question whether the suit had been properly valued for the purposes of court-fees and jurisdiction. The District Munsif considered that the suit should be valued in accordance with the full amount due under the document creating the charge and therefore ordered the plaint to be returned to the petitioner for presentation to the Court having jurisdiction, in other words, to the Court of the Subordinate Judge. The petitioner then re-presented the plaint to the Subordinate Judge, who adhered to his previous decision and refused to accept it. In these circumstances the petitioner asks this Court, in the exercise of its revisional powers, to set aside the Subordinate Judge's order directing the plaint to be returned and compel him to try the suit. In re-presenting the plaint to the Subordinate Judge, the petitioner did not amend it in any way and did not tender any

KAILASA
v.
SUNDARAM.
—
LEACH C.J.

KAILASA
v.
SUNDARAM.
LEACH C.J.

additional court-fee. The petitioner admits that he must ask for the sale of all the properties included in the charge and that the total amount due to the members of his family and to P. M. Krishna Ayyar under the document creating it is Rs. 4,461, but he says that notwithstanding, he is entitled to sue in the Court of the Subordinate Judge on payment of a court-fee based on the amount of his own share only.

Section 7 of the Court Fees Act and section 8 of the Suits Valuation Act contain the only relevant statutory provisions. Sub-section (i) of section 7 of the Court Fees Act states that in suits for money the amount of the court-fee shall be computed according to the amount claimed. It is common ground that, when a mortgagee or a person entitled to a charge on immovable property sues to recover what is due to him, the plaint falls to be stamped under this sub-section. Sub-section (ix) requires a suit against a mortgagee for the recovery of the mortgaged property or a suit by a mortgagee to foreclose the mortgage to be stamped according to the principal money expressed to be secured by the instrument of mortgage, but this sub-section goes no further, and a suit to enforce a mortgage by a decree for sale obviously does not come within it. Section 8 of the Suits Valuation Act states that, where in suits other than those referred to in section 7 (v), (vi), (ix) and (x-d) of the Court Fees Act, court-fees are payable *ad valorem* under the Court Fees Act, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same. Therefore, in a suit like the one referred to in the petition, it is the value of the claim which determines the forum, but it remains to be seen whether in such a suit the claim must be taken to be limited to the payment of the plaintiff's individual

share or whether it is to be construed as one for the enforcement of the whole mortgage and valued as such.

KAILASA
v.
SUNDARAM.
LEACH C.J.

It is not disputed, nor can it be in view of the authorities, that one of several co-mortgagees who are in the position of tenants-in-common can sue to recover his own share of the mortgage, provided that he makes his co-mortgagees defendants, if they refuse to join him as plaintiffs. See *Atchamma v. Subbarayadu*(1) and *Sunitibala Debi v. Dhara Sundari Debi Chowdhurani*(2). The last mentioned case was decided by the Privy Council and, in delivering the judgment of the Board, Lord BUCKMASTER said :

"Where a mortgage is made by one mortgagor to two tenants-in-common, the right of either mortgagee who desires to realize the mortgaged property and obtain payment of the debt, if the consent of the co-mortgagee cannot be obtained, is to add the co-mortgagee as a defendant to the suit and to ask for the proper mortgage decree which would provide for all the necessary accounts and payments, excepting that there could be no judgment for a sum of money entered as between the mortgagee-defendant and the mortgagor."

Neither in *Atchamma v. Subbarayadu*(1) nor in *Sunitibala Debi v. Dhara Sundari Debi Chowdhurani*(2) did any question of court-fee or jurisdiction arise. Therefore these cases leave open the question under discussion, although we consider that the observations of Lord BUCKMASTER just quoted greatly assist in the solution of the problem. We shall return to *Sunitibala Debi v. Dhara Sundari Debi Chowdhurani*(2) presently, but at this stage it will be convenient to examine the judgments of this Court which are in conflict. They are the judgment delivered by RAMESAM J. in *Seth Bansiram Jashamal v. Gunnia Naga Aiyar*(3) and the

(1) (1903) 15 M.L.J. 496.

(2) (1910) I.L.R. 47 Cal. 175 (P.C.).

(3) (1930) 59 M.L.J. 928.

KAILASA
v.
SUNDARAM.
LEACH C.J.

judgment of VARADACHARIAR J. in *Peer Ammal v. Nalluswami Pillai*(1).

The case of *Seth Bansiram Jashamal v. Gunnia Naga Aiyar*(2) was decided by RAMESAM J. sitting alone. The learned Judge held that section 67 (d) of the Transfer of Property Act does not prevent a person interested in part only of the mortgaged property instituting a suit. He may institute a suit for the recovery of his share, provided the reliefs he prays for relate to the entire property. In the course of his judgment the learned Judge observed :

"Thus the real question in all such cases is not one of maintainability of the suit but what it is the court-fee to be paid by the plaintiff in such cases and perhaps, though the point does not arise now, there is also the question of jurisdiction. In such cases, should the plaintiff pay court-fee upon the whole of the mortgage money or only upon his share ? It is true that for realizing his share of the mortgage money he has to pray for sale of the whole property. If the whole of the mortgaged property realized more than the amount due on the document to all the mortgagees, the plaintiff will be simply paid his amount and the rest of it will be held by the Court and will not be paid to the other co-mortgagees until they pay their court-fees. The fear that the Government will be deprived of the Government revenue, while the whole of the mortgage amount is being realized and only a small amount is being paid as court-fee, is therefore illusory. After the trial of the case and the final decree is passed, the Court will make a provision directing the defendant-mortgagees to pay their court-fees within a certain time and, if they do not pay the court-fees, the amount will be paid to the mortgagor after taking security. In such a case no mortgagee will allow his money to go back to the mortgagor's hands owing to non-payment of court-fees, so that ultimately the Government will get the whole court-fee due upon the whole of the mortgage money."

It follows from these observations that RAMESAM J. was of the opinion that the plaintiff could only be

(1) (1937) 2 M.L.J. 666.

(2) (1930) 59 M.L.J. 928.

called upon to stamp his plaint according to the value of his share in the mortgage and, if this opinion is correct, the petitioner has complied with the requirements of the law and the proper forum will be the District Munsif's Court.

In *Peer Ammal v. Nalluswami Pillai*(1) VARADACHARIAR J., sitting with MOCKETT J., indicated strong dissent from the opinion expressed by RAMESAM J. in *Seth Bansiram Jashamal v. Gunnia Naga Aiyar*(2). In the course of his judgment the learned Judge said :

"Justice can be done between all the parties concerned only by providing in the decree for the distribution of the sale-proceeds amongst the co-mortgagees. It accordingly seems to me more reasonable to regard the mortgage as a single cause of action at any rate for purposes of jurisdiction and in such a case, under section 8 of the Suits Valuation Act, the valuation for purposes of court-fee cannot be different. RAMESAM J. suggests that, as regards the defendant co-mortgagee's share, the Court may be able to collect the court-fees later on before distributing the moneys to him. With great respect, I venture to doubt if there is anything in the Court Fees Act authorizing the Court to do so."

With great respect we consider that the opinion of VARADACHARIAR J. is to be preferred to that of RAMESAM J. The governing section is section 7 of the Court Fees Act and not section 8 of the Suits Valuation Act, but, in deciding what court-fee is payable under section 7 of the Court Fees Act, the Court must have regard to the real nature of the claim. A co-mortgagee suing alone for his share must ask for a preliminary mortgage decree in respect of the entire debt. As already pointed out, Lord BUCKMASTER in *Sunitibala Debi v. Dhara Sundari Debi Chowdhurani*(3) stated that, where a co-mortgagee is suing alone, he must ask for the proper decree which would provide for all the

KAILASA
v.
SUNDARAM.
LEACH C.J.

(1) (1937) 2 M.L.J. 666.

(2) (1930) 59 M.L.J. 928.

(3) (1919) I.L.R. 47 Cal. 175 (P.C.).

KAILASA
v.
SUNDARAM.
LEACH C.J.

necessary accounts and payments, although a defendant-mortgagee could not ask for judgment in his favour. This can only mean that the plaintiff must ask the Court to decide what is due on the mortgage as a whole and to fix a period for redemption of the mortgaged property in its entirety. There can be no redemption in part. Therefore the plaintiff cannot get his share until the mortgagor has paid into Court what he owes on the mortgage or the mortgaged properties have been sold under the preliminary decree. In these circumstances it seems to us that the primary claim can only be taken to be the enforcement of payment of the full mortgage debt, which means that the plaint must be stamped accordingly. Although hardship cannot be regarded as a factor, it may be pointed out that to require a co-mortgagee suing alone to pay court-fees on the full amount of the mortgage debt will not result in hardship. If he obtains a mortgage decree, he will be entitled to recover out of the money paid into Court by the mortgagor or out of the proceeds of the sale of the mortgaged property the full amount which he has had to pay in court-fees.

The question of what would be the proper course for a mortgagee-defendant to take to recover his share of the moneys brought into Court as the result of a suit by a co-mortgagee does not arise in this case and the question can be left for decision until it does arise.

In the course of his judgment the District Munsif referred to the decision of PANDRANG ROW J. in *Ramachandra Ayyar v. Sivarama Ayyar*(1), and the decision has been quoted to us in the course of the arguments.

(1) (1936) 44 L.W. 502.

KAILA
v.
SUNDAR
LEACH (

In that case a mortgage deed had been executed in favour of several creditors of the mortgagors for the aggregate amount of their dues, but it was the intention of the parties that there should be no separate payment to any of the co-mortgagees until the entire amount had been realized. PANDRANG ROW J. considered that the judgment of the Privy Council in *Sunitibala Debi v. Dhara Sundari Debi Chowdhurani*(1) did not apply, and he held that one of the creditors could not bring a suit for his share. There are observations in the judgment which are open to criticism, but it is not necessary to embark upon a discussion of the judgment, because in this case it is common ground that *Sunitibala Debi v. Dhara Sundari Debi Chowdhurani*(1) does apply. The only contest is with regard to its bearing on the question raised by the petitioner.

For the reasons given, we hold that the petitioner should value his suit at Rs. 4,461 and pay court-fees on that amount, which means that the proper Court to try this suit is that of the Subordinate Judge of Palghat provided, of course, the plaint is properly stamped. The costs of this petition will be costs in the cause.

The petitioner attached the plaint to his petition. The plaint will now be returned to him.

N.S.

(1) (1919) I.L.R. 47 Cal. 175 (P.C.).

APPELLATE CIVIL.

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

1941,
October 24.

CHOKKALINGA MUDALI (PLAINTIFF—DECREE-HOLDER),
APPELLANT,

v.

MANICKA MUDALI *alias* SINGARA MUDALI
(FIRST DEFENDANT—JUDGMENT-DEBTOR),
RESPONDENT.*

Provincial Insolvency Act (V of 1920), sec. 44 (2)—Code of Civil Procedure (Act V of 1908), O. XXXIV, r. 6—Mortgage decree against insolvent—Order of discharge in favour of insolvent—Subsequent execution of mortgage decree—Sale proceeds of mortgaged property insufficient to discharge mortgage debt—Right of decree-holder to apply for personal decree for balance against insolvent.

A mortgagee filed a suit on his mortgage and obtained a final decree against the mortgagor on 29th January 1920. The mortgagor was adjudicated an insolvent on 18th September 1920 and was given his discharge unconditionally on 23rd February 1926. The mortgagee took no steps to enforce his security until the year following the mortgagor's discharge. Proceedings in execution of the mortgage decree were then taken and the mortgaged property was brought to sale on 23rd March 1927. The sale proceeds fell short of the amount required to discharge the mortgage debt and, on 9th July 1927, the mortgagee applied under Order XXXIV, rule 6, Civil Procedure Code, for a personal decree for the balance against the mortgagor. It was contended by the mortgagor that no personal decree could be passed against him in view of the provisions of section 44 (2) of the Provincial Insolvency Act by reason of the order of discharge in his favour in the insolvency proceedings.

Held.—The mortgagee was entitled to a personal decree for the balance of the amount due to him. As the mortgagee had

* Second Appeal No. 1119 of 1938.

not, during the insolvency proceedings, realised his security or surrendered or valued it, no portion of the debt due to him had become provable in the insolvency. Section 44 (2) had therefore no application to the case.

Khupchand Nathmal Marwadi v. Rajeshwar Shankar Deshpande(1) dissented from.

Athiappa Chettiar v. Ibramsa Pulavar(2) overruled.

APPEAL against the decree of the Court of the Subordinate Judge of Chingleput in Appeal Suit No. 113 of 1937 (Appeal Suit No. 75 of 1936, District Court, Chingleput) preferred against the order of the Court of the District Munsif of Poonamallee in Miscellaneous Petition No. 660 of 1927 in Original Suit No. 822 of 1916.

K. Rajah Ayyar for *V. Rajagopalachari* for appellant.
T. R. Srinivasan for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by LEACH C.J.—The question for decision in this appeal is whether a mortgagee is entitled in law to a personal decree for the balance of the mortgage debt when the mortgagor has been adjudicated an insolvent and has obtained an unconditional order of discharge. The reported decisions disclose a divergence of opinion. The adjudication in this case was under the Provincial Insolvency Act, but admittedly there is no distinction to be drawn between that Act and the Presidency-towns Insolvency Act in this connection.

On 4th November 1910 the respondent mortgaged immovable property to the appellant who on 10th October 1916 filed a suit in the Court of the District Munsif of Poonamallee to enforce his security. On 8th January 1917 he obtained a preliminary mortgage

(1) I.L.R. [1940] Nag. 512.

(2) (1941) 2 M.L.J. 690.

CHOKKALINGA
v.
MANICKA.
LEACH C.J.

decree and on 29th January 1920 a final decree for the sale of the mortgaged property. In the meantime, to be exact, on 13th November 1919, the respondent filed a petition asking that he be adjudicated an insolvent. This application was granted on 18th September 1920. On 23rd February 1926 the respondent was given his discharge unconditionally. The appellant took no steps to enforce his security until the year following the respondent's discharge. He then instituted proceedings in execution and the property was brought to sale on 23rd March 1927. The sale proceeds fell short of the amount required to discharge the appellant's debt by the sum of rupees 383-13-4. On 9th July 1927 the appellant applied under the provisions of Order XXXIV, rule 6, of the Code of Civil Procedure for a personal decree for the balance. His application was granted on 27th September 1927.

The respondent appealed to the District Judge of Chingleput against the order passed on the application under Order XXXIV, rule 6, but not against the personal decree itself. The District Judge held that in these circumstances the appeal did not lie and refused to allow the respondent to convert the appeal into one against the personal decree. The respondent then appealed to this Court which allowed the appeal to the District Judge to be converted into an appeal against the personal decree and remanded the case to the District Judge for disposal on the merits. The District Judge in turn remanded the case to the District Munsif who held that the appellant was entitled to a personal decree. The respondent challenged this decision in an appeal to the Subordinate Judge who reversed the District Munsif's decision. This resulted in the filing of the present appeal. In the first instance

the appeal came before KING J. who considered that it should be decided by a Bench in view of the conflict of authority.

The sections of the Act which call for consideration here are sections 28 (2) and (6), 34 (2), 44 and 47 and their provisions will be mentioned in the order most convenient to the question raised. Section 28 (2) of the Provincial Insolvency Act states that, on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver and shall become divisible among the creditors, but sub-section 6 says that nothing in the section shall affect the power of a secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if the section had not been passed. Section 47 states that where a secured creditor realizes his security he may prove for the balance due to him after deducting the net amount realized, or if he relinquishes his security for the general benefit of the creditors he may prove for his whole debt, or where he does not either realise or relinquish his security he may value it and prove for the balance. Section 34 (2) says that, save as provided by sub-section 1 which has no bearing in this case, all debts and liabilities, present or future, certain or contingent, to which a debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of an obligation incurred before the date of the adjudication, shall be deemed to be debts provable under the Act. Sub-section 1 of section 44 states that an order of discharge shall not release the insolvent from certain specified debts, but sub-section 2 says that subject to sub-section 1 an order of discharge shall release the insolvent from all debts provable under the Act. A

CHOKKALINGA
v.
MANICKA.
LEACH C.J.

CHOKKALINGA
v.
MANICKA.
LEACH C.J.

debt due to a mortgagee is not one of the specified debts.

By reason of the provisions of section 47 the debt of a secured creditor is not provable until he has realised his security or has abandoned it or valued it. Until one of these events has happened there is no debt provable in the insolvency proceedings. In the course of the arguments it has been suggested by the learned Advocate for the respondent that a secured debt is at all times a provable debt within the meaning of section 44 (2) and in support of this argument he has pointed to section 34 (2). The argument overlooks, however, the provisions of section 28 (6) and section 47 which are the governing provisions so far as the secured creditor is concerned. If the argument were to be accepted it would mean that, once an insolvent had obtained his discharge unconditionally, the secured creditor would be deprived of the benefit of his security. He could not retain the security if the mortgagor were released from all liability under the mortgage. This could never have been the intention of the Legislature in inserting sub-section 2 in section 44.

The real position is that a secured creditor may prove in the insolvency proceedings, but his right is a contingent one and until the contingency happens he is outside the Act. If the secured creditor has not during the insolvency proceedings realized his security, or surrendered or valued it, section 44 (2) cannot affect him, because no portion of the debt due to him has become provable and the section only applies to debts which are provable in the insolvency. This means that he is entitled to a personal decree if the security has not been realized before the discharge of the insolvent. If it has and there is a deficiency, the balance

of the debt constitutes a debt provable in the insolvency and section 44 (2) will operate to cancel it.

Turning now to the reported cases, the Allahabad High Court in *Niaz Ahmad v. Phul Kunwar*(1) held that an order of discharge has no more effect upon the rights of a secured creditor than an order of adjudication and consequently he is entitled to a personal decree whenever he has realized his security. The basis of this decision was the opinion that the debt due to a secured creditor is not a debt provable in insolvency and the order of adjudication and the subsequent order of discharge cannot affect the rights of the secured creditor which flow from the mortgage contract. The report does not, however, show at what stage the order of discharge was obtained. The question was again raised in the Allahabad High Court in *Sundar Lal v. Banarsi Das*(2). The report here mentions the date of the order of discharge, but the date of the realization of the property is not given. The judgment in *Niaz Ahmad v. Phul Kunwar*(1) was however followed. It would appear that the opinion of the Allahabad High Court is that the secured creditor is at all times outside the Act and may obtain a personal decree even if the property has been realized before the passing of the order of discharge. In our opinion this is going too far.

The Lahore High Court in *Haveli Shah v. Mt. Hussaina Jan*(3) held that, where a creditor of an insolvent holding a mortgage decree realizes the security before the mortgagor obtains his discharge, the order of discharge prevents the mortgagee obtaining a personal decree. It follows from what we have said that we regard this case as having been rightly decided.

(1) (1931) I.L.R. 54 All. 428.

(2) I.L.R. [1939] All. 492.

(3) A.I.R. 1938 Lah. 217.

CHOKKALINGA
v.
MANICKA.
LEACH C.J.

CHOKKALINGA
v.
MANICKA.
LEACH C.J.

In *Khupchand Nathmal Marwadi v. Rajeshwar Shankar Deshpande*(1) the Nagpur High Court, however, held that a secured creditor is debarred from obtaining a personal decree when the mortgaged property has been realized after the discharge of the insolvent. In this case part of the property was realized on 23rd February 1929, but the remainder was not sold until 21st March 1930 and until all the properties had been sold the mortgagee creditor could not ask for a personal decree. Before 21st March 1930 the insolvent had obtained his discharge. It also follows from what we have said that we are unable to agree with this decision. At no stage of the insolvency proceedings was there a provable debt.

After the present case had been referred to a Bench by KING J., the question was considered by VENKATARAMANA RAO J. in *Athiappa Chettiar v. Ibramsa Pulavar*(2). VENKATARAMANA RAO J. accepted the opinion of the Nagpur High Court but, as already indicated, we do not share this opinion.

In the present case there was no surrender or valuation of the security and it was not realized during the pendency of the insolvency proceedings. Therefore during the pendency of those proceedings there was no provable debt and section 44 (2) could have no application. Consequently we hold that the Subordinate Judge was wrong in reversing the decision of the District Munsif.

The appeal will be allowed with costs throughout.

N.S.

(1) I.L.R. [1940] Nag. 512.

(2) (1941) 2 M.L.J. 690.

APPELLATE CIVIL.

Before Mr. Justice Horwill.

SYED DEWAN KHAJA MOIDEEN SAHEB (DEFENDANT),
PETITIONER,

1941,
October 13.

v.

D. M. ABDUL GAFFOOR SAHIB (PLAINTIFF), RESPOND-
ENT.*

Court Fees Act (VII of 1870) Art. 17-B of Sch. II—Suit for administration of estate of deceased person—Proper court-fee payable—Jurisdiction of Court—Market value of suit property—Question of jurisdiction—Preliminary stage—Interference in revision.

A suit for the administration of the estate of a deceased person is not merely a suit for accounts. It should be valued for purposes of court-fee under article 17-B of Schedule II of the Court Fees Act and not under section 7 (iv) (f). The jurisdiction of the Court which can try such a suit is determined by the market value of the suit property.

Case law reviewed and discussed.

Civil Miscellaneous Appeal No. 235 of 1938 followed.

The fact that a finding on a question of jurisdiction could be challenged in an appeal from the decree passed in the suit does not preclude the High Court from interfering in revision on a question of jurisdiction when it arises at a preliminary stage in a suit.

PETITION under section 115 of Code of Civil Procedure (Act V of 1908), praying the High Court to revise the order of the Court of the District Munsif of Udumalpet, dated 17th September 1940 and made in Original Suit No. 46 of 1940.

K. V. Ramaseshan and C. D. Venkataramanan for petitioner.

* Civil Revision Petition No. 1699 of 1940.

KHAJA
MOIDREH
v.
ABDUL
GAFFOOR.

Government Pleader (*K. Kuttikrishna Menon*) for Government.

K. V. Ramachandra Ayyar for respondent.

Cur. adv. vult.

JUDGMENT.

HORWILL J.

HORWILL J.—This petition has been filed against the finding of the District Munsif of Udumalpet in Original Suit No. 46 of 1940 that he has jurisdiction to try the suit.

The suit was one for the administration of the estate of one Kairunnisa Bibi, for accounts and for division of the assets amongst the heirs under the Muhammadan law. The short point that arises in this petition is whether the provisions of section 7 (iv) (f) of the Court Fees Act or article 17-B of Schedule II apply. At first sight there is a very formidable array of authority in support of the contention of Mr. Ramachandra Ayyar for the respondent, that an administration suit should be treated as a suit for accounts and that, therefore, section 7 (iv) (f) is applicable. He has cited *Khatija v. Shekh Adam Husenally*(1), *Shashi Bhushan Bose v. Manindra Chandra Nandy*(2), *Saraju Bala Dasi v. Jogemaya Dasi*(3), *Shivaprasad Singh v. Pragnakumari Debee*(4), *San Paw v. Ma Yin*(5) and *Ma Thin On v. Ma Ngwe Hmon*(6), in most of which cases it was held that section 7 (iv) (f) was the proper provision of the Court Fees Act to apply. Of these cases, however, only one, viz., *Shashi Bhushan Bose v. Manindra Chandra Nandy*(1), discusses this question fully and directly. That was a case where there was a trust for sale created by a

(1) (1915) I.L.R. 39 Bom. 545.

(3) (1917) I.L.R. 45 Cal. 634.

(5) (1918) 55 I.C. 258.

(2) (1916) I.L.R. 44 Cal. 890.

(4) (1933) I.L.R. 81 Cal. 711, 724.

(6) (1934) I.L.R. 12 Ran. 512.

debtor for the benefit of his creditors. The history in the English Courts of administrative actions was discussed; but the whole of the reasoning, the discussion and the conclusions were confined to that particular kind of administration suit in which a creditor seeks to have administered the estate of a deceased debtor for the benefit of the creditors. If this suit had been one for the administration of a debtor's estate, I should have been compelled to regard this well-considered decision as a very strong authority for Mr. Ramachandra Ayyar's position that section 7 (iv) (f) was the proper provision of the Court Fees Act to determine both the question of court-fee and the question of jurisdiction; but can the analogy for purposes of court-fee between an administration suit and a suit for accounts be extended to other kinds of administration suits in which the next of kin, the legatee, or the executor seeks to have the estate of the deceased person administered for the benefit of those entitled to some share of the deceased person's property, and which may involve not merely the taking of accounts but the division of moveable and immoveable property?

In *Khatija v. Shekh Adam Husenally*(1) the question discussed was whether the suit, which was for accounts and the administration of an estate of a deceased person, was really an administration suit or whether it was not a suit for a definite share of property. The pleadings were discussed and the learned Judges came to the conclusion that it was an administration suit. They did not discuss what provisions of the Court Fees Act applied to an administration suit. They say:

"According to the provisions of the Court Fees Act, if the plaintiff succeeds in showing upon the accounts that she

KHAJA
MOIDREH
v.
ABDUL
GAFFOOR.

HORWILL J.

(1) (1915) I.L.R. 39 Bom. 545.

KHAJA
MOIDEEN
v.
ABDUL
GAFFOOR.

HORWILL J.

is entitled to a share in the property and assets of Tyeballi Sheikh Adam, she will not be able to obtain execution of any decree that may be passed in her favour by reason of the provisions of section 11 of the Court Fees Act until the difference between Rs. 130 and the fee which would have been payable, had the suit comprised the whole of the amount decreed, has been paid to the proper officer. That being so, there does not appear to be any reason why this should not be treated as a suit for account and for the share which may be found due to the plaintiff upon taking of such account, and if it is a suit for an account falling under section 7 (iv) (f) of the Court Fees Act, the plaintiff is at liberty to value it at Rs. 130 or any other sum she pleases."

Saraju Bala Dasi v. Jogemaya Dasi(1) was an administration suit of a somewhat similar kind to that in *Khatija v. Shekh Adam Husenally*(2); but the learned Judges do not discuss whether that particular kind of administration suit would properly be governed for purposes of court-fee by section 7 (iv) (f) of the Court Fees Act. They follow *Khatija v. Shekh Adam Husenally*(2) and *Shashi Bhushan Bose v. Manindra Chandra Nandy*(3) without expressing any reasons. *Shivaprasad Singh v. Prayagkumari Debee*(4) has been quoted by Mr. Ramachandra Ayyar because of a sentence found in the judgment in which the learned Judges were discussing whether the suit under consideration was an administration suit or not. They held that it was not; because [quoting *Shashi Bhushan Bose v. Manindra Chandra Nandy*(3)] "an administration suit is in essence a suit for accounts". *San Paw v. Ma Yin*(5) merely follows *Khatija v. Shekh Adam Husenally*(2) and *Shashi Bhushan Bose v. Manindra Chandra Nandy*(3) without argument. *Ma Thin On v. Ma Ngwe Hmon*(6) dealt with an administration suit,

(1) (1917) I.L.R. 45 Cal. 624.

(2) (1916) I.L.R. 44 Cal. 890.

(3) (1918) 55 I.C. 258.

(2) (1915) I.L.R. 39 Bom. 545.

(4) (1933) I.L.R. 61 Cal. 711, 724.

(6) (1934) I.L.R. 12 Ran. 512.

KHAJA
MOIDEEN
v.
ABDUL
GAFFOOR.

HORWILL J.

the nature of which is not clear from the judgment. The learned Judges purported to follow *C. K. Ummar v. C. K. Ali Ummar*(1) which, however, did not deal with an administration suit at all, but with a suit for accounts. They apparently assumed, as a proposition that needed no argument, that an administration suit is a suit for accounts. *Ma Thin On v. Ma Ngwe Hmon*(2) also contains a reference to *Ma Fatima and others v. Momin Bibi and others*(3) which dealt with a suit for the administration of the estate of a deceased Muhammadan. There the relief was valued by the plaintiff at Rs. 2,000, that being her share in the property. It was held by the learned Judge that that was the correct valuation. Clearly section 7 (iv) (f) was not applied in that case. The learned Judge went on to say that, as the suit was not of the nature described in the Court Fees Act, section 7, paragraphs 5, 6 and 9 and paragraph 10 of clause (d), and that, as the court-fee was payable *ad valorem* on the claim, the value of the suit for the computation of court-fees and the value for purposes of jurisdiction were the same. He therefore concluded that the value of the share of the plaintiff in the deceased's estate determined jurisdiction.

In none of the above decisions was it considered whether it would not be more appropriate to apply article 17-B of Schedule II of the Court Fees Act. The question in each case was whether the plaintiff should pay court-fee on a reasonable valuation of his share of the deceased's assets. If not, it was assumed that section 7 (iv) (f) was the correct provision of the Court Fees Act to apply. The learned District Munsif quoted the decision of WADSWORTH J.

(1) (1931) I.L.R. 9 Ran. 165 (F.B.).

(2) (1934) I.L.R. 12 Ran. 512.

(3) (1929) I.L.R. 7 Ran. 164.

KHAJA
MOIDEEN
v.
ABDUL
GAFFOOR.
HORWILL J.

in Civil Miscellaneous Appeal No. 235 of 1938. This was a short order on a check slip put up by the office in which the learned Judge pointed out that an administration suit was not merely a suit for accounts, that section 7 (iv) (f) could not therefore be applied, and that, as there was no provision in the Court Fees Act applicable to an administration suit, it followed that the residuary provision of article 17-B of Schedule II would have to be applied. He did not discuss the case law on this point beyond saying that *Ramaswami Ayyar v. Rangaswami Ayyar*(1) was an authority for the position that an administration suit was not a suit for accounts. The point that fell for decision in *Ramaswami Ayyar v. Rangaswami Ayyar*(1) was whether creditors who were impleaded in an administration suit as defendants would have to pay court-fee on the value of their claims. It was argued by the learned Government Pleader, on the analogy of section 11 of the Court Fees Act, that, as a suit for administration was substantially a suit for accounts, the defendant-creditors would have to pay a court-fee. The learned Judges, while conceding that in a sense a creditor's suit for administration was a suit for accounts, pointed out that the analogy between an administration suit and an ordinary suit for accounts broke down in many respects. They were not prepared to consider it a suit for accounts for the purpose of applying section 11 of the Court Fees Act. They pointed out that it would be improper in a fiscal enactment like the Court Fees Act to argue by analogy and to apply to an administration suit rules that were laid down solely for a suit for accounts. The learned Judges avoided expressing any opinion as to the court-fee payable by the creditor who filed

(1) (1931) I.L.R. 55 Mad. 26.

KHAJA
MOIDEEN
v.
ABDUL
GAFFOOR.
HORWILL J.

the suit; but if we exercise the caution thought necessary by the learned Judges in applying the provisions of a fiscal enactment relating to one type of suit to another, it is clear that we ought not to regard an administration suit as a suit for accounts for any purpose relating to court-fee, above all in a suit which is not one by a creditor for the administration of the assets of a deceased person to be divided amongst the creditors, but one in which a division of movable and immovable property might have to be made. I therefore respectfully agree with WADSWORTH J.'s expression of opinion in Civil Miscellaneous Appeal No. 235 of 1938 that, as an administration suit is not a suit for accounts, it should be valued under article 17-B of Schedule II of the Court Fees Act.

It is conceded that, if article 17-B of Schedule II of the Court Fees Act is to govern the court-fee, then the jurisdiction is determined by the market value of the property. If the market value exceeds the pecuniary jurisdiction of the Court, then the plaint will have to be returned for presentation in the Court having jurisdiction. As this is conceded, it is not necessary to discuss the authorities on this point. It is sufficient to refer to *Karuppanna Nadar v. Karuppa Nadar*(1), which follows *Vasireddi Veeramma v. Butchayya*(2). The learned Munsif, while holding that article 17-B of Schedule II governed the court-fee, came to the conclusion that the court-fee paid was sufficient; because the plaintiff had paid Rs. 22 whereas, under article 17-B of Schedule II, all that was necessary was a court-fee of Rs. 15. On the question of jurisdiction, he contented himself with saying:

"As regards issue 10, since there is nothing preventing an administration suit being filed in this Court and since this

(1) (1939) 50 L.W. 154.

(2) (1926) I.L.R. 50 Mad. 646.

KHAJA
MOIDEEN
v.
ABDUL
GAFFOOR.
—
HORWILL J.

suit is a suit for administration, I find on this issue that this Court has jurisdiction."

He did not consider whether, despite its being an administration suit, the value of the property was such as to preclude him from trying the suit. It seems probable that the market value of the property exceeded the pecuniary jurisdiction of the Court; but as the learned District Munsif has not given any definite finding on this point, he will have to do so.

It was argued by Mr. Ramachandra Ayyar that, even though the District Munsif erred in holding that he had jurisdiction, this Court ought not to interfere at this stage; for, if the suit is decreed in favour of the plaintiff, the defendant would be entitled to raise this question in appeal; and, if he satisfied the Court that he had suffered prejudice by the wrongful exercise of jurisdiction by the District Munsif, he would be able to get the decree set aside. He quoted *Zamindar of Kallikote v. Mongolopur*(1) in support of his argument. I do not think that *Zamindar of Kallikote v. Mongolopur*(1) can be considered to be an authority for the position that this Court should not interfere in revision on a question of jurisdiction when it arises at a preliminary stage in the suit. The learned Judges thought that, under the peculiar circumstances of the case before them, it was not necessary for them to consider the principal point raised in revision. This Court has frequently interfered before the disposal of a suit where it has been found that a Court has wrongfully assumed jurisdiction. I quite appreciate the argument as to the inconvenience caused by holding up the trial of a suit in order that this Court might consider the correctness of decisions made during the course of the trial. If I had considered the question of inconvenience

(1) (1926) 51 M.L.J. 500 (F.B.).

KHAJA
MOIDEEN
v.
ABDUL
GAFFOOR.
—
HORWILL J.

soon after admission, I might have held that it was not advisable to interrupt the trial of the suit; but that inconvenience has already been caused and the disposal of the suit has been delayed for a considerable time owing to the pendency of this civil revision petition. That cannot now be avoided; so there is no longer any reason why, when the suit is still in its early stages, this Court should not interfere to correct an error which affects jurisdiction.

The petition is therefore allowed and the suit remanded to the District Munsif for fresh consideration of the question of jurisdiction. If he finds that the market value of the property exceeds Rs. 3,000, he should return the plaint to the plaintiff for presentation in a Court having jurisdiction. The costs of the parties to this application will abide the result and will be provided for in the order of the District Munsif. The Government Pleader will be entitled to his costs from the Government.

V.V.C.

APPELLATE CIVIL.

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

1941,
October 29.

RAMIREDDI RAYALAMMA AND TWO OTHERS
(PLAINTIFFS 2 TO 4), APPELLANTS,

v.

SREE MUTHANGI BUTCHIRAMAYYA GARU AND
FOUR OTHERS (DEFENDANTS), RESPONDENTS.*

*Interest—Partition arrangement—"Owelty"—Agreement to pay
certain sum to equalise shares in partition—No specific
provision to pay interest on said sum—Liability to pay
interest—Equity—Interest Act (XXXII of 1839), sec. 1.*

A partition arrangement was entered into between two branches of a joint family by which the family properties were divided into two lots A and B. The deed of settlement, dated 14th March 1930, *inter alia*, provided: "Those who got this A schedule share of properties should pay separately to those who got the B schedule share of properties a sum of Rs. 14,000." The person who got the B schedule properties claimed interest on Rs. 14,000 from 14th March 1930 at twelve per cent per annum.

Held: Per VENKATARAMANA RAO J.—The sum of Rs. 14,000 to be paid by the person who took the A schedule properties to the person who got the B schedule properties was by way of equality of partition or what is termed as "owelty" in a Court of Equity. When "owelty" had to be paid, the amount was always regarded as in the nature a sum due to the vendor of land from his vendee. One co-sharer parted with a portion of the property as representing the share he was legitimately entitled to in consideration of a sum of money in respect whereof he must be regarded as the vendee. The person who got the B schedule properties was entitled to interest at six per cent from 14th March 1930.

Per ABDUR RAHMAN J.—The time when the payment was to be made must be held to be certain and the sum of

* Appeal No. 174 of 1938.

Rs. 14,000 must be held to be payable on 14th March 1930 by virtue of the written partition deed within the meaning of section 1 of the Interest Act (XXXII of 1839). Further, having regard to the fact the persons who got the A schedule of properties had been realising the income which would otherwise have been realised by the persons who got the B schedule property in partition, from 1st July 1929 without discharging the debt that they were liable to pay under the terms of the partition deed, it may not be incorrect to award interest under the proviso to section 1 of the Interest Act, even though the analogy of a vendor and purchaser may not be strictly applicable to the case.

Ratanlal Chunilal v. Municipal Commissioner for City of Bombay(1) followed.

Case law reviewed and discussed.

APPEAL against the decree of the District Court of East Godavari at Rajahmundry in Original Suit No. 10 of 1936.

Advocate-General (Sir A. Krishnaswami Ayyar) and Ch. Raghava Rao for appellants.

V. Govindarajachari and M. S. Ramachandra Rao for second, third and fifth respondents.

Other respondents were not represented.

Cur. adv. vult.

JUDGMENT.

ABDUR RAHMAN J.—The only two questions debated in this appeal relate to (a) interest claimed by the plaintiff and (b) set off claimed by defendants 2 to 5. They arise out of the following facts. Muthangi Buchiramiah, the first defendant, and Muthangi Narasiah were real brothers. Narasiah died leaving him surviving a son Sitharamiah, the first plaintiff, and four daughters. Sitharamiah died childless *pendente lite* and is now represented by his sisters, plaintiffs 2 to 5. Sitharamiah was a minor at the time of his father's

RAYALAMMA
v.
BUTCHI-
RAMAYYA.

ABDUR
RAHMAN J.

(1) (1918) I.L.R. 43 Bom. 181 (P.C.).

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

death and his uncle, Buchirarniah, acted as his guardian. Disputes seem to have arisen between them in regard to partition of property after Sitharamiah had come of age. Buchirarniah was, it appears, adamant; but his sons, defendants 2 to 5, took a more reasonable attitude. They settled the matter amicably and entered into an agreement (Exhibit A) on 11th March 1930 with Sitharamiah under which a partition of joint family properties, both movable and immovable, was agreed upon. A perusal of this document however shows that on account of difficulties in regard to partition of outstandings due to them by third persons, the parties to the agreement agreed to divide them along with other movables separately and by a process different from what was to be adopted in the partition of immovable properties. It also appears from this document that defendants 2 to 5 were to make a proposal for partition of immovable properties by dividing them into two lots and since the choice of selecting one of them for himself was given to Sitharamiah, he had agreed to pay a sum of Rs. 5,500 to the persons making the proposal for partition. The properties were accordingly divided by defendants 2 to 5 into two lots, "A" and "B", and in order to equalise the value of the two lots, the lot "A" was to carry with it a liability to pay a sum of Rs. 14,000 to the person who got the lot "B". Sitharamiah selected the lot "B" and thus became entitled to recover a sum of Rs. 14,000 from the defendants who had got immovable properties of that value in excess of their share. This settlement was recorded on 14th March 1930 in the deed of partition, Exhibit B, under which the lot "B" was declared to have been allotted to Sitharamiah and the lot "A" along with its liability to pay the sum of Rs. 14,000 to all the defendants

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

including Buchirarniah, his sons taking the responsibility on themselves to secure their father's consent to the partition thus effected and to indemnify the plaintiff if he suffered any loss in consequence of Buchirarniah's refusal to agree to the partition. Exhibit B provided that the "share marked B was allotted to Sitharamiah of us and he shall immediately" (or as translated by Mr. Govindarajachari, as soon as possible) "take possession of the properties of that share and enjoy them". The same provision was made in regard to the other lot "A" allotted to the defendants. The deed of partition also contained the following provision:

"The income derived from the properties in schedules A and B shall be taken by the persons to whose respective share they had fallen. After 1st July 1929 each sharer shall take the income derived from his respective share of properties."

The schedule referring to the lot "A" appended to this deed of partition and described as schedule "A" was followed by the following words:

"Those who got this A schedule of properties should pay separately to those who got B schedule of properties a sum of Rs. 14,000."

And a note was added to the effect that

"there is no connection whatever between this amount and the sum of Rs. 5,500 payable by Mutangi Sitharamiah to Mutangi Jaggarao and others."

Buchirarniah ratified the agreement, Exhibit A, and the deed of partition, Exhibit B.

The defendants did not, in spite of taking possession of their share of immovable properties in accordance with the deed of partition, pay the said sum of Rs. 14,000 to Sitharamiah. This led to the institution of the suit out of which the present appeal arises. The plaintiff claimed interest at twelve per cent per annum with

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

effect from either 1st July 1929 or from 14th March 1930, to 14th March 1936, i.e., the date when the suit was instituted. He also asked for subsequent interest from the date of the plaint up till the date of realisation of the amount sued for.

Besides the objection as to limitation, non-maintainability of suit, etc., the defendants denied their liability to pay interest and claimed a set-off of Rs. 5,500 in accordance with the agreement contained in Exhibit B. In regard to the partition of movable properties and outstandings another suit was brought by the defendants in 1931 in the Subordinate Judge's Court of Rajahmundry. This is now numbered as Original Suit No. 7 of 1935 and is in spite of a lapse of a decade still pending in that Court.

The learned District Judge of East Godavari overruled the other objections raised by the defendants but refused to allow the interest asked for by the plaintiff and allowed the set-off claimed by the defendants. In dealing with the question of interest he agreed with the contention raised by Counsel for the plaintiffs that there was nothing in section 73 of the Indian Contract Act or in section 1 of the Indian Interest Act that would disentitle the plaintiff from recovering interest, thereby obviously meaning that it could be awarded under section 73 of the Indian Contract Act, a proposition which had already been negatived in *Kamalammal v. Peeru Meera Levvai Rowthen*(1) and in *Nanchappa Goundan v. Ittichathara Mannadiar*(2), and has now been set at rest by the decision of their Lordships of the Privy Council in *Bengal Nagpur Railway Company, Limited v. Ratanji Ramji*(3). As regards section 1 of the Interest Act

(1) (1897) I.L.R. 20 Mad. 481.

(2) (1929) I.L.R. 53 Mad. 549.

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

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

the point was not so easy as not to have merited any discussion at all. This was the main point that has engaged the attention of this Court and of the learned Counsel for the parties for more than a day and we will have to deal with it in due course in this judgment.

The facts which the learned Judge has mentioned for disallowing interest and the considerations by which he seems to have been guided in coming to that conclusion seem to be entirely irrelevant and would not bear examination. The learned Judge holds that he is quite satisfied

"that the parties had no intention at all at the time of Exhibit B of charging any interest or business men as they were, they would have made some provision for interest in Exhibit B itself".

The interest was not claimed under any agreement arrived at between the parties and, in the absence of any such allegation, a reflection like this was apt to lead him astray and succeeded in doing so. It had nothing to do with the application of the provisions of the Interest Act. Then the learned Judge states that the suit was filed on the last day of limitation without any registered notice (having regard, in all probability, to the provisions of the Interest Act but as to which there was no allegation) on rather legal advice that this claim for Rs. 14,000 would be time-barred. What again the delay had in instituting the suit to do with the award of interest, it is not easy to understand. No equitable relief was being asked for in regard to which delay could have been a deciding or even a material factor. None the less, the learned Judge proceeds to say that he did not think it was a fit case in which interest should be awarded up to the date of decree—as if the grant of interest was a question of discretion and any reason would have been enough

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

not to award it. Last of all he states in his judgment that

“ the fact that interest has been disallowed in this suit can be brought to the notice of the Sub-Court, Rajahmundry, when final decree is passed in the pending partition suit ”.

We really fail to see what was at the back of the learned Judge's mind. He was not dealing with the other suit and the decision in this litigation could possibly have no bearing on the other one unless it be that he had the consent, expressed by the first witness for the defendants in the witness box to pay interest in this suit conditional on his getting the same in Original Suit No. 7 of 1935, in mind, which he had rejected in an earlier portion of his judgment on the ground that it had probably emanated from the defendants with the object of prolonging this suit and deferring partition of movable property. Nothing was said by the learned Judge in regard to the subsequent interest claimed by the plaintiffs.

The learned Advocate-General, who argued the case on behalf of the plaintiffs (appellants), contended in the first instance that, according to the true construction of Exhibit B, the date of payment of the sum of Rs. 14,000 should be held as specified and fixed and, the money found, to be payable at a “ certain time ” within the meaning of that expression as used in section 1 of the Interest Act (XXXII of 1839). If that be so, the provisions of the Interest Act would apply and the plaintiffs would be entitled to get interest at a rate not exceeding the current rate.

In view of the decision in *Bengal Nagpur Railway Company, Limited v. Ratanji Ramji*(1) it was admitted that interest could be awarded only if it was payable by custom or if there was an agreement either express

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

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

or implied to pay interest or under the provisions of any substantive law entitling the plaintiffs to recover the same. Since there was no proof of custom or even of an express agreement (although at one time the learned Advocate-General wished to bring it within the meaning of the expression “ income derived from the properties in schedules A and B ” used in Exhibit B, a contention with which we were not impressed as, in our opinion, the word “ properties ” used in that context refers to immovable properties alone) the second contention advanced by the learned Advocate-General was to the effect that, inasmuch as possession of Sitharamiah's share had passed to the defendants from 1st July 1929 and they had been enjoying the rents and profits thereof from that date, the agreement to pay interest may be implied as from that date or in any case from 14th March 1930 when Exhibit B was executed.

The last position taken up on behalf of the appellant was that the defendants having got possession of the plaintiff's property on partition without paying its full price or equivalent in value, there was no reason why equitable jurisdiction should not be invoked and interest not awarded to the plaintiffs within the meaning of the proviso to section 1 of the Interest Act which is to the effect that

“ interest shall be payable in all cases in which it is now payable by law ”.

The learned Counsel for the respondents contended on the other hand :

(a) The provisions of the Interest Act could not be attracted in this case as the date on which the payment of Rs. 14,000 was to be made could not be regarded as “ certain ” within the meaning of that Act. He admitted that it was not necessary that a date to be “ certain ” should be specifically mentioned for payment but it was essential he contended, for

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

the purpose of the Interest Act, that in the absence of a specific date on which a payment is to be made, a definite time for payment must have been explicitly and expressly mentioned in the document by virtue of which it is to be made and must not be left to be either merely inferable from its construction or held to have been impliedly fixed as contended for on behalf of the appellant in this case.

(b) The date for payment, even if it could be inferable from the construction of the document or held to have been impliedly fixed, as urged by the learned Advocate-General, could not be regarded as "certain" as the payment of the sum of Rs. 14,000 was according to the contents of Exhibit B contingent on the delivery of possession to the defendants.

(c) There was no intention to pay any interest and the omission by business men like the parties to this document to mention the same was extremely significant.

(d) That partition of movable and immovable property was the one object for which Exhibit A came into being and the arrangement in Exhibit B was merely a preliminary step towards a final partition of their entire properties between the parties. The item as to interest could therefore be at the outside an item in general accounting between them at the time of final partition in the suit, Original Suit No. 7 of 1935, which is still pending in the Court of the Subordinate Judge of Rajahmundry.

In order to ascertain whether the date of payment for the sum of Rs. 14,000 was fixed between the parties and was "certain" or whether the payment of that sum was merely conditional or contingent on the happening of certain other events, we will have to bear the terms of the deed of partition in mind. It clearly states that the share marked "B" was *allotted* to Sitharamiah and not that it was to be allotted to him later on. This would mean that Sitharamiah had, on or before the date on which this partition deed was executed, namely 14th March 1930, become, in accordance with the arrangement contained therein, the complete owner of the properties specified in the B schedule.

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

Then follows the expression "and so he shall immediately take possession" and not that the other party, i.e., the defendants in the present suit, will deliver possession. What I understand by that expression is that either party who was in joint possession of all the properties up to that date had agreed on partition that had been completed by them to surrender his respective rights and possession in the properties that had fallen to the other. In other words, the defendants to whom the properties specified in the "A" schedule had been allotted agreed to withdraw their rights and possession from the properties which had fallen to the plaintiff's share and the plaintiff agreed to withdraw his rights and possession from the share allotted to the defendants. Both the parties thus became free from that day to go and take possession of their respective shares irrespective of any act of the other. It could not therefore be said that the arrangement contained in the deed of partition or the payment of the sum of Rs. 14,000 was conditional or contingent on anything that had to happen or to be done subsequently.

It was vehemently argued by Mr. Govindarajachari, the learned Counsel for the respondents, that it is not open to a Court to find out the date of payment from the construction of a document and, in order to fall within the provisions of the Interest Act, it should be either found to have been expressly stated therein or specified in it explicitly so as to be known by an arithmetical calculation or by a reference to a calendar. But this is not correct in my opinion.

Whether the time is found to have been specified expressly or by means of a necessary implication on a construction of a document, the result in both the cases is, in my judgment, the same. Construction of a

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

document is one of the well recognized methods from which the intention of the parties is to be gathered. Where the Court is asked to find a date from a document, on which a certain act had to be done by one of the parties, it is not only permissible but incumbent upon the Court to ascertain it not only from what the parties have stated expressly but also from what they may be deemed to have said impliedly, though unambiguously. It may be that a document may contain no indication, express or implied, from which an inference as to the date on which the act had to be done or performed may be deducible. But that is a different matter. In that case the conclusion will be that the parties had omitted to specify the date of performance altogether. But this would be because, by a reading of the document or by a construction of the same, the intention of the parties cannot be gathered. In ascertaining the intention of the parties as to the date of performance by an act of arithmetical calculation or by a reference to a calendar is as much permissible for a Court as to discover it by the construction of a document or from what may be implied from the nature of the transaction from which it might be inferred that the contracting parties must have intended that date to be a part of the agreement between them. No date was expressly specified in Exhibit B for payment and, unless it is contended that it was not to be paid at all, which would be obviously against the intention of the parties if the contract is to be effective, it must be held to be implied in that deed on the presumed intention of the parties. When a representation that it was safe for a ship to lie at a wharf was imported into a contract for the use of wharf in *The Moorcock*(1) on the presumed intention

(1) (1889) 14 P.D. 64 (C.A.).

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

of the parties and in order to give the transaction that efficacy that both parties must be intended to have given and to prevent such a failure of consideration as could have been within the contemplation of the parties, there is no reason why in construing the deed of partition, the date of payment should not for the same reason be held to have been impliedly and unambiguously fixed between the parties in this case. Similarly, if A writes a slip to B to meet him in half an hour to receive payment of a debt due to the latter without specifying or mentioning the date on which he was to meet or on which the slip was written, the date on which the payment was to be made must be, in my opinion, held to be specified and certain, although not expressly mentioned in the slip of paper, if the date on which it was written could be established *aliunde*. Since the sum of Rs. 14,000 was to go to Sitharamiah in consideration of the larger share of the property which under the partition was allotted to the defendants, he must be, in my judgment, held entitled to recover that money, in the absence of anything else stated in the document, on that day in the same manner as he was entitled to recover or get possession on that day of the immovable properties allotted to him. According to the construction that I am placing on Exhibit B, the contract to pay cannot be deemed to have been contingent, as urged by the learned Counsel for the respondents, and the date of payment must be held to be fixed. Whether it is possible to regard that date as falling within the expression of "at a certain time" under the provisions of the Interest Act is a different question and will be discussed later.

The contention of the learned Advocate-General that as, in view of the provisions in Exhibit B, either party had to get the income of his respective shares

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

from 1st July 1929, his clients should be entitled to recover interest from that date and that the sum of Rs. 14,000 had to become payable to them on that day is also, in my opinion, incorrect. I have already referred to the fact that the word "properties" used in Exhibit B in the expression "income derived from the properties in schedule A" does not refer to the sum of Rs. 14,000. It is clear from Exhibit A which came into existence on 11th March 1930 that the proposal for partition, not to say of the actual allotment of properties in accordance with that proposal, was not made up to the time when that document was executed. How then can a sum of Rs. 14,000, or for the matter of that any other sum, be said to be payable to Sitharamiah before that date? It was only after the execution of that document that the proposal to divide the immovable property must have been made by the defendants and as a part of that proposal, a sum of Rs. 14,000 had, in order to equalise the shares, to go to the person or persons who got the "B" lot. Had Sitharamiah selected the "A" schedule he would have been indebted in a sum of Rs. 14,000 instead of becoming entitled to recover the same sum from the defendants. In view of this it is impossible to hold that the sum of Rs. 14,000 was payable on any date prior to the acceptance by Sitharamiah of the proposal for partition made by the defendants. Moreover no income can be said to have been derived or in any case proved to have been so from this sum of Rs. 14,000 even if the expression "income derived from his respective share of properties" is interpreted so as to cover this amount. The date of payment cannot, for the above reasons, be held to be 1st July 1929 but 14th March 1930, the date on which the title to the entire property specified in schedule B passed to Sitharamiah.

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

Having construed the deed of partition, Exhibit B, and found that the sum of Rs. 14,000 was payable by the defendants to Sitharamiah on the date on which the properties were allotted to him under Exhibit B, the next question to decide is whether this is sufficient to attract the provisions contained in the first part of section 1 of the Interest Act.

Before proceeding to consider that section, however, it must be stated that, in applying the provisions of the Interest Act, the facts that there was no agreement to pay interest or that the parties did not intend to pay interest as deductible by way of an inference from a mere omission of a promise to pay the same are, in my opinion, entirely irrelevant. Had there been an agreement to pay interest either express or implied, it would have had to be awarded independently of the provision of the Interest Act. The questions whether a creditor did or did not intend to take interest or a debtor did not intend to pay the same have no bearing when a Court is called upon to decide whether interest could be awarded under the provisions of the Interest Act.

Since the terms of the Interest Act (XXXII of 1839) are identical with section 28 of Lord Tenterden's Act (3 and 4 Will. IV, ch. 42) or even with section 24 (1) of the New Brunswick Judicature Act of 1909, the parties freely referred to the English decisions on the point. The following English and Indian decisions were cited by the learned Counsel for the parties in the course of their arguments; *De Bernales v. Fuller*(1), *Juggomohun Ghose v. Manickchand*(2), *Merchant Shipping Co. v. Armitage*(3), *Duncombe v. Brighton Club Co.*(4), *London, Chatham, and Dover Railway*

(1) (1810) 2 Camp 426; 170 E.R. 1206.

(2) (1920) 1 M.T.A. 242.

(3) (1873) L.R. 9 Q.B. 99.

RAYALAMMA
v.
BUTOBI-
RAMAYYA.
—
ABDUR
RAHMAN J.

Company v. South Eastern Railway Company(1), *London Chatham and Dover Railway Co. v. South Eastern Railway Co.*(2), *In re Horner. Fooks v. Horner*(3), *Maine and New Brunswick Electrical Power Co. v. Hart*(4), *Rajah of Pittapur v. Ballapragada Pallamraju*(5), *Attakoya v. Kunhikoya*(6) and *Gulab Shanker v. Mul Chand*(7).

It is supererogatory on my part to examine the English cases, as most of them have been considered in *In re Horner. Fooks v. Horner*(3) and by their Lordships of the Privy Council in *Maine and New Brunswick Electrical Power Co. v. Hart*(4). It may however be stated generally that every one of the English cases on which reliance was placed by the learned Counsel for the respondents is a case of contingent or conditional contract, in regard to which the dates of payment could not have been said to be certain until some other event had come into existence.

A great deal of stress was laid by the learned Counsel for the respondents on Lord BLACKBURN's (then Mr. Justice BLACKBURN) dissenting opinion in *Duncombe v. Brighton Club Co.*(8), which was accepted later in *London, Chatham, and Dover Railway Company v. South Eastern Railway Company*(1) and by the House of Lords in *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*(2). But even BLACKBURN J.'s dissenting opinion does not, in my judgment, help the respondents. Reliance was placed by Mr. Govindarajachari on the following words in his judgment :—

"I think that the construction of the statute is, that the written instrument should specify the time; and, if that be so, the written instrument in this case does not do it."

(1) [1892] 1 Ch. 120

(2) [1893] A.C. 429.

(4) [1929] A.C. 631 (P.C.).

(6) I.L.R. [1940] Mad. 50.

(3) [1896] 2 Ch. 188.

(5) (1920) 40 M.L.J. 18.

(7) A.I.R. 1927 All. 444.

(8) (1875) L.R. 10 Q.B. 371.

In order to understand these words, one might remember that LUSH J. was putting the case thus :

"In this case the contract is, one-third to be paid in cash, that is, in ready money, as soon as the goods are delivered and the invoices are delivered, so that the amount can be ascertained. So that the time of payment is fixed by the contract of the parties, and it is to be determined by the time when the goods are delivered. That is, I think, in accordance with and in analogy to cases decided upon the well-known maxim, 'Id certum est quod certum reddi potest'."

BLACKBURN J.'s opinion to the contrary was that the section

"does not mean by 'certain time' a time which is to depend on a future named event, which will, when the event happens, become certain."

This would show that the words on which reliance was placed by Mr. Govindarajachari only meant to convey that time should not have been conditional or contingent on things which were to happen subsequently but should be certain on the date on which the document under which the payment was to be made came into being. He did not lay down that the written instrument should specify the time expressly. This was not the point which he was considering. That is how Lord TOMLIN understood the effect of BLACKBURN J.'s decision as approved by the Court of appeal and by the House of Lords in *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*(1) and in *Maine and New Brunswick Electrical Power Co. v. Hart*(2).

The reply to the question "whether a sum certain is not payable by the written instrument at a time certain" under section 1 of the Interest Act was given by Lord TOMLIN in delivering the judgment of the

(1) [1893] A.C. 429.

(2) [1929] A.C. 631 (P.C.).

RAYALAMMA
v.
BUTOBI-
RAMAYYA.
—
ABDUR
RAHMAN J.

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

Board in *Maine and New Brunswick Electrical Power Co. v. Hart*(1) in the following words:

“A sum certain is not payable by the written instrument at a time certain if its payment is contingent upon events which may never happen and the amount payable is capable of ascertainment only if and when those events happen and the time for happening of those events, if they ever do happen, may be indefinitely postponed.”

If that is the test which has to be applied to this case, there can be no doubt that the payment of Rs. 14,000 was not contingent upon events which might never happen, as partition had already been effected and Sitharamiah and the defendants had become complete owners of their definite shares which had fallen to them on partition. The last three Indian decisions to which reference was made have also no application as in the case of the *Rajah of Pittapur v. Ballapragada Pallamraju*(2) the contract had provided that

“all work done by the contractor shall be paid for by the Raja according to the rates herein specified within a reasonable time after it has been inspected and finally approved and passed.”

The money due under the contract could not be held to have been payable by the Raja unless it had been approved and passed and was for that reason held by WALLIS C.J. (as he then was) not to

“contain a provision for the payment of a sum certain or for the payment of such sum on a certain day.”

As for the second Madras decision in *Attakoya v. Kunhikoya*(3), the inam granted in that case did not fix the dates when the land revenue was to be paid to the inamdar; as, within the provisions of the Interest Act, the debt or sums payable were to be so by virtue of a written instrument and the written

(1) [1929] A.C. 631 (P.C.).

(2) (1920) 40 M.L.J. 18.

(3) I.L.R. [1940] Mad. 50.

instrument in that case was the inam grant only, the provisions of the Interest Act could not be held to apply. In *Gulab Shanker v. Mul Chand*(1) the *rokka* in question had simply stated that the defendants' father had borrowed Rs. 4,000 in cash “which is to be debited to my account and I have therefore executed this *rokka*.” Having regard to those words, it was held by the learned Judges of that Court that there was nothing in the form of a promise to pay, much less to pay on any certain day.

I must therefore hold that the authorities cited by the learned Counsel for the respondents have no application to the facts of the present case and the time at which the payment was to be made must be held to be certain and the sum must be held to be payable on 14th March 1930 by virtue of the written partition deed, Exhibit B, within the meaning of the first section of the Interest Act. This is quite enough to grant the plaintiff the relief as to interest which he claims, although not at twelve per cent as mentioned in the plaint but at a rate not exceeding the current rate of interest from the time when the sum of Rs. 14,000 was payable. But, in view of the other contentions raised by the parties, it is desirable that I should say a few words in regard to them as well.

The second contention advanced by the learned Advocate-General was that an agreement to pay interest may be implied from the fact that Sitharamiah's share had passed to the defendants who were to get the rents and profits of the same from 1st July 1929. It is not possible for me however to accept that contention. According to my construction of the partition deed, the sum of Rs. 14,000 had to be paid by the defendants on 14th March 1930.

(1) A.I.R. 1927 All. 444.

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

There was therefore no necessity for them to have agreed to pay any interest either expressly or even by implication. The money had to be paid on 14th March and, if it was not paid on that day, it was open to Sitharamiah to bring an action against the defendants on the next day. In fact the cause of action for the recovery of that money must be deemed to have accrued on the date on which Exhibit B was executed and had this money not been sued for for a period of six years, it would have been barred by time. That is why an attempt was made on behalf of the defendants to defeat this claim on the ground of limitation. But fortunately the document under which the payment was to be made was registered and the limitation for this payment was six years and not three. There was thus no question of credit granted to the defendants for the payment. I cannot, therefore, reasonably infer any implied agreement from the deed of partition, Exhibit B.

The third contention advanced by the learned Advocate-General was that, in so far as the defendants had taken the plaintiffs' share of the property on partition and had begun to enjoy it not only from the date on which the partition took place but as from 1st July 1929, his client was entitled to recover interest under the proviso to section 1 of the Interest Act, as interpreted by various Indian and Privy Council decisions, where Courts of Equity could, in the circumstances mentioned above and in the exercise of their equitable jurisdiction, award interest. Had the jural relationship between the parties to this suit been of a vendor and purchaser, the jurisdiction of the Equity Courts to grant interest would have been undisputed. There is a specific provision now in regard to the payment of interest in cases where the

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

vendor has parted with possession of the property sold by him without receiving the price either wholly or in part [*vide* section 55 (4) (b) of the Transfer of Property Act]. This is not however a case of sale but that of partition. It was contended by the learned Advocate-General that, even in this suit, Sitharamiah's share must be held to have passed to the defendants in consideration partly of the defendants' share in the joint property that was conveyed under this scheme of partition and partly of cash, i.e., of the sum of Rs. 14,000, and viewed thus, this sum would really be nothing else but the price payable to him (the first plaintiff) in cash by the defendants for the property that had passed to them.

The learned Counsel for the respondents contended, on the other hand, that in order to attract the equitable jurisdiction of the Courts, the legal relationship between the parties must necessarily be such as mentioned in Halsbury's Laws of England, First Edition, Volume XXI, paragraph 74, at pages 40 and 41, and inasmuch as the jural relationship between the parties to the present suit did not fall under one of the heads mentioned therein, the equitable jurisdiction could not have been exercised by the Courts and interest could not therefore be said to be "payable by law".

The learned Counsel for the appellant relied on several decisions in support of his contention. The first one was *Fludyer v. Cocker*(1). This was a case where a purchaser who had taken possession of a property without a conveyance was compelled to pay interest though the money was to be paid on particular date on the execution of the conveyance. Sir W. GRANT,

(1) (1805) 12 Ves. Jun. 25; 33 E.R. 10.

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

Master of the Rolls, in delivering the judgment for the plaintiff observed as follows:—

“The purchaser might have said he would not have anything to do with the estate until he got a conveyance. But that is not the course he took. He enters into possession; an act, that generally amounts to a waiver even of objections to title. He proceeds upon the supposition that the contract will be executed; and therefore agrees, that from that day, he will treat it, as if it was executed. The act of taking possession is an implied agreement to pay interest; for so absurd an agreement, as that the purchaser is to receive the rents and profits, to which he has no legal title, and the vendor is not to have interest, as he has no legal title to the money, can never be implied.”

Our attention was also drawn to *Ratanlal Chunilal v. Municipal Commissioner for City of Bombay*(1) where Lord SHAW, in a case of compulsory acquisition, awarded interest on equitable considerations. He observed as follows:—

“The Board is of opinion that the right to interest depends upon the following broad and clear consideration. Unless there be something in the contract of parties which necessarily imports the opposite, the date when one party enters into possession of the property of another is the proper date from which interest on the unpaid price should run. On the one hand, the new owner has possession, use, and fruits; on the other, the former owner, parting with these, has interest on the price. This is sound in principle and authority fully warrants it.”

Following this decision, the Bombay High Court subsequently awarded interest in the case of *Pandurang Balaji v. Mahadev Gopal*(2) where, in pursuance of a contract for sale of property, a purchaser was let into possession and the vendor was, in seeking to recover the balance of the purchase money, held entitled, independently of the provisions of the Transfer of Property Act, to get interest on such unpaid balance

(1) (1918) I.L.R. 43 Bom. 181 (P.C.). (2) (1921) I.L.R. 46 Bom. 195.

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

from the date when possession was delivered by him. Mr. Govindarajachari relied, on the other hand, on a decision by a Division Bench of this Court in *Nanchappa Goundan v. Ittichathara Mannadiar*(1), where it was held that a lessor was not entitled to recover interest on the arrears of rent under the provisions of the Interest Act on general equitable grounds, as the proviso to section 1 of the Interest Act enabled the Court to award interest only in cases where it was payable in law before the Act was passed and the Courts in India following the practice of the English Courts did not, prior to the Indian Act, award interest in the case of ordinary debts but did so only in certain special cases.

Having regard to the various decisions to which reference has been made, there cannot be much of a doubt that although the jural relationship of the parties to the present suit was not one of those stated in Halsbury's Laws of England, Volume XXI, pages 40 and 41, yet in view of what was stated by their Lordships of the Privy Council in *Ratanlal Chunilal v. Municipal Commissioner for City of Bombay*(2) and having regard to the fact that the defendants had been realising the income of the plaintiff's share in the joint property under the deed of partition even from 1st July 1929 without discharging the debt that they were liable to pay under the terms of the partition deed, it may not be incorrect to award interest under the proviso to section 1 of the Interest Act, even if the analogy of a vendor and purchaser may not be strictly applicable to this case.

As for the question of set-off claimed by the defendants and allowed by the lower Court, I am of opinion that the decision of the learned District Judge was

(1) (1929) I.L.R. 53 Mad. 549.

(2) (1918) I.L.R. 43 Bom. 181 (P.C.).

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
ABDUR
RAHMAN J.

correct and cannot be interfered with. Having regard to certain English decisions, the learned Advocate-General did not advance the contention, and rightly so, that the defendants were not, in view of what was contained in the note to the partition deed, Exhibit B, and which has been reproduced in this judgment, entitled to claim a set-off; but he contended that, in so far as the first defendant was not a party to the partition and a promise by Sitharamayya to pay Rs. 5,500 was made to the defendants 2 to 5 only, it was not permissible to grant a set-off to them in an action to which the first defendant was also a party. And, in support of this, reliance was placed on the statement made by the second defendant as a witness in this case, where he had expressed his inability to say if his father had anything to do with the sum of Rs. 5,500. It is true that the agreement to pay Rs. 5,500 was entered into between the first plaintiff and defendants 2 to 5 only; but having regard to the fact that they were acting on behalf of the whole joint family including their father and the properties were being allotted on the assumption that the first defendant (i.e., the father) was a party to the arrangement of partition, which he eventually ratified, there can be no manner of doubt that this money was payable to all the defendants in spite of what the second defendant had stated in his cross-examination and not only to defendants 2 to 5. It was therefore rightly allowed by way of set-off to the plaintiffs' claim.

For the above reasons the plaintiffs' appeal must be accepted to the extent that they will be entitled to recover interest at six per cent from 14th March 1930 up to the date of realization. The parties will be entitled to pay and receive proportionate costs, in accordance with the measure of their success and failure both in this and in the lower Court.

VENKATARAMANA RAO J.—The facts are so fully stated in the judgment of my learned brother that I consider it unnecessary to re-state them. He has also dealt with the question of set-off which arises in the case. I therefore do not propose to deal with it at length. The set-off must be clearly allowed in view of Exhibit A, clause 1, and the fact that the father ratified the partition.

The main question in the case is whether the plaintiffs are entitled to claim interest on the sum of Rs. 14,000 payable under Exhibit B. The claim to interest is rested by the learned Advocate-General who argued the appeal, on the provisions of the Interest Act. Under that Act the Court can award interest upon all debts or certain sums payable at a certain time or otherwise in the following cases :—

- (i) The Court may allow interest to the plaintiff if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument;
- (ii) if payable otherwise, then from the time when the demand for payment shall have been made in writing; and
- (iii) interest shall be payable in all cases in which it is payable by law.

The learned Advocate-General claimed interest both on the ground that there was a sum certain payable at a certain time by virtue of a written instrument (Exhibit B) and also that it was payable by law. Taking the first ground, there is the written instrument and the sum certain. But the question is whether the said sum was payable at a certain time. The learned Counsel on either side relied on a number of English cases in support of their respective contentions because the Interest Act is based on the English Act which is known as Lord Tenterden's Act and the English cases have been relied on both by the Privy Council and the Courts in India in the interpretation of the Indian Act.

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
VENKATA-
RAMANA RAO J.

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
VENKATA-
RAMANA RAO J.

There is a conflict of view in regard to the interpretation to be placed on the expression "certain time" in the English cases ; but on a careful consideration of those cases it seems to me that, with reference to the point in controversy in this case, that conflict is not material. In *Merchant Shipping Co. v. Armitage*(1) COLERIDGE C.J., who delivered the judgment of the Exchequer Chamber, held that, where a sum of money was payable under a charterparty after entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the custom-house although the time was ascertained and became settled by the event, the money was not payable at a time certain within the meaning of the statute. LINDLEY L.J. explained the scope of this decision in *London, Chatham, and Dover Railway Company v. South Eastern Railway Company*(2) thus :

"The Act, as construed by the Exchequer Chamber, requires that the *contract shall ascertain the sum and the time ; the certainty of both must appear from the contract.* But still if all the elements of certainty appear by the contract, and nothing more is required than an arithmetical computation to ascertain the exact sum or the exact time for payment, that will be sufficient." (The italics are mine).

Lord TOMLIN dealing with this case in *Maine and New Brunswick Electrical Power Co. v. Hart*(3) remarked thus :

"In their Lordships' judgment the decision of the Exchequer Chamber in *Merchant Shipping Co. v. Armitage*(1) is an authority binding the English Courts up to and including the Court of Appeal to hold under Lord Tenterdon's Act that if the sum becomes payable at a time fixed by reference to a contingent event which may or may not happen, it is not payable by the written instrument at a time certain." (The italics are mine).

(1) (1873) L.R. 9 Q.B. 99.

(2) [1892] 1 Ch. 120, 144.

(3) [1929] A.C. 631, 639 (P.C.).

In *Duncombe v. Brighton Club Co.*(1) the Court had to consider this question and on the particular document before them there was a difference of view. In that case BLACKBURN J. took the view that the money was not payable at a certain time within the meaning of the Act. But both MELLOR J. and LUSH J. differed from him. In that case there was a contract for the supply of furniture. The terms of the contract were embodied in a letter which ran thus :

"I have thought over your application respecting the Norfolk Hotel ; the best terms I could offer would be one-third in cash, and bills at six and twelve months for the balance."

BLACKBURN J. in construing this document remarked thus :

"I have not the slightest hesitation in saying that the written instrument, by virtue of which the debt became payable, contemplated a particular day, which, when the goods were delivered, would be ascertained, and then the money would be payable at a certain time. But did the debt become payable by the written instrument at a certain time ?"

He held not and gave the following reason :—

"The construction of the statute is that the written instrument would specify the time ; and if that be so, the written instrument in this case does not do it . . ."

MELLOR J. observed thus :

"The object of the section was, not that the actual day should be ascertained upon the face of the instrument, but that the basis of the calculation which was to make it certain should be found in the instrument in writing."

He therefore took the view that when the goods were sent in, the time for the payment of the one-third in cash had arrived and that would be enough. LUSH J. observed thus :

"I agree with my brother Blackburn that the early part of the section which we are now discussing intends that

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
VENKATA-
RAMANA RAO J.

(1) (1875) L.R. 10 Q.B. 371.

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
VENKATA-
RAMANA RAO J.

the written document *should specify the time of payment*; but then it appears to me that the section does not require that it should so specify it by mentioning the day of payment The section says, 'upon all debts or 'otherwise' is put into contrast with 'at a certain time'. It means, I think, payable originally by the contract of the parties at a time certain, or *not at a time certain—where the time is fixed by the agreement of the parties, or not fixed by the agreement of the parties.* But where it is fixed by the agreement of the parties it shall appear in writing The other case 'or otherwise' is where no time is fixed for payment, then the creditor, the amount being due, may make interest to run from the time he chooses to demand it provided he makes the demand in writing. In this case the contract is one-third to be paid in cash, that is, in ready money, as soon as the goods are delivered and the invoices are delivered, so that the amount can be ascertained. So that the time of payment is fixed by the contract of the parties, and it is to be determined by the time when the goods are delivered."

It will be seen from this decision that all the Judges have concurred in one matter, namely, the written instrument should specify the time of payment; if not, the section would not apply. The conflict between the learned Judges was whether the day of payment could be rendered certain by reference to a future named event, i.e., as soon as the goods are delivered. The view of BLACKBURN J. was that when a time is made to depend upon a future named event, it cannot be called a certain time within the meaning of the section because it has to be rendered certain in future. But the other learned Judges were of the opinion that if the time of payment was specified, it would be enough. MELLOR J. put it thus:

"It was quite sufficient if there was a time fixed which by extrinsic facts could be made to identify the date for the calculation, without its appearing in so many words upon the face of the instrument."

Even in *Merchant Shipping Co. v. Armitage*(1) the time was specified in the contract but, as Lord TOMLIN points out, the precise time of payment can only be fixed by reference to a contingent event which may or may not happen. Sir JOHN COLERIDGE, who delivered the judgment of the Privy Council in *Juggomohun Ghose v. Manickchund*(2), remarks that the statute requires that certainty of time and the amount should be created by the written instrument and should exist at the time when the promise is made and, therefore, it does not affect debts contingent in amount and time of becoming due, so that the Act would not apply to cases where there is no promise absolutely to pay any sum, certain or uncertain, *nor any time limited for the payment* but only a promise, contingent on events which may never happen, to pay a sum capable of ascertainment only, and if when these shall happen, and the time for the happening of which, if they ever do happen, may be indefinitely postponed. No doubt in this case there is no question of contingency in regard to the payment of the amount. But the question is whether there is a time "limited for the payment". The written instrument need not name the precise day of payment but it should specify the time of payment. The exact day of payment can be ascertained with reference to the provision relating to the time specified.

The question in this case is, does Exhibit B specify the time of payment? That which is relied on is the following passage in the document:

"Those who got this A schedule share of properties should pay separately to those who get the B schedule share of properties a sum of Rs. 14,000."

RAYALAMMA
v.
BUTCHI-
RAMAYYA.
—
VENKATA-
RAMANA RAO J.

(1) (1873) L.R. 9 Q.B. 99.

(2) (1859) 7 M.I.A. 263.

RAYALAMMA
v.
BUTCHI-
RAMAYYA.

VENKATA-
RAMANA RAO J.

Prima facie this clause declares only the liability and does not specify when the sum of Rs. 14,000 is payable. The learned Advocate-General has contended that the document specifies the time of payment and says that the time of payment is either 1st July 1929 or at any rate 14th March 1930, the date of the document. So far as the argument based on the former date is concerned, it is untenable because the liability to pay Rs. 14,000 is not fixed until 14th March 1930. The contention in regard to the date, 14th March 1930, is put thus ; that as from that date the parties became severally entitled in respect of properties which were allotted to them at the partition, the amount must be deemed to be payable from that date. The question is not whether the amount can be deemed to have become payable but did the document specify that from that date the amount was payable? I find it a little difficult to say that the document specifies the time from which it is payable. It is in such cases, I think, as LUSH J. points out in *Duncombe v. Brighton Club Co.* (1), the words "or otherwise" would become applicable. (*Vide* the observations already cited by me.) I therefore prefer to rest my decision on the second ground advanced by the learned Advocate-General which seems to be well founded. The proviso to the section that interest should be allowed in all cases in which it is payable by law has been construed by the Privy Council both in *Maine and New Brunswick Electrical Power Co. v. Hart* (2) and *Bengal Nagpur Railway Company, Limited v. Ratanji Ramji* (3) as applying to cases in which the Court of equity exercises jurisdiction to allow interest. In case of sales and purchases

(1) (1875) L.R. 10 Q.B. 371.

(2) [1929] A.C. 631 (P.C.).

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

RAYALAMMA
v.
BUTCHI-
RAMAYYA.

VENKATA-
RAMANA RAO J.

of land, as pointed out by Viscount CAVE in *Swift & Co. v. Board of Trade* (1) :

" it is the practice of the Court of Chancery to require the purchaser to pay interest on his purchase money from the date when he took, or might safely have taken, possession of the land ; but this practice rests upon the view that the act of taking possession is an implied agreement to pay interest and this rule has been extended to cases of compulsory purchase under the statutory enactments".

The principle of equity that is invoked is thus explained by Lord SHAW in *Ratanlal Chunilal v. Municipal Commissioner for City of Bombay* (2) :

" On the one hand, the new owner has possession, use and fruits ; on the other, the former owner, parting with these, has interest on the price. This is sound in principle, and authority fully warrants it."

The question is whether this principle can be extended to the present case. The sum of Rs. 14,000 to be paid by the person who takes the A schedule properties to the person who gets the B schedule properties is by way of equality of partition or what is termed as "owelty" in a Court of Equity. When "owelty" has to be paid, the amount is always regarded as in the nature of a sum due to the vendor of land from his vendee. The reason is obvious. One co-sharer parts with a portion of the property as representing the share he is legitimately entitled to in consideration of a sum of money in respect whereof he must be regarded as the vendor and the person who takes the property must be regarded as the vendee. Mr. Govindarajachari relied upon a passage in Halsbury's Laws of England, First Edition, Vol. XXI, page 40, in support of his contention that the case of partition is not mentioned as one of the cases where a Court of Equity would grant interest. But the cases mentioned therein

(1) [1925] A.C. 520, 532.

(2) (1918) I.L.R. 43 Bom. 181 (P.C.).

RAYALAMMA
v.
BUTOHI-
RAMAYYA.
—
VENKATA-
RAMANA RAO J.

are only illustrative and not exhaustive. The passage clearly indicates that, where the relationship of a vendor and purchaser exists between the parties, the Court of Equity would award interest. Therefore the passage relied on by Mr. Govindarajachari does not support him.

I am therefore of the opinion that this is a case where the Court of Equity would certainly award interest. The plaintiffs would therefore be entitled to interest and I agree with my learned brother that the interest would be payable at six per cent from 14th March 1930. The plaintiffs will be entitled to have a decree for the sum of Rs. 8,500 after setting off the sum of Rs. 5,500 with interest from 14th March 1930 up to the date of realization. I also agree with the order as to costs proposed by my learned brother.

G.R.

APPELLATE CRIMINAL.

*Before Mr. Justice Horwill.*1941,
September 24.IN RE K. K. NARAYANA NAMBIAR (ACCUSED),
PETITIONER.*

Code of Criminal Procedure (Act V of 1898), sec. 540—Wide scope—Discretion—Not limited to the benefit of accused.

Section 540 of the Code of Criminal Procedure is extremely wide in its provisions. It enables a Magistrate at any stage of any proceeding to examine any person as a witness; and, where it is essential to the just decision of the case, he is bound to do so. The very width of the powers given to the Magistrate require, however, a corresponding caution in using these

* Criminal Revision Case No. 739 of 1941. (Criminal Revision Petition No. 694 of 1941.)

powers. The section is not intended only for the benefit of the accused. If the Court thinks that in order to give a just finding it is necessary to examine a witness, it would not be an improper exercise of the powers of the Court to summon that witness under this section merely because the evidence supports the case of the prosecution and not that of the accused.

Case law discussed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Sessions of the South Malabar Division at Calicut, dated 21st July 1941 and passed in Criminal Appeal No. 36 of 1941, preferred against the judgment of the Court of the Subdivisional Magistrate of Calicut in Calendar Case No. 47 of 1941.

V. V. Srinivasa Ayyangar and M. C. Sridharan for petitioner.

Public Prosecutor (V. L. Ethiraj) for the Crown.

ORDER.

HORWILL J.—The petitioner was convicted under section 409 of the Indian Penal Code of committing criminal breach of trust by dishonestly misappropriating a sum of Rs. 118-15-0 entrusted to him in his capacity as Head Clerk, District Court, North Malabar; and the offence is said to have been committed between 2nd December 1940 and the 17th of that month. His appeal was dismissed, the conviction and sentence being affirmed.

The principal question which arises in this petition is whether the learned Magistrate, purporting to act under section 540 of the Code of Criminal Procedure, exercised his discretion improperly in admitting the evidence of a person who was examined as C.W. 1. The prosecution let in evidence through P.Ws. 8 and 9

NARAYANA,
In re.

HORWILL J.

NARAYANA,
In re.
HORWILL J.

that on 14th December 1940 the petitioner took a sum of Rs. 2 out of the bag in which he kept his money as Head Clerk and gave it to P.W. 9 to purchase seven stamp papers, which were subsequently handed over to P.W. 8. Formal evidence was given to this effect and there was not much cross-examination on this point. The reverse sides of the stamp papers however show that six of them were purchased in the name of one Appu Nair and one in the name of a still different person. There was therefore a possibility that the Court might be unable to accept the evidence of P.W. 9 in the face of the endorsements of the stamp-vendor. The seventh paper was dated 4th December 1940, ten days before P.W. 9 is said to have made the purchase. Not unnaturally, the accused exploited these endorsements and examined a man who bore the name of Appu Nair and who deposed that he had purchased these papers. Faced with the possibility that P.Ws. 8 and 9 might be disbelieved because of an apparent discrepancy which he knew could be easily explained, the Public Prosecutor filed an application in the Magistrate's Court asking him to exercise his discretion under section 540, Criminal Procedure Code, and examine the stamp-vendor as a witness. He did so; and the stamp-vendor explained how it was possible for a person to purchase a stamp paper and yet for one to find some other name on the reverse. He also deposed that the Appu Nair whose name appeared on the reverse of six of the stamp papers was not D.W. 6 but an Appu Nair residing in an entirely different village to that in which D.W. 6 was living.

As will be seen from the wording of section 540, Criminal Procedure Code, it is extremely wide in its provisions and enables a Magistrate at any stage of any proceeding to examine any person as a witness; and,

where it is essential to the just decision of the case, he is bound to do so. The very width of the powers given to the Magistrate require, however, a corresponding caution in using these powers.

In the many cases cited by Mr. Srinivasa Ayyangar on behalf of the petitioner, various views have been expressed with regard to the power of the Court to examine witnesses after the defence case has been closed; but in all those cases it was obvious that the power had been misused. In *Rex v. Dora Harris*(1) the Recorder permitted the examination as a Court witness of a co-accused who had throughout the trial been standing in the dock by the side of the accused against whom this evidence was let in and who was admittedly an accomplice. AVORY J., who delivered the judgment of the Court, quotes at page 594 the rule laid down by TINDAL C.J. in *Regina v. Frost*(2) :

"There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso*, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown."

However, in expressing the considered opinion of the Bench, AVORY J. himself lays no restricting rule. He says :

"In the circumstances, without laying down that in no case can an additional witness be called by the Judge at the close of the trial after the case for the defence has been closed, we are of opinion that in this particular case the course that

NARAYANA,
In re.
HORWILL J.

(1) [1927] 2 K.B. 587.

(2) (1839) 9 Car. & P. 129; 173 E.R. 771.

NARAYANA,
In re.
HORWILL J.

was adopted was irregular, and was calculated to do injustice to the appellant."

In India we are governed by the express provisions of section 504, Criminal Procedure Code, which, as I have said, is extremely wide in its terms. In *Sital Singh v. Dalganjan Singh*(1), after the prosecution case had been closed, the prosecution put in an entirely fresh list of witnesses to be called, and the learned Judge held that that was an abuse of section 540, Criminal Procedure Code. In *Ramchandra Prasad v. Emperor*(2) the learned Judge found that the object of the additional evidence was merely to fill in an important gap in the prosecution case and that it would be wrong for a Court to invoke section 540, Criminal Procedure Code, for that purpose. In *Narayana Nair v. Bhargavi Amma*(3) CURGENVEN J. found that the prosecution evidence as originally let in disclosed no case against the accused at all and that the Court had based its finding against the accused exclusively on evidence adduced subsequently. In *Collett v. Emperor*(4) the Prosecuting Inspector had deliberately refrained from examining the wife of the accused because he knew that she would not give evidence in support of the prosecution. He therefore adopted the plan of persuading the Judge to examine her as a Court witness, so that he could cross-examine her. It was held that that was gross abuse of the exercise of the powers given to the Magistrate under section 540, Criminal Procedure Code. Nevertheless, it was found that there was abundant other evidence, and the convictions were confirmed. In *Natabar Ghose v. Adya Nath*(5) some

(1) (1913) 12 All. L.J. 15.

(3) (1926) 25 L.W. 151.

(2) A.I.R. 1937 Pat. 246.

(4) 1929 M.W.N. 395.

(5) A.I.R. 1923 Cal. 690.

general remarks on the use of section 540 are found, but no reasons are given for the particular decision arrived at. In *Emperor v. Satyendra Kumar*(1) the abuse of section 540, Criminal Procedure Code, was of the same nature as in *Collett v. Emperor*(2). In *Udho Ram v. The Crown*(3) the Magistrate, after hearing the evidence of both sides and the arguments, when nothing remained but to pronounce judgment, suddenly decided to hold a local inspection and, without any notice either to the prosecution or the accused, examined four witnesses at the scene of offence.

Mr. Srinivasa Ayyangar particularly relies on some remarks to be found in *Sital Singh v. Dalganjan Singh*(4) that no witnesses should be examined at the bidding of any person; and he argues in this case that this C.W. 1 was examined at the bidding of the prosecution and that therefore the accused was prejudiced. I cannot however see how a Court is precluded from exercising its discretion under section 540, Criminal Procedure Code, merely because somebody asks it to do so. It is also argued that section 540, Criminal Procedure Code, is intended only for the benefit of the accused. I see no reason why section 540, Criminal Procedure Code, should be so limited. It is in the interests of justice that a guilty person should be convicted just as it is in the interests of justice that an innocent person should be acquitted. If the Court thinks that in order to give a just finding it is necessary to examine a witness, then it could not be an improper exercise of the powers of the Court to summon that witness under section 540, Criminal Procedure Code, merely because the evidence supports the case of the prosecution and not that of

(1) A.I.R. 1923 Cal. 463.

(3) (1928) I.L.R. 10 Lah. 790.

(2) 1929 M.W.N. 395.

(4) (1913) 12 All. L.J. 15.

NARAYANA,
In re.
HORWILL J.

NARAYANA,
In re.
HORWILL J.

the accused. It is possible to argue that the Public Prosecutor should have foreseen that there was a discrepancy between what P.W. 9 was going to speak to and the endorsements on the stamp papers, which the accused would be certain to exploit, and that he should therefore have examined the stamp-vendor to explain this discrepancy; but I do not think that this lack of foresight on the part of the prosecution should preclude the Court from examining the stamp-vendor and clearing up the point. It is true that C.W. 1 not only gave evidence to explain the apparent discrepancy but contradicted D.W. 6 by saying that the Appu Nair whose name appeared on the reverse of the stamp papers was not this witness. I am of opinion that the Court has power under section 540, Criminal Procedure Code, to examine a witness even to rebut defence evidence; but clearly those powers should be sparingly invoked for such a purpose. If a witness were examined under section 540 to contradict defence witnesses, then the accused might demand that further witnesses should be examined by the Court under the same section to contradict the prior witness examined and thus lead to that improper prolonging of a case so strongly condemned in the Allahabad case. If, in the present case, the learned Magistrate had examined C.W. 1 for the sole purpose of contradicting D.W. 6, I might have been inclined to hold that he had not exercised his powers under section 540 judicially; but the main object of his examination was undoubtedly to explain how the name of a person could appear as vendee on the back of a stamp paper when that person had not purchased it. I am unable to say therefore that the Magistrate did not exercise his discretion properly in examining C.W. 1.

It has been said that no notice was given to the accused of the intention of the Court to examine C.W. 1. That is not legally necessary; but if an accused person is suddenly called upon to meet evidence which he does not know is going to be adduced, he may well be prejudiced. The order here was passed on the 12th May and he was not examined until the 26th May and, as can be seen from the cross-examination of that witness, the learned Counsel for the accused was quite prepared to meet this additional evidence.

On the appreciation of the evidence of the prosecution witnesses, the defence witnesses and the Court witness, I see no reason to interfere. There are concurrent findings of fact in the Magistrate's Court and in the Sessions Court.

The petition is accordingly dismissed.

V.V.C.

NARAYANA,
In re.
HORWILL J.

APPELLATE CIVIL—FULL BENCH.

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

1941,
November 10.

POLAVARAPU LINGAYYA AND FOUR OTHERS (Nos. 2 TO 5,
LEGAL REPRESENTATIVES OF THE DECEASED, FIRST
APPELLANT, AND NOS. 4 AND 5 BY GUARDIAN AND MOTHER
MAHALAKSHMI, PLAINTIFFS), APPELLANTS,

v.

VUPPUTURI PUNNAYYA AND TWO OTHERS (DEFENDANTS),
RESPONDENTS.*

*Hindu law—Son's liability—Pious obligation—Sale of joint
family property by father—No family necessity—Sale set
aside at the instance of sons to the extent of their interest
in property—Suit by vendee for recovery of proportionate
part of purchase price—Liability of sons to refund.*

In a suit filed by the sons of a Hindu father after his death to set aside a sale by him of joint family property, it was found that the sale was not made for family necessity and the sale was consequently set aside to the extent of the sons' interest in the property. The vendee subsequently filed a suit against the sons for the recovery of a proportionate part of the purchase price paid by him.

Held: The sons could be compelled by reason of the rule of pious obligation to discharge a liability incurred by the father to refund a proportionate share of the purchase consideration.

When an unlawful sale of family property is set aside during the father's lifetime, the vendee has an enforceable claim against him for the return of a proportionate part of the purchase consideration and a liability of that nature comes within the rule of pious obligation under Hindu law. If the transaction is set aside after the father's death, the vendee has a claim against his estate and the position is the same.

* Second Appeal No. 218 of 1939.

The nature of the obligation of a Hindu son to discharge his father's debt is not confined to a debt known to the English common law but applies also to other financial obligations incurred by the father unless incurred for illegal or immoral purposes. The rule of pious obligation applies even in cases where the father's liability is contingent and the contingency arises only after his death.

Per KRISHNASWAMI AYYANGAR J: On a sale by a Hindu father of family property being set aside at the instance of his sons, his liability to refund to the purchaser the consideration for the sale, contingent though it be, is still inherent in the sale itself and is not a new liability coming into existence for the first time when the sale is set aside.

Raman Pandithan v. Satha Cudumban(1) approved.

Observations to the contrary in *Srinivasa Aiyangar v. Kuppuswami Aiyengar*(2) disapproved.

Nachimuthu v. Balasubramania(3) approved and affirmed.

APPEAL against the decree of the Court of the Subordinate Judge of Bapatla in Appeal Suit No. 6 of 1937, preferred against the decree of the Court of the District Munsif of Ongole in Original Suit No. 806 of 1934.

B. V. Ramanarusu for appellants.—Under Hindu law there is a liability of the sons to pay the debts of their father which are not tainted with illegality or immorality; *Brij Narain v. Mangal Prasad*(4). Whether the father who contracted the debt is alive or dead the rule is the same; *vide* the fifth rule of law laid down by their Lordships in the above Privy Council case.

When the father of the respondents sold the land to the appellant he became liable to indemnify the appellant if and when the consideration failed to any extent. On the sale being set aside at the instance of the sons, the liability which was contingent till then, became ascertained and definite. It is not correct to say that the debt came into existence for the first time only when the sale was set aside. The decision in *Raman Pandithan v. Satha Cudumban*(1) is correct and it applies to the facts of the present case. The observations

(1) (1916) 31 M.L.J. 502.

(2) (1920) I.L.R. 44 Mad. 801.

(3) I.L.R. [1939] Mad. 422.

(4) (1923) I.L.R. 46 All. 95 (P.C.).

LINGAYYA
v.
PUNNAYYA.

to the contrary in *Srinivasa Aiyengar v. Kuppuswami Aiyengar*(1) are not correct. The word "debt" as used in Hindu law has a wider meaning than what is ordinarily understood by that term. For example, the liability of a partner to account for the profits and losses of a partnership is "rina" under Hindu law. Such a liability would be an antecedent "debt" to support a mortgage executed by a Hindu father in respect of the monies found due on the subsequent taking of accounts of the partnership. The case in *Nachimuthu v. Balasubramania*(2) exhaustively reviews the case law and the texts of Hindu law bearing upon the meaning of the word "rina". [*Venkatacharyulu v. Mohana Panda*(3) was also referred to.]

A decree for the payment of the amount at any rate should have been passed against the sons executable against any separate property of the father in the hands of the sons. It is not necessary to show that there are assets of the deceased before a decree is obtained. That would arise only in execution.

K. Umamaheswaram for respondent.—In a case like the present one the liability to pay the debt arose for the first time after the sale was set aside and not at the time when the property was sold; see the observations in *Srinivasa Aiyengar v. Kuppuswami Aiyengar*(1). The earlier decision in *Kilaru Kotayya v. Polavarapu Durgayya*(4) was to the same effect. [Mulla's Principles of Hindu Law, Eighth Edition, section 268(2) and Mayne's Hindu Law, Tenth Edition, page 515, were referred to.] There are decisions of other High Courts which hold the same view. See *Sahu Ram Chandra v. Bhup Singh*(5) and the other cases collected in Mayne's Hindu Law at page 515. SESHAGIRI AYYAR J., who was one of the judges in *Raman Pandithan v. Satha Cudumban*(6), observed later that his earlier decision required reconsideration. It is submitted that the decision in *Raman Pandithan v. Satha Cudumban*(6) is wrong.

The sale in this case was set aside at the instance of the sons. It was held to be not binding on them and cannot be relied upon for the refund of the consideration. The transaction cannot be split up.

Cur. adv. vult.

(1) (1920) I.L.R. 44 Mad. 801.

(3) (1920) I.L.R. 44 Mad. 214.

(5) (1917) I.L.R. 39 All. 437 (P.C.).

(2) I.L.R. [1939] Mad. 422.

(4) (1918) 35 M.L.J. 451.

(6) (1916) 31 M.L.J. 502.

JUDGMENT.

LEACH C.J.—The rule of Hindu law which makes a son liable for his father's debts, provided they have not been incurred for illegal or immoral purposes, has been discussed in innumerable cases in the Courts of India and many of the cases have been carried to the Privy Council. This appeal calls for a further discussion of the rule in order to settle a conflict of opinion in this Court with regard to its application.

In 1917 the first and second respondents with their father, Lingayya, constituted an undivided Hindu family. On 22nd June 1917 Lingayya, purporting to act for his sons as well as himself, sold to the appellant for Rs. 1,350 land belonging to the family. The area covered by the deed was 6.34 acres. On 19th July 1917 the father died. On 1st December 1924 the first and second respondents filed in the District Munsif's Court a suit for a decree setting aside the sale to the appellant. They pleaded that their father was insane at the time of the transaction, that no consideration had passed and that there was no necessity for the sale. The District Munsif held that the father was sane and that consideration passed, but that there was no necessity for the sale so far as the family was concerned. Consequently he declared the transfer to be invalid to the extent of two-thirds. On appeal the Subordinate Judge of Bapatla concurred in the decision of the District Munsif and the land was then partitioned between the first and second respondents and the appellant under the decree of the Subordinate Court. On 5th December 1934 the appellant filed the present suit to recover a proportionate part of the purchase price. He claimed that he was entitled to a decree for Rs. 1,478, being two-thirds of the Rs. 1,350 with interest, on the ground that the pious

LINGAYYA
v.
PUNNAYYA.
LEACH C.J.

LINGAYYA
v.
PUNNAYYA.
LEACH C.J.

obligation rule applied and that the vendor's sons were liable to the extent of the family property which had come into their hands. He also claimed that the first and second respondents were in possession of properties belonging to their father personally and were liable as the representatives of his estate. The District Munsif considered that the pious obligation rule did not apply in such circumstances and dismissed the suit. The Subordinate Judge was of the same opinion and the present appeal is from the decree of the Subordinate Judge dismissing the appeal from the decision of the District Munsif.

The appeal has been placed before a Full Bench because of the conflict of opinion to be found in the judgments of this Court in *Raman Pandithan v. Satha Cudumban*(1) and *Srinivasa Aiyangar v. Kuppuswami Aiyengar*(2). In the first of these two cases the facts were very similar to the facts in the case now before the Court. In 1894 the father of the defendants sold certain family properties to the plaintiff. The father died in 1904 and in the following year his sons sued the plaintiff for possession of their shares on the ground that the sale was not binding on them. It was held that the sale was unlawful so far as they were concerned and, as their shares amounted to five-sixths of the whole, it was set aside to this extent. The vendee then sued the sons to recover five-sixths of the purchase consideration, basing his claim on the pious obligation rule, and SESHAGIRI AYYAR and NAPIER JJ. held that the claim was well founded. In the second of the two cases a son during the lifetime of his father sued for partition of the family estate and also asked that certain alienations of family property which his

(1) (1916) 31 M.L.J. 502.

(2) (1920) I.L.R. 44 Mad. 801.

LINGAYYA
v.
PUNNAYYA.
LEACH C.J.

father had made should be set aside. The Court was called upon to decide merely whether the son was entitled to a decree for his share in the family properties without being required to refund the consideration paid to his father by the alienees. It was held by WALLIS C.J. and SESHAGIRI AYYAR J. that the son was entitled to recover his share without any obligation to refund being imposed upon him. If the judgments had stopped there the present controversy would probably have not arisen, but both WALLIS C.J. and SESHAGIRI AYYAR J. went beyond the immediate question and the Court has now to consider whether their further observations can be accepted. There exists an important distinction between that case and the present one. There the question was whether the sons were entitled in a suit for partition filed by them against their father to have unlawful alienations made by him set aside unconditionally. Here the question is whether the sons can in a suit by the vendee be compelled by reason of their personal law to discharge a liability incurred by their father, namely, a liability to refund a proportionate share of the purchase consideration. The liability to the vendee is the father's liability and, until the transaction has been set aside, the vendee is not in a position to invoke the pious obligation rule and, if the father meets the vendee's claim, the question of the application of the rule can never arise.

WALLIS C.J. laid great stress on the judgment of the Privy Council in *Saku Ram Chandra v. Bhup Singh*(1) and, after observing that it was there pointed out that the alienation of joint family property by a father, where there is neither necessity nor antecedent

(1) (1917) I.L.R. 39 All. 437 (P.C.).

LINGAYYA
v.
PUNNAYYA.
LEACH C.J.

debt, amounts to a plain breach of trust and that the Mitakshara law does not warrant or legalize any such transaction, he added :

" It follows in my opinion that the Courts are bound to afford the sons adequate relief in the nature of a *restitutio in integrum* unfettered by any conditions based on the alleged pious obligation of the sons to pay their father's debts. I am moreover not satisfied that any such obligation exists in this case. Any liability which the father may incur to the alienees on such unconditional setting aside of the alienation arises from his own immoral act in making the alienation in the first instance, in breach of the duty which he owed to his sons as manager of the joint family property, and I do not think the sons can properly be held to be under any pious obligation to relieve him from the consequences of his unsuccessful attempt to defraud them ".

It is true that, in delivering the judgment of the Board in *Sahu Ram Chandra v. Bhup Singh*(1), Lord SHAW expressed the opinion that the father, as the manager of the joint family of which he is the head, is in the position of a trustee and to permit him to use the family property for his own purposes would be equivalent to sanctioning a plain, and it might be, a deliberate breach of trust. The judgment delivered by Lord SHAW was the subject of much comment, as at first it was read as laying down the proposition that a loan raised by a father for his own necessity on the security of joint family property could not be regarded as constituting an antecedent debt which would render a subsequent mortgage of family property binding on his sons. The pious obligation rule makes the sons of a Hindu father liable for his debts when they have not been incurred for illegal or immoral purposes. The important factor is the purpose for which the debt is incurred. Though the father may in abuse of

(1) (1917) I.L.R. 39 All. 437 (P.C.).

LINGAYYA
v.
PUNNAYYA.
LEACH C.J.

his powers have executed a deed purporting to charge family property, this will not make the debt illegal or immoral. Two years after the judgment in *Sahu Ram Chandra v. Bhup Singh*(1) was delivered a Full Bench of five Judges of this Court, WALLIS C.J. presiding, considered its effect in *Armugham Chetty v. Mathu Koundan*(2) and the conclusion arrived at was that the Privy Council did not intend to depart from what had up to then been accepted as the law and consequently held that a debt contracted by a Hindu father on the security of the joint family estate, provided that it was not contracted for an illegal or immoral purpose, is an antecedent debt and will support a subsequent mortgage which will involve the sons' shares in the property charged. Shortly after this decision had been given, a Bench of this Court in *Kandasami Goundan v. Kuppu Mooppan*(3) held that in a suit instituted against a Hindu father and his sons on a mortgage bond executed by the father alone the mortgagee was, notwithstanding that the mortgage was not binding on the sons, entitled to a conditional decree against the father personally and against the joint family property of himself and his undivided sons for the recovery of the balance should the proceeds of sale of the father's share of the mortgaged properties prove insufficient. In *Brij Narain v. Mangal Prasad*(4) a Full Board of the Privy Council accepted this Court's interpretation of *Sahu Ram Chandra v. Bhup Singh*(1) and there laid down the following propositions of law :—

(i) The managing co-parcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity ; but

(1) (1917) I.L.R. 39 All. 437 (P.C.). (2) (1919) I.L.R. 42 Mad. 711 (F.B.).
(3) (1919) I.L.R. 43 Mad. 421. (4) (1923) I.L.R. 46 All. 95, 104 (P.C.).

LINGAYYA
v.
PUNNAYYA.
—
LEACH C.J.

(ii) If he is the father and the reversionaries are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

(iii) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate.

(iv) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

(v) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead.

In view of the judgment of the Judicial Committee in *Brij Narain's case*(1) the dicta of WALLIS C.J. in *Srinivasa Aiyangar v. Kuppuswami Aiyengar*(2) cannot be accepted as correctly stating the law. Notwithstanding that in charging the family properties for his own necessity the father has exceeded his powers, the debt incurred by him is one which falls within the purview of the pious obligation rule and can be enforced against the sons to the extent of their interests in the family property. The Hindu law makes no difference between a mortgage and sale in this connection and therefore the fact that the father has abused his powers does not taint his obligation to the alienee to an extent which would justify the Court in holding that it is not *vyavaharika*.

The observations of SESHAGIRI AYYAR J. in *Srinivasa Aiyangar v. Kuppuswami Aiyengar*(2) remain to be considered. SESHAGIRI AYYAR J. said in effect that the pious obligation rule only applies to debts of the father which were enforceable when the family was joint. He considered that the liability of the father to refund to the alienee the purchase price when an alienation

(1) (1923) I.L.R. 46 All. 95 (P.C.). (2) (1920) I.L.R. 44 Mad. 801.

of family property is set aside is a liability for unliquidated damages and not a debt, but even if it becomes a debt, it is not a debt on the date of the suit for partition. SESHAGIRI AYYAR J. referred to his previous decision and distinguished it on the ground that in that case there had been no severance of the joint family status. In my judgment this distinction is not sufficient and I find myself also unable to accept the opinion which SESHAGIRI IYER J. expressed with regard to the nature of the obligations to which the rule applies. I consider that the rule has a much wider application.

In *Nachimuthu v. Balasubramania*(1) my learned brother KRISHNASWAMI AYYANGAR examined with great care in the light thrown by the ancient texts, with which he is so well acquainted, the nature of the obligation of a Hindu son to discharge his father's debts and his conclusion was that the rule is not confined to a debt known to the English common law, but applies to other financial obligations incurred by the father, unless of course incurred for illegal or immoral purposes. I respectfully agree with all that my learned brother said there. He was not, however, called upon to express an opinion on the question whether the rule applies in the case where the father's liability is contingent and the contingency arises only after his death. That is the position in the present case and therefore it is necessary to carry the discussion somewhat further.

When a father sells family property without the needs of the family requiring the transaction to be entered into, he becomes liable to return to the vendee a proportionate part of the purchase consideration

LINGAYYA
v.
PUNNAYYA.
—
LEACH C.J.

(1) I.L.R. [1939] Mad. 422.

LINGAYYA
v.
PUNNAYYA.
LEACH C.J.

should the other co-parceners insist, as they have the right to do, on the sale being set aside so far as they are concerned. On this event happening the vendee can compel the father to make the refund. The position then is that until the transaction is set aside at the instance of one or more of the other co-parceners the father's liability is contingent, but when the event has happened the liability becomes a present one. The basis of the pious obligation rule is the benefit which will accrue to the soul of the father by the discharge of his earthly obligations. This being the case it is difficult to see what difference the nature of the father's liability in the law can make, provided that it is a liability which the law recognizes and is prepared to enforce in terms of money. When an unlawful sale of family property is set aside during the father's lifetime the vendee has an enforceable claim against the father for the return of a proportionate part of the purchase consideration and it seems to me that a liability of this nature must come within the rule, if it is to be applied in accordance with the wording of the texts and the underlying idea. If the transaction is set aside after his death the vendee has a claim against his estate and the situation is the same.

In *Srinivasa Aiyengar v. Kuppuswami Aiyengar*(1) SESHAGIRI AYYAR J. said that the father can hardly be expected to be rescued from hell when the son is compelled, very much against his will and with imprecations in his mouth, by a decree of Court to make the payment. In *Subramania Ayyar v. Sabapathy Aiyar*(2) COUTTS TROTTER C.J. described the rule as being an illogical relic of antiquity, unsuited to any but

(1) (1920) I.L.R. 44 Mad. 801.

(2) (1927) I.L.R. 51 Mad. 361 (F.B.).

LINGAY
v.
PUNNAY
LEACH

a primitive society. Even if the description given by SESHAGIRI AYYAR J. of the attitude of the Hindu son is a true one, it is not for me to express an opinion. I cannot imagine what difference it will make to the father if the son discharges a parental obligation with imprecations on his lips or with a smile on his face. What matters is payment to the father's creditor. The criticism of COUTTS TROTTER C.J. is equally irrelevant in view of the fact that the rule still remains a rule of Hindu law and, as I had occasion to point out in *Mohana v. Gangaraju*(1), the Court is bound to apply it unless the Legislature steps in and alters the law.

For the reasons indicated, I consider that *Raman Pandithan v. Satha Cudumban*(2) was rightly decided and that the observations in *Srinivasa Aiyengar v. Kuppuswami Aiyengar*(3) which are in conflict should be disregarded. It follows that in my opinion the Courts below erred in dismissing the suit and I would remand the case to the trial Court for decision on the other issues.

Learned Counsel for the respondent has intimated that his clients claim to be entitled to a scaling down of the debt in accordance with the provisions of the Madras Agriculturists Relief Act. In the circumstances this claim should be made in the District Munsif's Court.

The appellant is entitled to his costs here and in the Subordinate Judge's Court. The decree for costs passed against him by the trial Court should be set aside and a direction given that the costs of that Court should abide the result of the trial. The appellant is also entitled to the refund of court-fees

(1) I.L.R. [1942] Mad. 95 (F.B.). (2) (1916) 31 M.L.J. 502.

(3) (1920) I.L.R. 44 Mad. 801.

LINGAYYA
v.
PUNNAYYA. paid on this appeal to the Subordinate Court and on his appeal to this Court.

HAPPELL J.—I agree and have nothing to add.

KRISHNASWAMI
AYYANGAR J. KRISHNASWAMI AYYANGAR J.—While I concur with the judgment just now pronounced by my Lord, I have considered it necessary, in view of the importance of the question at issue, to add a few words of my own by way of criticism of some of the opinions expressed in *Srinivasa Aiyangar v. Kuppaswami Aiyengar*(1). The actual decision reached in that case, on the facts such as they were, is not open to question, if I may say so with respect. In arriving at the conclusion that the alienee is not entitled to relief in the very suit in which the alienation is set aside, WALLIS C.J. was only following, as he himself stated, the practice of the Court according to which a condition for the refund of the consideration is not ordinarily attached to the decree. Such a condition can properly be imposed where the alienation is justifiable in part, but not in whole, as in such a case the alienee is obviously entitled to an equity in respect of that part of the consideration which is found good. But where on account of a total absence either of necessity or antecedent debt, the father's sale is declared not binding on the sons to any extent whatever, the alienee can claim no equity as the liability of the sons to refund the consideration arises independently of the sale successfully impeached by them in the suit. It is in fact an extraneous obligation cast upon them by their personal law. On this ground it was that the learned Chief Justice came to the conclusion that the sons were entitled to relief in the nature of *restitutio in integrum* unfettered by any

(1) (1920) I.L.R. 44 Mad. 801.

condition for the refund of the purchase money. This was sufficient to dispose of the case and the further question whether the disappointed alienee has a remedy against the sons by recourse to a separate suit did not arise for determination. But the Chief Justice went on to express the opinion that the father's liability to refund the consideration in the circumstances mentioned does not constitute such a debt as the sons will be bound to discharge by reason of their pious obligation. Support for this opinion was derived from the observations of the Privy Council in *Sahu Ram Chandra v. Bhup Singh*(1), in which Lord SHAW authoritatively defined an antecedent debt as meaning a debt antecedent in time and dissociated in fact from the alienation in question. The noble Lord proceeded however to explain the principle in language which literally taken would tend to displace a long current of Indian authority and upset numberless titles to property. He observed that the joint family estate cannot be effectively sold or charged so as to bind the sons except when it is made

"in order to discharge an obligation not only antecedently incurred but incurred *wholly apart from the ownership of the joint estate or the security afforded or supposed to be available for such joint estate*".

The words italicised suggest a qualification not theretofore known to Hindu law, *Sami Ayyangar v. Ponnammal*(2), and for some time was understood as laying down the proposition that no mortgage for ready money could ever be an antecedent debt the payment of which was capable of supporting a new and later mortgage. This qualification has since been declared untenable first by a Full Bench of this

LINGAYYA
v.
PUNNAYYA.
KRISHNASWAMI
AYYANGAR J.

(1) (1917) I.L.R. 39 All. 437 (P.C.).

(2) (1897) I.L.R. 21 Mad. 28.

LINGAYYA
v.
PUNNAYYA.
—
KRISHNASWAMI
AYYANGAR J.

Court in *Armugham Chetty v. Muthu Koundan*(1) and later by a Full Board of the Privy Council in *Brij Narain v. Mangal Prasad*(2) on the ground that the observations of Lord SHAW were in the nature of *obiter dicta* and not a decision on the point. It is in the passage thus commented on, there occur the other observations referred to by WALLIS C.J., which were obviously made for the purpose of elucidating the theory underlying the doctrine since exploded as mentioned. Lord SHAW said that to permit a father to mortgage the family property for his own purposes would be to enable him to sacrifice those very rights which he was bound to conserve and that this would be "equivalent to sanctioning a plain, and it may be, a deliberate breach of trust". Breaches of trust are of course offences against morality and may even sound in crime; and it may well be that a liability arising out of a breach of trust bears the taint of illegality or immorality. But even apart from authority, it is difficult to accept the proposition that an alienation by the father, when there was no necessity or antecedent debt, is a breach of trust in this sense. Legal expressions and legal concepts peculiar to one system of law do not always accurately fit into another system with a different origin and history and founded upon different theories. For instance the notion that the property of maths and similar religious institutions is trust property and those charged with its administration are trustees caught the fancy of lawyers and held the field for some time in this country until the Privy Council set aside this view in *Vidya Varuthi v. Balusami Ayyar*(3),

(1) (1919) I.L.R. 42 Mad. 711 (F.B.).
(2) (1923) I.L.R. 46 All. 95 (P.C.). (3) (1921) I.L.R. 44 Mad. 831 (P.C.).

explaining away a previous decision of the Board in *Ram Prakash Das v. Anand Das*(1). If I may say so with respect, expressions such as "trust" and "breach of trust" are strictly speaking out of place in describing the position of a father or manager in a joint Hindu family. Neither of them fills the position of an agent with respect to the family property in his charge, though it may be that some of his duties and functions may appear to be similar in character to those of trustees strictly so called; see *Annamalai Chetty v. Murugasa Chetty*(2). But it is necessary to bear in mind the warning uttered more than once before—the decision of the Privy Council in *Arumilli Perrazu v. Subbarayadu*(3) is an instance in point—that it is a mistake to apply to such persons the strict rules of law applicable to trustees without necessary qualification. Neither a father nor a manager is in law accountable as a trustee. Neither of them is legally bound to keep or render accounts. Neither of them is under a duty to save, economise or invest the funds of the family. They cannot be called upon to account for acts of negligence. In the distribution of the family income they are guided not by the quantum of the share of the individual members but by their actual needs as conceived by them. Such being their position, it will not be incorrect to describe it as one far removed from those duties and restrictions which are associated with trustees strictly so called. It is not perhaps necessary to labour the point in view of the decision of the Board in *Brij Narain v. Mangal Prasad*(4) already referred to, where their Lordships accepted

LINGAYYA
v.
PUNNAYYA.
—
KRISHNA AMI
AYYANGAR J.

(1) (1916) I.L.R. 43 Cal. 707 (P.C.).
(2) (1903) I.L.R. 26 Mad. 544, 553 (P.C.).
(3) (1921) I.L.R. 44 Mad. 656, 663 (P.C.).
(4) (1923) I.L.R. 46 All. 95 (P.C.).

LINGAYYA
v.
PUNNAYYA.
—
KRISHNASWAMI
AYYANGAR J.

after a critical examination of Lord SHAW's observations in the earlier case, the proposition that an independent debt contracted by a Hindu father on the security of the family property is still an antecedent debt sufficient to support a later mortgage of the sons' share, notwithstanding that the debt was incurred simultaneously with the execution of the prior mortgage. The theory of breach of trust must therefore be held to have been laid to rest for good as otherwise the invalid charge created by the father on the family property, invalid for the reason that there was a simultaneous borrowing of ready money, could not have been held to have been a good antecedent debt which was neither illegal nor immoral. There can be no doubt that the Privy Council held such a debt to be a good antecedent debt. It is impossible to mistake the meaning of the illustration given by their Lordships at page 102 of the report :

"For, after all, if looked at straight in the face, what position can be more anomalous than this? A father who is manager, borrows a like sum from A and B. To A he gives a mortgage on the family estate containing a personal covenant. To B he gives a simple acknowledgment of loan. B sues and gets a decree; on this decree execution can follow and the estate can be taken. A suing upon his mortgage cannot recover. It seems to have been felt that if the debt for which a mortgage is given was in any proper sense, antecedent, then it, so to speak, escaped the direct infringement of the principle that the father manager could not burden the estate except for necessity."

In fact and apart from the dicta to be found in *Sahu Ram Chandra v. Bhup Singh*(1), no authority for the proposition can be found either in the texts or the decided cases. Even in that case it is to be observed that the Judicial Committee were not dealing

(1) (1917) I.L.R. 39 All. 437 (P.C.).

with the nature or incidents of a father's alienation for the purpose of fixing the character of his liability consequent on the alienation being set aside at the instance of the sons; much less for the purpose of determining the scope of the pious obligation of the latter. It would therefore be wrong, in my opinion, to rely on this decision in justification of the view that the liability to refund is an immoral debt which the sons are not bound to discharge; and my opinion receives support from the decision of this Court in *Kandasami Goundan v. Kuppu Mooppan*(1). See also *Shanmukam v. Nachu Ammal*(2) and *Vennimal Pillai v. P. & O. Banking Corporation Ltd.*(3). What has always to be remembered in this connection is that a father's debt even though incurred for his own personal purposes has still to be discharged by the sons, notwithstanding that it met no necessity or procured no benefit for the joint family. It is therefore difficult to see how the fact that money was obtained for such purposes under a purported sale, so long as the object was neither illegal nor immoral, can alter the character of the liability or convert the resulting obligation into *avyavaharika* debt. It is the purpose for which the money is obtained which determines the character of the debt and not the means adopted which may vary. It follows from what has been said that the observations of the learned Chief Justice cannot be taken to represent the correct rule of law on the point in question.

SESHAGIRI AYYAR J. delivered a separate judgment though he concurred with the Chief Justice. He took the occasion for expressing the view that the

LINGAYYA
v.
PUNNAYYA.
—
KRISHNASWAMI
AYYANGAR J.

(1) (1919) I.L.R. 43 Mad. 421.

(2) (1936) 44 L.W. 738.

(3) 1936 M.W.N. 863.

LINGAYYA
v.
PUNNAYYA.
—
KRISHNASWAMI
ATTYANGAR J.

pious obligation of the son to discharge the debts of the father which were neither illegal nor immoral was in the nature of a moral precept which should never have been recognized by Courts of law and indeed he went the length of wishing that the texts on the point had been consigned to the limbo of oblivion as, in his opinion, they involved a theory incongruous with modern conditions. This, however, is an opinion which few, I consider, will share. As long as the joint family system lasts with its doctrine of survivorship and the recognition of equal and co-ordinate rights in the sons, so long it seems to me that the theory of pious obligation should be maintained in the interests of the fair name of Hindu law and its title to take rank with civilized systems of jurisprudence. Mayne in his well-known treatise on Hindu law (Mayne's Hindu Law, Ninth Edition, paragraph 348) explains the rule underlying the principle thus :

"The notion of a religious as well as a civil obligation to pay debts evidences the introduction of Brahmanical theories into a law *which was previously founded merely upon natural justice*. The kindred theory that the soul of a deceased debtor could not find repose till his debts were discharged probably grew up still later. The religious theory of obligation could well co-exist with the civil theory, as affording an additional sanction for a liability *which was already recognized*. The antiquity of the texts which state this religious theory shows that it had sprung up before the family bonds were relaxed, by allowing the sons to possess a co-ordinate interest in the property and a right to restrain their father in his dealings with it. But even after this later development, natural equity and convenience would continue to attach a specially binding character to debts which were contracted by the official head and representative of the family, while the religious obligation would assume greater prominence in proportion as the secular obligation was weakened." (The italics are mine.)

The basis of the rule also fell to be explained by the Allahabad High Court in *Lalta Prasad v. Gajadhar Shukul*(1) where IQBAL AHMAD J., as he then was, made the following pertinent observations :—

LINGAYYA
v.
PUNNAYYA.
—
KRISHNASWAMI
ATTYANGAR J.

"So far as I can see, this rule was introduced as a sort of corrective to the rule that every male member of a joint Hindu family acquires an interest in the joint family property from the moment of his birth, and therefore no member of such family can predicate the extent of his share or can alienate the same. If by the mere fact of his birth the newly born son acquires an interest in the joint family property and thus automatically reduces the extent of his father's interest in the same, it is but fair and just that he should shoulder along with the father the liabilities of the father. To make provision for the payment of debts due to a creditor far from being 'unsuited to any but a primitive and patriarchal society' is in consonance with common honesty and is, I should think, the recognized practice of the civilised world. The liability imposed on a son to pay the just debts of his father is not a gratuitous obligation thrust on him by Hindu law but is a necessary corollary—if not a salutary counter-balancing proviso—to the principle that the son from the moment of his birth acquires along with the father, an interest in joint family property."

It appears to me that the statement of the law contained in the passages extracted above exhibit a truer perception of the fundamentals of the doctrine and there would seem to be little reason either for those who are governed by the Hindu law to feel ashamed of it or for the Courts which are called upon to administer it to feel any compunction in enforcing it. I also regret to say that I find it difficult to follow the dictum that a father can hardly be expected to be rescued from hell when the son is compelled very much against his will and with imprecations in his mouth by a decree of Court to make the payment. With religious beliefs held or denied, the Court has nothing

(1) (1932) I.L.R. 55 All. 283.

LINGAYYA
v.
PUNNAYYA.
—
KRISHNASWAMI
AYYANGAR J.

to do. But even under the ancient texts, it is to be remembered that the liability of the son, whether it had its origin in secular or religious considerations, was a rule of law and not a rule of morality binding merely on the conscience. However that may be, it is hard to appreciate the argument; for, surely the redemption of the father cannot depend upon the state of mind of the son who pays the debt but on the fact of its discharge whatever the reason behind.

The learned Judge has also expressed the view that the statement of the Judicial Committee in *Sahu Ram Chandra v. Bhup Singh*(1) about the sale by the father amounting to a breach of trust deserved to be strictly enforced, in which event, he was of opinion that the decisions in *Venugopala Naidu v. Ramanadhan Chetty*(2), *Hanumat Mahton v. Sonadhari Singh*(3), *Ramakrishna Trimbak v. Narayan*(4) and *Hanmant Kashinath v. Ganesh Annaji*(5) would stand in need of review as they tried to put a strained construction on the rule of pious obligation. Here again, there is need for caution and a wholesale denunciation is, if I may say so with respect, scarcely warranted. If the theory that a sale by the father even when made for no justifiable purpose is a breach of trust is negatived, as I think it should be, the learned Judge's criticism of these cases, even if sound, would be found to be of little weight in advancing the argument. But it may be pointed out that the cases decided by this Court bearing on the question whether a son is liable for the debt of the father connected with a breach of trust have been recently considered by this Court in *Anandarao v. Co-operative Credit Society, Pedatadepalli*(6)

(1) (1917) I.L.R. 39 All. 437 (P.C.).

(3) (1919) 4 P.L.J. 653.

(5) (1918) I.L.R. 43 Bom. 612.

(2) (1912) I.L.R. 37 Mad. 458.

(4) (1915) I.L.R. 40 Bom. 126.

(6) I.L.R. [1941] Mad. 27.

in the light of the decision of the Privy Council in *Toshanpal Singh v. District Judge of Agra*(1) and my Lord the Chief Justice has, if I may say so with respect, clearly stated the principle in the following words:—

“This Court has always held that where a father has fully received money, the fact that he misappropriates it later will not change the character of the debt and the son is liable under the pious obligation rule. Where a person receives money on behalf of another a civil liability immediately arises and the fact that the person who has received it fails in his duty to pay it over to the person entitled to it does not alter the civil character of the debt.”

The question which arises in this class of cases is whether a liability of the father having its origin in a criminal act of his gives rise to a debt falling within the pious obligation rule, and the answer clearly is that it does not. It is certainly not a crime or anything akin to it for a father to raise money for his personal needs by selling family property. The restraint on his powers in this behalf is merely designed to provide some measure of check, albeit temporary in character.

A close examination of the judgment of SESHAGIRI AYYAR J. reveals that it is based upon two grounds, namely,

(i) that the claim of the disappointed purchaser for a refund of the consideration on the sale in his favour being set aside at the instance of the sons is really in the nature of a claim for damages against the father which does not materialise into a debt until the sale is set aside;

(ii) that if on that date the father was already dead or a division in status had been established between him and his sons, the latter would not in

(1) (1934) I.L.R. 56 All. 548 (P.C.).

LINGAYYA
v.
PUNNAYYA.
—
KRISHNASWAMI
AYYANGAR J.

LINGAYYA
v.
PUNNAYYA.
KRISHNASWAMI
AYYANGAR J.

either event be liable. With respect to the first ground, I have little to add to what has fallen from my Lord the Chief Justice. As regards the second ground I may perhaps add that the law on the point which was involved in a certain amount of doubt has since been elucidated by the Full Bench decision in *Subramania Ayyar v. Sabapathy Aiyar*(1) which has firmly established the liability of the sons after partition for a debt of the father incurred before it. After this decision the only point which may require consideration is whether the obligation is one which has been incurred by the father before partition, and whether it is tainted by illegality or immorality. His subsequent death would make no difference; neither would a subsequent severance of status. I respectfully agree with my Lord in holding that the liability of the father, contingent though it be, is still inherent in the sale itself, and not a new liability coming into existence for the first time when the sale is set aside.

Of the decisions referred to by SESHAGIRI IYER J. at page 809, the case in *Sivaganga Zamindar v. Lakshmana*(2) will be found on examination to have no reference to the question of the liability of the sons for a debt of the father after partition. *Krishnasami Konan v. Ramasami Ayyar*(3) has been interpreted in the Full Bench decision in *Subramania Ayyar v. Sabapathy Aiyar*(1) and held not to affect the principle laid down in it. The actual decision in *Kilaru Kotayya v. Polavarapu Durgayya*(4) goes no further than that in the suit by the sons for the recovery of their share in the joint family property sold by their father for purposes not binding on the family, the purchaser is not entitled to any charge on the sons' share for any

(1) (1927) I.L.R. 51 Mad. 361 (F.B.).
(3) (1899) I.L.R. 22 Mad. 519.

(2) (1885) I.L.R. 9 Mad. 188.
(4) (1918) 35 M.L.J. 451.

portion of the consideration paid by him. It expressly left open the question whether or not he was entitled to sue the father and the sons by a separate suit for the refund of the consideration which had failed. The learned Judge's judgment in *Raman Pandithan v. Satha Cudumban*(1) is clearly in point, and there the Court held that the debt of the father arose when he made the invalid sale and that it made no difference to the liability of the sons that the purchaser's claim was in the nature of unliquidated damages against the father. The position here taken is, if I may say so with respect, quite correct, only we must understand the word "debt" used in this decision as well as in the case in *Kilaru Kotayya v. Polavarapu Durgayya*(2) in the wider sense in which the word "*rina*" is used in Hindu law.

For the reasons explained, I am of opinion that the view of SESHAGIRI AYYAR J., that the death of the father or the disruption of the joint family before the sale is set aside would deprive the purchaser of his remedies as against the sons, cannot be supported either on principle or authority. I may add that for an obligation of the father to be enforceable against the sons, it does not require to be converted into a decree in the first instance.

V.V.C.

(1) (1916) 31 M.L.J. 502.

(2) (1918) 35 M.L.J. 451.

LINGAYYA
v.
PUNNAYYA.
KRISHNASWAMI
AYYANGAR J.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Kuppuswami Ayyar.

1941,
December 8.

N. P. L. EGAPPA CHETTIAR, MINOR THROUGH HIS NEXT
FRIEND V. A. V. SUBRAMANIAN CHETTIAR (PLAINTIFF),
APPELLANT,

v.

RM. S. V. L. RAMANATHAN CHETTIAR AND SIX OTHERS
(DEFENDANTS), RESPONDENTS.*

Minor—Decree against—Setting aside on ground of gross negligence of guardian—Suit therefor by minor, competent.

A minor can sue to set aside a decree passed against him in a suit not only on the ground of fraud or collusion but also on the ground of gross negligence on the part of his guardian in the suit.

Case law reviewed and discussed.

Punnayyah v. Viranna(1) followed.

Venkata Seshayya v. Kotiswara Rao(2) explained.

APPEAL against the decree of the Court of the Subordinate Judge of Devakottai, dated 29th July 1938 and passed in Original Suit No. 59 of 1937.

T. V. Muthukrishna Ayyar and *T. V. Ramiah* for appellant.

C. A. Md. Ibrahim and *T. S. Santhanam* for first and second respondents.

R. Kesava Ayyangur for fifth respondent.

O. T. G. Nambiar for seventh respondent.

Other respondents were not represented.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—The appellant instituted this suit in the Court of the Subordinate Judge of Devakottai for a

* Appeal No. 35 of 1939.

(1) (1921) I.L.R. 45 Mad. 425.

(2) I.L.R. [1937] Mad. 263 (P.C.).

declaration that the decree passed in Original Suit No. 88 of 1933 by the Subordinate Judge of Coimbatore is void and therefore not binding on him. When that suit was tried the appellant was a minor and his adoptive mother acted as his guardian *ad litem* at all times material to the present suit. The suit resulted in a decree being passed against him for the payment of the sum of Rs. 31,497-10-6. It had been filed to recover money deposited with a firm belonging to the family in which the appellant was born. Before the suit was instituted he was given in adoption to another family and therefore was not responsible for the liabilities of his father's family. In the present suit the appellant averred that his guardian *ad litem* had been guilty of gross negligence in that she had not pleaded a partition and in not proving his adoption. At the hearing the Official Assignee, who is the seventh defendant, raised the contention that the suit was not maintainable unless the plaintiff could show fraud or collusion, although this plea was not raised in his written statement. An issue was, however, framed and the question was argued. The result was that the Subordinate Judge came to the conclusion that the suit did not lie unless fraud or collusion was alleged and, consequently, he dismissed the suit with costs. The appeal is from this decision.

For many years this Court has consistently held that it is open to a minor to challenge a decree passed against him on the ground that his guardian had been grossly negligent in the conduct of the suit. The leading case is *Punnayyah v. Viranna*(1) and this has been followed on numerous occasions since. In *Karri Bapanna v. Yerramma*(2) the Court went a step further

(1) (1921) I.L.R. 45 Mad. 425.

(2) (1921) 45 M.L.J. 324.

EGAPPA
v.
RAMANATHAN.
LEACH C.J.

EGAPPA
v.
RAMANATHAN.
LEACH C.J.

and held that a minor could by way of defence raise a plea of gross negligence on the part of his guardian *ad litem* in a previous suit. The opinion of this Court expressed in *Punnayyah v. Viranna*(1) is shared by the High Courts of Calcutta, Allahabad, Patna, Lahore and, until recently, by the Bombay High Court. At first the Calcutta High Court took the view that a minor could not maintain such a suit without pleading fraud or collusion on the part of his guardian; see *Raghubar Dyal Sahu v. Bhikya Lal Misser*(2). But a contrary opinion was expressed some ten years later in *Lalla Sheo Churn Lal v. Ramnandan Dobey*(3). The opinion formed in that case is still maintained; see *Mahesh Chandra Bayan v. Manindra Nath Das*(4). A Full Bench of the High Court of Allahabad considered the question in *Siraj Fatma v. Mahmud Ali*(5) and came to the conclusion that a suit would lie even in the absence of fraud or collusion, if there had been gross negligence. The Patna High Court came to the same conclusion in *Mathura Singh v. Rama Rudra Prasad Sinha*(6). Like the Calcutta High Court, the Lahore High Court at first held that there must be fraud or collusion. The first decision was given in *Imam Din v. Puran Chand*(7) in which reliance was placed on *Raghubar Dyal Sahu v. Bhikya Lal Misser*(2), but in two later cases, *Fazal Din v. Md. Shafi*(8) and *Punnun Mal v. Bishambar Dayal*(9), the opinion that gross negligence is sufficient to found a suit was expressed.

The earlier decisions of the Bombay High Court were to the effect that gross negligence gave a minor a cause of action; see *Cursandas Natha v. Laddkavahu*(10),

(1) (1921) I.L.R. 45 Mad. 425.

(3) (1894) I.L.R. 22 Cal. 8.

(5) (1932) I.L.R. 54 All. 646 (F.B.).

(7) (1919) I.L.R. 1 Lah. 27.

(9) A.I.R. 1940 Lah. 205.

(2) (1885) I.L.R. 12 Cal. 69.

(4) I.L.R. [1941] 1 Cal. 477.

(6) (1935) I.L.R. 14 Pat. 824.

(8) A.I.R. 1928 Lah. 674.

(10) (1895) I.L.R. 19 Bom. 571.

EGAPPA
v.
MANATHAN.
LEACH C.J.

Hanmantapa v. Jivubai(1) and *Sureshchandra v. Bai Ishwari*(2). But strong doubt was expressed by BEAUMONT C.J. in *Auraj Joharmal v. Dalpat Supadu*(3) When the question was raised later in *Krishnadas Padmanabhrao v. Vithoba Annappa*(4) it was referred to a Full Bench. In that case the learned Chief Justice expressly held that under the English law an infant cannot challenge a decree properly passed against him on the ground that his guardian *ad litem* was guilty of gross negligence in suffering the decree and, that being so, there was no reason why such a cause of action should lie in British India. The other learned Judges concurred. The result is that in Bombay a suit cannot be instituted unless there is fraud or collusion averred.

In the present case the Subordinate Judge considered that *Punnayyah v. Viranna*(5) had been overruled by the decision of the Privy Council in *Venkata Seshayya v. Kotiswara Rao*(6) and for this reason he held in favour of the defendants on the preliminary issue. The Subordinate Judge failed to appreciate the judgment of the Judicial Committee. It is manifest that it does not in any way affect the judgment in *Punnayyah v. Viranna*(5). In *Venkata Seshayya v. Kotiswara Rao*(6) the plaintiff sought a declaration that certain temples in the Guntur District were public temples and that certain lands formed their endowments. It was contended for the defendants that the doctrine of *res judicata* applied as the questions in issue had been raised and decided in a former suit. With a view to meeting this contention the plaintiffs pleaded that the plaintiffs in the

(1) (1900) I.L.R. 24 Bom. 547.

(3) I.L.R. [1937] Bom. 839.

(5) (1921) I.L.R. 45 Mad. 425.

(2) (1937) 40 Bom. L.R. 127.

(4) I.L.R. [1939] Bom. 340 (F.B.).

(6) I.L.R. [1937] Mad. 263 (P.C.).

EGAPPA
v.
RAMANATHAN.
LEACH C.J.

former suit had been guilty of gross negligence. In the trial Court and in this Court the principles relating to negligent conduct in previous litigation by a guardian in the name of a minor were accepted as being applicable to a case in which the parties were litigating on behalf of a public institution, but the Judicial Committee held that these principles did not apply. After referring to *Lalla Sheo Churn Lal v. Ramnandan Dobey*(1), *Punnayyah v. Viranna*(2), *Karri Bapanna v. Yerramma*(3) and *Ananda Rao v. Appa Rao*(4), Lord THANKERTON in delivering the judgment of the Board observed :

"Their Lordships are not concerned to discuss the validity of these decisions, or the elusive distinction between negligence and gross negligence, as they are satisfied that the principle involved in these cases is not applicable to such cases as the present one. The protection of minors against the negligent actings of their guardians is a special one, and in these cases the plaintiff in the second suit was also the plaintiff in the former suit, although in the earlier suit he or she had sued through a guardian. Their Lordships would only add that they are not prepared to agree with the view expressed in *Karri Bapanna's* case(3) that the principle of section 44 of the Indian Evidence Act can be extended to cases of gross negligence."

Their Lordships did not decide the question whether a person could rely on the gross negligence of his guardian *ad litem* in a previous suit when he sought to set aside the decree passed therein. They were merely considering whether the principle expressed in India should be extended to suits with regard to public religious trusts and the answer was in the negative. Their Lordships did indicate that *Karri Bapanna v. Yerramma*(3) certainly went too far, but they did not go beyond this. In *Krishnadas Padmanabhras v. Vithoba*

(1) (1894) I.L.R. 22 Cal. 8.
(3) (1921) 45 M.L.J. 324.

(2) (1921) I.L.R. 45 Mad. 425.
(4) (1924) 47 M.L.J. 700.

Annappa(1) the Full Bench, which decided that appeal, also held that the Privy Council in *Venkata Seshayya v. Kotiswara Rao*(2) had not determined this question. The Calcutta High Court in *Mahesh Chandra Bayan v. Manindra Nath Das*(3) has read the judgment of the Judicial Committee as indicating that a minor is in a special position and as affirming *Punnayyah v. Viranna*(4) and *Lalla Sheo Churn Lal v. Ramnandan Dobey*(5). In *Punnun Mal v. Bishambar Dayal*(6) the Lahore High Court also agreed that the judgment of the Privy Council in *Venkata Seshayya v. Kotiswara Rao*(2) does not effect any change in the law. As in our opinion this is undoubtedly the case, this appeal will be allowed and the suit remanded to the trial Court to hear and determine the remaining issues.

The appellant is entitled to his costs in this Court. The costs in the trial Court will abide the further hearing. The appellant is also entitled to a refund of the court-fee paid on the memorandum of appeal.

Solicitors for s. venth respondent : *King & Partridge*.

N.S.

(1) I.L.R. [1939] Bom. 340 (F.B.). (2) I.L.R. [1937] Mad. 263 (P.C.).
(3) I.L.R. [1941] 1 Cal. 477. (4) (1921) I.L.R. 45 Mad. 425.
(5) (1894) I.L.R. 22 Cal. 8. (6) A.I.R. 1940 Lah. 205.

APPELLATE CIVIL.

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

1941,
November 18.

SRI RAJAH SAHEB MEHARBAN-I-DOSTAN SRI
RAJAH RAVU VENKATA KUMARA MAHIPATI
SURYA RAO BAHADUR GARU, MAHARAJA OF
PITHAPURAM (PLAINTIFF), APPELLANT,

v.

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

Rivers—Bed of—Public navigable river in Madras Presidency—Ownership of, in Crown—Tidality not essential—Rule of English common law inapplicable—Permanent settlement sanad—Construction of—Long enjoyment by zamindar of formations in bed of public navigable river—Recognition of enjoyment, by Government officials—Ineffective in absence of proof of adverse possession—Lankas—Lateral accretions—Re-formations in situ—Ownership of.

The Zamindar of Pithapuram claimed ownership of a number of lankas formed in the bed of the river Godavari on the grounds, *inter alia*, (i) that the rule of English common law recognized a right in the Crown to the bed of a river, only where it is both tidal and navigable, and the Godavari having been admitted to be non-tidal though navigable in the locality where the disputed lankas were situated, the bed of that part of the river did not vest in the Crown; (ii) that the permanent sanad granted by the Government to the zamindar in 1803 included also the bed of the river in that portion; and (iii) that the lankas in dispute were either re-formations of or lateral accretions to the lankas which were admitted to belong to him.

Held: (i) The Godavari was a public navigable river of great importance and its bed vested in the Crown.

* Appeals Nos. 89 of 1937, 151 and 152 of 1938.

The conditions in the Madras Presidency are so dissimilar from those in Great Britain that the rule of English common law relating to tidal and navigable rivers is not applicable here without modification and public rights should be recognized in the beds of rivers which are not tidal but navigable.

Srinath Roy v. Dinabandhu Sen(1) and *Secretary of State for India v. Venkatanarasimha Naidu*(2) followed.

Secretary of State for India v. Subbarayudu(3) and *Dawood Hashim Esoof v. C. Tuck Sein*(4) explained and distinguished.

Case law reviewed and discussed.

(ii) The claim of the zamindar to the bed of the river must be rejected. There was nothing in the sanad itself which indicated that the Government intended to vest the bed of the river in the holder of the zamindari. The fact that officials of the revenue department of the Government allowed the holder of the zamindari to take possession of new formations in the bed of the river without objection cannot in itself affect the rights of the Crown in the absence of a claim based on adverse possession.

(iii) Some only of the lankas in dispute were either lateral accretions to or re-formations of the lankas previously belonging to the zamindar and the zamindar was entitled to those lankas only and not to others.

APPEALS against the decrees of the Court of the Subordinate Judge of Cocanada in Original Suits Nos. 52, 53 and 54 of 1936 respectively.

Advocate-General (Sir A. Krishnaswami Ayyar),
Ch. Raghava Rao and *K. Subrahmanyam* for appellant.

Government Pleader (K. Kuttikrishna Menon),
N. Srinivasa Ayyangar and *A. Rama Rao* for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by
LEACH C. J.—These three appeals arise out of separate LEACH C.J.

(1) (1914) I.L.R. 42 Cal. 489 (P.C.). (2) (1919) 11 L.W. 256.
(3) (1931) I.L.R. 55 Mad. 268 (P.C.).
(4) (1931) I.L.R. 9 Ran. 122 (P.C.).

MAHARAJA OF
PITHAPURAM
v.
SECRETARY OF
STATE FOR
INDIA.
LEACH C.J.

suits instituted by the appellant with the object of establishing title to certain lankas, or alluvial islands, in the river Godavari. In Original Suit No. 52 of 1936 out of which Appeal No. 89 of 1937 arises, the appellant claimed the ownership of eighteen lankas but, only succeeded in respect of two of them. The suits out of which Appeals Nos. 151 and 152 of 1938 arise were dismissed in their entirety. All the suits were tried together by the Subordinate Judge of Cocanada and were decided in one judgment. In Appeal No. 89 of 1937 the respondent has filed a memorandum of cross-objections which challenges the correctness of the Subordinate Judge's decision that the appellant had established ownership of two of the lankas. It is common ground that, if the questions of law which arise in Appeal No. 89 of 1937 are decided against the appellant, Appeals Nos. 151 and 152 of 1938 must fail. In the circumstances this judgment will be confined to the main appeal until all the questions arising therein have been dealt with.

The appellant is the proprietor of the ancient Zamindari of Pithapuram in the Godavari District of the Madras Presidency. The zamindari was included in the permanent settlement of 1801, and on 5th May 1803 a sanad was issued by Lord Clive, the Governor in Council of Fort Saint George, confirming the holder's rights in the lands forming the estate. The document, however, did not define the lands, but it is conceded on behalf of the respondent that they must have included the lanka lands of the village of Mulakallanka which was, and still is, situate within the banks of the river. In 1861 the revenue department of the Government surveyed this part of the river, and the plan prepared as the result recognized that the appellant was the owner of certain of the lankas then in existence.

It is common ground that the eighteen lankas in dispute in Appeal No. 89 of 1937 were not then in existence. They had, however, all appeared by 1901 when the river conservancy authorities made a survey of the river. In a river like the Godavari, lankas sometimes appear suddenly, but whether the disputed lankas were formed suddenly or gradually is not to be gathered from the evidence. All that we have is that they were there in 1901. It is also common ground that after their formation the appellant took possession of them and leased to tenants those portions which were fit for cultivation. In 1921 the Lanka Inspector prepared a new plan and, as the result, the appellant was called upon to show cause why he should not be proceeded against under sections 5 and 6 of the Madras Land Encroachment Act for unauthorized occupation of the disputed lankas. Lengthy correspondence followed between the appellant and the Collector of East Godavari without the appellant being able to convince the Government that his claims were well founded and on 14th February 1937 the Collector demanded the sum of Rs. 1,16,229-2-8 as the revenue assessed upon these lands for the years 1917 to 1926, and payment was enforced. On 26th June 1927 the appellant was called upon to vacate the disputed lankas and was informed that in default he would be summarily evicted. Thereupon the appellant filed a suit claiming (i) a declaration of his title, (ii) the refund of the Rs. 1,16,229-2-8, and (iii) an injunction restraining the respondent from evicting him. The suit was originally filed in the Court of the District Judge of East Godavari and numbered Original Suit No. 22 of 1927, but in 1929 it was transferred to the Court of the Subordinate Judge of Rajahmundry and in 1936 to the Court of the Subordinate Judge of

MAHARAJA OF
PITHAPURAM
v.
SECRETARY OF
STATE FOR
INDIA.
LEACH C.J.

MAHARAJA OF
PITHAPURAM
v.
SECRETARY OF
STATE FOR
INDIA.
LEACH C.J.

Cocanada. The reason for the second transfer was that the Principal Subordinate Judge of Rajahmundry had begun the hearing but had not completed it before he himself was transferred to Cocanada. In the Cocanada Court the suit was re-numbered Original Suit No. 52 of 1936.

In this part of the river there is a large lanka, known as the Pedda lanka, the southern portion of which belongs to the Zamindar of Pithapuram and the northern portion to another proprietor. This lanka was in existence in 1874 and in that year a dispute arose between the two proprietors with regard to the boundary. The dispute gave rise to a suit in the Court of the District Judge (Original Suit No. 3 of 1874). The dispute was settled by the District Judge drawing a line between a point on the western bank and a point on the eastern bank. In 1896 there was a boundary dispute in respect of a lanka lying some distance south of the Pedda lanka. On this occasion the disputants were the Zamindar of Pithapuram and the Government. This dispute was settled by the Sub-Collector in a similar manner. The lankas now in suit lie within the lines drawn by the District Judge and the Sub-Collector. The appellant claims that he is entitled to all the lankas which fall within the area bounded on the north by the line drawn by the District Judge in Original Suit No. 3 of 1874, on the east by the eastern bank of the river, on the south by the line drawn by the Sub-Collector in 1896 and on the west by the western bank of the river. In the first place, the appellant bases his claim on the fact that he is the owner of the lands on both banks of the river which is here non-tidal. He points to the fact that the common law only recognizes a right in the Crown to the bed of a river where it is both navigable and tidal. In the

trial Court the appellant contended that the river was not even navigable in this part, but the Subordinate Judge held that it was, and the appeal has proceeded on the basis that the Godavari is a public navigable river. In the second place, the appellant claims that by the sanad issued in 1803 the Government granted to the zamindari the bed of the river in so far as it lies within the area already mentioned. He also claims title to the disputed lankas on the ground that they represent lateral accretions to or re-formations of lankas which are admittedly his. The respondent denies the validity of all these claims. The Subordinate Judge held that in India the bed of a public navigable river, whether tidal or not, is vested in the Crown, that the sanad confers on the appellant no title to the bed of the river and that sixteen of the eighteen lankas represent formations unconnected with the lands of the appellant. Other questions were raised in the trial Court, but the appeal has been confined to those indicated.

The question whether the bed of a public navigable river in India vests in the Crown involves the examination of a number of decisions of the Privy Council but, before entering upon this task, it will not be out of place to say something with regard to the nature of the Godavari river. In 1907 Mr. F. R. Hemingway, a member of the Indian Civil Service, compiled at the instance of the Government a gazetteer of the Godavari District, and this contains much useful information. In the course of the description of the river, the author of the Godavari District Gazetteer at page 4 says :

"Among the great rivers of India the Godavari takes rank next after the Ganges and the Indus. It runs nearly across the peninsula, its course is 900 miles long, and it receives the drainage from 115,000 square miles, an area greater than

MAHARAJA OF
PITHAPURAM
v.
SECRETARY OF
STATE FOR
INDIA.
LEACH C.J.

MAHARAJA OF
PITHAPURAM
v.
SECRETARY OF
STATE FOR
INDIA.
—
LEACH C.J.

that of England and Scotland combined. Its maximum discharge is calculated to be one and a half million cubic feet per second, more than two hundred times that of the Thames at Staines and about three times that of the Nile at Cairo."

After describing the river's course to the Eastern Ghats, through which it forces its way, the author proceeds at page 5 :

"In flood time the water flows with terrific force. . . . Native boatmen are much afraid of navigating the river at such times. . . . So great is the action of the stream during floods that the rocky bed has been scoured out to depths popularly supposed to be unfathomable but which really vary normally from 100 to nearly 200 feet. High floods rise quite 50 feet above the normal level, so that the gorge then encloses a torrent of waters from 150 to 250 feet in depth."

The Godavari flows into the Bay of Bengal and a few miles from the coast it has formed a delta. With regard to this part of the river, the author of the Gazetteer says at page 6 :

"Seven traditional mouths are recognized as sacred by Hindus. The holy waters of the Godavari are said to have been brought from the head of Siva by the saint Gautama, and the seven branches by which it is traditionally supposed to have reached the sea are said to have been made by seven great rishis. The mouths of these are considered especially holy, and to bathe in the sea at any one of them is considered an act of great religious efficacy."

The village of Mulakallanka is some fifty miles from the mouth of the river.

It is impossible to compare a river like the Godavari with any river in England, and this is sufficient in itself to make one hesitate to apply to it common law rules with regard to riparian ownership. The great difference in conditions in India from those in England was referred to by BURN J. in *Secretary of State*

for *India v. Venkatanarasimha Naidu*(1) where he observed that conditions in Madras are so dissimilar from those in Great Britain that it might well be that the English common law rule should not be applied without modification and that public rights should be recognized in the beds of rivers which are navigable but not tidal. That this opinion is well founded appears to us to be clear from the judgments of the Privy Council in *Sri Balusu Ramalakshamma v. The Collector of the Godavari District*(2), *Srinath Roy v. Dinabandhu Sen*(3), *Haradas v. The Secretary of State for India in Council*(4), *Naresh Narayan Roy v. Secretary of State for India*(5) and *Tarakdas Acharjee Choudhury v. The Secretary of State for India in Council*(6).

In *Sri Balusu Ramalakshamma v. The Collector of the Godavari District*(2) the Judicial Committee were called upon to decide a case which also concerned newly formed land in the Godavari river. The plaintiff claimed the land as an accretion to a lanka belonging to her, but it was found that the accretion pertained to a lanka owned by the Government higher up the stream. In the course of the appeal the appellant endeavoured to set up a claim to the ownership of the river bed on the strength of being the owner of the land on both banks. This claim had not been suggested in the trial Court and the appellant was not allowed to raise it in the appeal. In the course of the judgment the Privy Council considered that, although there is not in Madras, as there is in Bengal, an express law embodying the principle that gradual alluvion enures

MAHARAJA OF
PITHAPURAM
v.
SECRETARY OF
STATE FOR
INDIA.
—
LEACH C.J.

(1) (1919) 11 L.W. 256. (2) (1899) I.L.R. 22 Mad. 464 (P.C.).
(3) (1914) I.L.R. 42 Cal. 489 (P.C.).
(4) (1917) 26 C.L.J. 590 (P.C.). (5) (1923) I.L.R. 50 Cal. 446 (P.C.).
(6) (1935) 69 M.L.J. 171 (P.C.).

MAHARAJA OF
PITHAPURAM
v.
SECRETARY OF
STATE FOR
INDIA.
LEACH C.J.

to the land to which the accretion is made, the rule is equally well established in both the provinces. Their Lordships intimated, however, that they had grave doubts whether the presumption applicable to little English rivers applies to great Indian rivers such as the Godavari.

The Judicial Committee refused to apply the English common law in *Srinath Roy v. Dinabandhu Sen*(1). There the appellants claimed to be the proprietors of a fishery in the tidal waters of the Ganges in Eastern Bengal. As the result of a sudden change in the course of the river, the waters of the fishery flowed over private lands, and the respondents pleaded their right to fish in a portion of the channel of which they owned both the bed and the banks. The Board held that the English common law of waters could not be applied in its entirety and that, where a right to fish had been granted by the Government, the right continues notwithstanding that there is a violent change in the course of the river which causes it to flow over private lands. It was pointed out that in the deltaic area of Lower Bengal changes occur rarely by slow degrees and often with an almost cataclysmal suddenness. The judgment was delivered by Lord SUMNER who inquired into the extent of the application of the English common law in the United States of America and his investigations showed that some of the States had refused to follow it because it was inapplicable to conditions there. In this connection Lord SUMNER said :

“The question how far a rule established in this country can be usefully applied in another, whose circumstances, historical, geographical and social, are widely different is well illustrated by the case of navigability as understood in the law of the

(1) (1914) I.L.R. 42 Cal. 489 (P.C.).

different States of the United States of America. Navigability affects both rights in the waters of a river, whether of passing or re-passing or of fishing, and the rights of riparian owners, whether as entitled to make structures on their soil which affect the river's flow or as suffering in respect of their soil quasi-servitudes of towing, anchoring, or landing in favour of the common people. The Courts of the different States, minded alike to follow the common law where they could, found themselves in the latter part of the eighteenth and the early part of the nineteenth centuries constrained by physical and geographical conditions to treat it differently. In Massachusetts, Connecticut, New Hampshire and Vermont, where the rivers approximated in size and type to the rivers of this country, the English common law rule was followed, that tidality decided the point at which the ownership of the bed and the right to fish should be public on the one side and private on the other. Other States, though possibly for other reasons, since they possessed rivers very different in character from those of England, namely, Virginia, Ohio, Illinois and Indiana followed the same rule. But in Pennsylvania, North Carolina, Iowa, Missouri, Tennessee and Alabama this rule was disregarded, and the test adopted was that of navigability in fact, the Courts thus approximating to the practice of Western Europe.”

Lord SUMNER went on to add :

“The reasoning has been put pointedly in Pennsylvania. Chief Justice TILGHMAN says in *Carson v. Blazer*(1) ‘the common law principle concerning rivers’ (viz., that rivers, where the tide does not ebb and flow, belong to the owners of adjoining lands on either side) ‘even if extended to America, would not apply to such a river as the Susquehanna, which is a mile wide and runs several hundred miles through a rich country, and which is navigable and is actually navigated by large boats. If such a river had existed in England no such law would ever have been applied to it.’”

The present case is concerned with an Indian river more than three miles wide in the relevant area and one which flows through a rich sub-continent for nine hundred miles.

(1) (1810) 2 Binney 477.

MAHARAJA OF
PITHAPURAM
v.
SECRETARY OF
STATE FOR
INDIA.
LEACH C.J.

MAHARAJA OF
PITHAPURAM
v.
SECRETARY OF
STATE FOR
INDIA.

LEACH C.J.

Lord BUCKMASTER, in delivering the judgment of the Privy Council in *Haradas v. The Secretary of State for India in Council*(1), said :

"The river Ganges in its course through the District of Dacca rests so uneasily in its bed that its boundaries can never at any moment be defined with the certainty that their limitation will be long observed. Frequently the river leaves its course, flows over large tracts of land, leaving other areas bare, and then again its waters recede, giving back the lands submerged in whole or in part to use and cultivation. It is obvious that difficulties as to ownership must arise in these circumstances, and of the extent and complication of these difficulties the present case affords an excellent illustration. The general law that is applicable is free from doubt. The bed of a public navigable river is the property of the Government though the banks may be the subject of private ownership. If there be slow accretion to the land on either side, due, for instance, to the gradual accumulation of silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made. (See Regulation XI of 1825.) If private property be submerged and subsequently again left bare by the water, it belongs to the original owner."

In that case the plaintiffs claimed that a large tract of land formerly under the river Ganges formed part of a permanently settled zamindari in the Dacca District of Bengal. The passage extracted from the judgment in *Haradas v. The Secretary of State for India in Council*(1) was quoted by Lord PHILLIMORE in *Naresh Narayan Roy v. The Secretary of State for India*(2) and was referred to as stating the principles upon which a tribunal should act in a claim of that kind.

The latest pronouncement of the Privy Council is that contained in *Tarakdas Acharjee Choudhury v. The Secretary of State for India in Council*(3) which

(1) (1917) 26 C.L.J. 590 (P.C.).
(2) (1923) I.L.R. 50 Cal. 446 (P.C.).
(3) (1935) 69 M.L.J. 171 (P.C.).

also referred to the ownership of large tracts of land formed by the recession of the Ganges in the Dacca District of Bengal. In this case their Lordships observed :

"It is beyond question that the bed of a public navigable river, and the river Ganges undoubtedly belongs to that category, is presumed to be the property of the Government and not that of a private person."

Neither in this case nor in *Haradas v. The Secretary of State for India in Council*(1) was any suggestion made that the tide is a factor in deciding the ownership of the bed of a public navigable river in India.

The judgments in these cases would appear to put it beyond doubt that the bed of a public navigable river in India is vested in the Crown, but on behalf of the appellants it has been suggested that they should be ignored by reason of the observations made in the judgments of the Privy Council in *Secretary of State for India v. Subbarayudu*(2) and *Dawood Hashim Esoof v. C. Tuck Sein*(3). The first of these two cases concerned the interpretation of section 1 of the Madras Irrigation Cess Act, 1865. That section states that whenever water is supplied or used for purposes of irrigation from a river, stream, channel, tank, or work belonging to, or constructed by, Government, it shall, subject to a proviso, 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 the water. The plaintiff owned about twelve acres of land under an inam granted by a zamindar. The land was bounded by a tidal channel which was

MAHARAJA OF
PITHAPURAM
v.
SECRETARY OF
STATE FOR
INDIA.

LEACH C.J.

(1) (1917) 26 C.L.J. 590 (P.C.). (2) (1931) I.L.R. 55 Mad. 268 (P.C.).
(3) (1931) I.L.R. 9 Ran. 122 (P.C.).

MAHARAJA OF
PITHAPURAM
v.
SECRETARY OF
STATE FOR
INDIA.
—
LEACH C.J.

connected with one of the branches by which the river Godavari then reached the sea. The plaintiff took water from this channel for irrigating his land and in consequence the Government levied a water cess. The suit was filed to recover the money which the plaintiff had been compelled to pay. The question was whether the river was one "belonging to" the Government for the purposes of the section and it was held that a river belonged to the Government when it is the proprietor of the land abutting on the river on both sides, or when the river is tidal and navigable. Their Lordships were not called upon in that case to consider the question whether the bed of a public navigable river in India can be deemed to be owned by the riparian owners when the river is non-tidal. We consider that the judgment should be read as applying only to the particular question raised in that case.

In *Dawood Hashim Esoof v. C. Tuck Sein*(1) the plaintiff, who was the proprietor of a saw mill, constructed on his land a pond in which he proposed to float logs from a creek into which the tidal waters of the Rangoon river flowed. The defendant, who claimed to own the soil of the upper part of the creek, planted piles opposite to the entrance to the plaintiff's pond in order to prevent the passage of logs. Thereupon the plaintiff sued for an injunction directing the removal of the obstruction. He alleged that the creek was a public waterway. The evidence showed that at certain periods of the month the tide reached the most remote part of the creek, but usually the upper part was dry, except for a few hours on five to ten days in each month when there

(1) (1931) I.L.R. 9 Ran. 122 (P.C.).

was sufficient water to float ordinary teak logs to the end. It was held that the evidence did not establish that the upper part of the creek was a public waterway. Sir GEORGE LOWNDES in delivering the judgment of the Board said that in India it had long been recognised that the beds or channels of tidal navigable waters are the property of the Government in right of the Crown and went on to observe :

"The principle of the English rule is stated by Lord CRANWORTH to be that it is only within these limits that the bed can be regarded as in the nature of unappropriated soil, not capable of ordinary cultivation and occupation. Their Lordships think that this principle is equally applicable to Indian waters and that the same rule should be applied. The public right of navigation or waterway can only be co-extensive with the right of the Crown or the Government in the bed, and their Lordships are therefore of opinion that the right claimed by the respondent in the present case over the creek cannot extend beyond the limits of ordinary high tides in the sense defined above."

Their Lordships were here concerned with the question whether a small creek was a public waterway and were not considering to what extent the rules of the English common law can legitimately be applied to a river like the Godavari.

After an examination of the questions raised in *Secretary of State for India v. Subbarayudu*(1) and *Dawood Hashim Esoof v. C. Tuck Sein*(2) we cannot regard the judgments in those cases as governing the question under discussion. On the other hand we are of opinion that the judgments of the Judicial Committee to which reference was first made give clear indication of the answer which should be given here. The Court is not bound to apply the principles of the English law when they are manifestly unsuited

(1) (1931) I.L.R. 55 Mad. 268 (P.C.). (2) (1931) I.L.R. 9 Ran. 122 (P.C.).

MAHARAJA OF
PITHAPURAM
v.
SECRETARY OF
STATE FOR
INDIA.
—
LEACH C.J.

MAHARAJA OF
PITHAPURAM
v.
SECRETARY OF
STATE FOR
INDIA.
—
LEACH C.J.

to the occasion, and the principle relied upon by the appellant is unsuitable here. The Godavari is a gigantic river of supreme importance to millions of people, its waters are regarded as sacred by all Hindus and there is a right in the public to navigate the river. In these circumstances, and having regard to the pronouncements of the Privy Council in the cases first mentioned, we hold that the Subordinate Judge was fully justified in refusing to recognize by virtue of riparian ownership a right in the appellant to the bed of that part of the Godavari river which flows through his zamindari.

The appellant's claim that the sanad issued in 1803 can be read as a grant to him of the bed of the river in this area does not call for lengthy discussion. There is nothing in the document itself which indicates that the Government intended to vest the bed of the river in the holder of the zamindari, but the appellant says that this should be inferred because in 1861 the Government recognized in him the ownership of certain lankas and until 1921 it made no claim to the lankas which were formed between 1861 and 1901 and are now in dispute. It is not suggested that the appellant has established a claim to any of these lankas by reason of adverse possession and the fact that officials of the revenue department of the Government allowed the holder of the zamindari to take possession of new formations without objection cannot in itself affect the rights of the Crown. It may be that their inaction can be attributed to negligence or connivance. The deciding factor here is the plan prepared by the revenue department in 1861. This plan admittedly shows that there were then in the area now claimed by the appellant two lankas which belonged to the Government and lanka lands of considerable extent which

belonged to private proprietors other than the Zamindar of Pithapuram. The plan shows towards the eastern bank a lanka known as the Bobbar Lanka and on the western bank a lanka called the Kumara-devam. Both these lands were in 1861 the property of the Government and they still remain its property. On the eastern side of the river there is a lanka called the Katavaram Lanka and another on the western side called the Chidipi Lanka. These lankas appear on the plan of 1861 and it cannot be disputed that they have always belonged to other zamindars. In addition the plan shows between the banks of the river in this part lanka lands belonging to the villages of Torredu, Bobbar Lanka, Jaliludi and Katavaram in which the Zamindar of Pithapuram has never had any interest. In these circumstances the appellant's claim to a grant of the river bed must be rejected. The wording of the sanad lends no support to his claim and the admitted facts negative any inference being drawn in his favour.

We will now deal with the evidence which relates to the contentions of the appellant that the disputed lankas must be regarded as accretions to lankas admittedly his or re-formations of lankas which had belonged to him. [His Lordship, after considering the evidence in detail, held that the appellant's claim to two of the lankas disallowed by the Subordinate Judge was established and that the appellant gave up his right to one of the lankas decreed by the Subordinate Judge in his favour, and proceeded :]

As the result of the finding that lankas Nos. IV and V belong to the appellant, he is entitled to a proportionate refund of the Rs. 1,16,229-2-8. Learned Counsel have agreed that the sum involved is Rs. 6,885-11-8. Therefore the decree of the trial Court

MAHARAJA OF
PITHAPURAM
v.
SECRETARY OF
STATE FOR
INDIA.
—
LEACH C.J.

MAHARAJA OF
PITHAPURAM
v.
SECRETARY OF
STATE FOR
INDIA.
LEACH C.J.

in Original Suit No. 52 of 1936 will be amended to provide for this. In other respects the decree of the trial Court will stand. In this Court the parties will pay and receive proportionate costs, but in view of the importance of the case the respondent will be allowed additional costs in the sum of Rs. 1,000. In accordance with the provisions of section 82 of the Code of Civil Procedure the Government will be allowed three months time in which to make the refund.

As the legal issues arising in the main appeal have been decided against the appellant, Appeals Nos. 151 and 152 of 1938 will be dismissed with costs.

The long course which this litigation has taken is a matter for regret. As already indicated the main suit was filed on 4th July 1927, but no evidence was recorded until 4th February 1936. The judgment was delivered on 14th January 1937. The memorandum of appeal was filed on 30th March 1937, but the appeal was not called for hearing until 3rd November 1941, more than fourteen years after the institution of the suit. The congestion of cases in the Courts of this province cannot be made the excuse for this regrettable state of affairs. One has only to glance at the case diary in the trial Court to learn that the parties themselves are largely to blame for the leisurely progress which this suit has made. If they had been as diligent as they should have been, the questions raised would have been decided long ago. We attach no blame to the Subordinate Judge who tried the case. On the other hand we consider that he has dealt with all the questions arising in the suit in a very able manner.

After this judgment had been delivered, the learned Government Pleader informed the Court that the appellant owned no lands on the western

bank of the river in this area and not all the lands on the eastern bank. This was admitted to be the case by Mr. Raghava Rao who has appeared with the learned Advocate-General for the appellant. When the appellant's case was argued by the learned Advocate-General, we understood the argument to be based on the ownership by the appellant of the lands on both the banks of the river and we also understood this to be accepted by the learned Government Pleader, although we gathered that the Government claimed to be the owner of land immediately beneath the banks. The position now disclosed does not affect our conclusions on the questions involved in the appeal whether of law or of fact, but if it had been disclosed during the arguments it would have simplified matters in some respects.

N.S.

MAHARAJA OF
PITHAPURAM
v.
SECRETARY OF
STATE FOR
INDIA.
LEACH C.J.

APPELLATE CIVIL.

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

1941,
October 21.

ELETATH *alias* MUTHETATH MALLISSERI NARAYANAN NAMBUDIRI AND OTHERS (PLAINTIFFS AND NIL), APPELLANTS,

v.

ETACHERI KUNNATH CHATHUKUTTI NAYAR AND ONE HUNDRED AND TEN OTHERS (DEFENDANTS NOS. 1, 2, 15 TO 34, 56 TO 70, 72 TO 84, 86 TO 93, 95 TO 97, 99 TO 101, 103 TO 116, 119, 127, 128 AND 130 TO 155 AND NIL), RESPONDENTS.*

Malabar Compensation for Tenants' Improvements Act (I of 1900), sec. 6 (2)—Jenmi—Obtaining of decree for arrears of rent—Allowing it to be barred by time—Right to set-off against kanom amount and value of improvements—Such decree for rent not liable to be scaled down under Madras Agriculturists Relief Act (IV of 1938).

Where a decree for arrears of rent had been obtained by a jenmi and it was allowed to be barred by time, the jenmi retains, under section 6 (2) of the Malabar Compensation for Tenants' Improvements Act (I of 1900), the right to have the decree set-off against the kanom amount and the value of improvements in spite of the fact that the decree had become barred.

Case law discussed.

In the case of such decree for arrears of rent, passed before the Madras Agriculturists Relief Act (IV of 1938) came into force, section 15 of that Act, not being retrospective in character, can have no application; and in that view the rent that had been wiped out after the setting off cannot be regarded as due or payable after Act IV of 1938 came into force.

APPEAL against the decree of the Court of the Subordinate Judge of Tellicherry, dated 28th July 1937 and

* Appeal No. 437 of 1938 and Civil Miscellaneous Petition No. 5946 of 1941.

passed in Original Suit No. 31 of 1935; and PETITION praying that in the circumstances stated therein and in the affidavit filed in support thereof the High Court may be pleased to apply the provisions of the Madras Agriculturists Relief Act (IV of 1938) to the decree to be passed in the above Appeal No. 437 of 1938.

K. Kuttikrishna Menon for appellants.

P. Govinda Menon for respondents 2nd, 23rd, 24th, 25th, 30th to 35th and 80th.

Other respondents were not represented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by ABDUR RAHMAN J.—The main question to decide in this appeal relates to the plaintiff's claim for setting off the arrears of rent due to him by the defendants against the value of improvements found to be payable by the former to the latter. A decree was secured by the plaintiff Dewaswom in regard to the arrears of rent but it has become barred by limitation.

The properties in suit including certain other items of property, sixty-three in all, belong to the plaintiff Dewaswom. They were demised by it on a kanom of Rs. 116 to defendants 1 to 55, who were members of a tarwad, for a period of five years so far as paddy lands were concerned and for a period of twelve years in respect of parambas. It appears that a *kuzhikanom* deed was executed by the plaintiff Dewaswom on the 26th February 1917 in favour of one V. Krishnan Nair who was then karnavan of the defendants' tarwad. Since he died without executing a corresponding marupat, the marupat on the basis of which the present suit was instituted, Exhibit A, was executed by the next karnavan Kunhoonhan Nair and second defendant in favour of the plaintiff Dewaswom on 9th June 1917. The plaintiff Dewaswom assigned

NARAYANAN
v.
CHATHUKUTTI.

ABDUR
RAHMAN J.

NARAYANAN
v.
CHATHUKUTTI.
ABDUR
RAHMAN J.

one year's rent. The assignee brought a suit, Original Suit No. 175 of 1922, obtained a decree; and in execution the tenancy rights of the defendants 1 to 55 were sold and purchased by the fifty-sixth defendant. The other defendants who are now in possession are claiming under the fifty-sixth defendant.

The plaintiff Dewaswom brought a suit, Original Suit No. 487 of 1921, for the recovery of rent due for the year 1096 (corresponding to 1920-21) in respect of both paddy lands and parambas and obtained a decree for the same on 17th December 1923. The amount claimed in the suit as rent forms one of the amounts which is being claimed in the present suit.

The plaintiff Dewaswom brought another suit, Original Suit No. 373 of 1922, for rent and for recovery of paddy lands alone, shown as items 33 to 63 in the marupat. This was decreed although items 62 and 63 in the marupat were excluded from the decree on the ground that they were parambas and the suit in regard to them was premature. The items of property which were recovered in the execution of the decree passed in that suit do not form the subject-matter of the present suit.

The suit for redemption, out of which the present appeal arises, was instituted by the plaintiff Dewaswom for the recovery of paramba lands on payment of a kanom of Rs. 116. Arrears of rent amounting to Rs. 6,305-6-11 including those for which the decree was passed were asked to be set-off against the value of improvements found to be payable to the tenants by the plaintiff. The defendants claimed the value of improvements in excess of the amount claimed by the Dewaswom but contended that the arrears of rent for which the decree had been obtained could not be set-off against the improvements due to them as the decree had become barred by time.

NARAYANAN
v.
CHATHUKUTTI.
ABDUR
RAHMAN J.

The Subordinate Judge of Tellicherry passed a decree for redemption in favour of the plaintiff Dewaswom on payment of the value of improvements due to various defendants detailed in the judgment but accepted the plea advanced by the defendants and refused to allow the set-off to the plaintiff in respect of the amount for which the decree had been obtained. The plaintiffs appeal and the first contention as stated above advanced on their behalf is that they were legally entitled to have the amount of rent covered by the decree in Original Suit No. 487 of 1921 set-off under section 6 (2) of the Malabar Compensation for Tenants Improvements Act (I of 1900) against the improvements decreed in favour of the defendants in spite of the fact that the decree in its favour might have been barred by time. It was also contended that the decree passed in Original Suit No. 487 of 1921 was not barred by time in fact; but on hearing the learned Counsel for the appellants we were not satisfied that this contention had any force and we did not for reasons which we will give later in this judgment call upon the other side to address us on that point.

The third contention advanced on behalf of the appellants was that the improvements in regard to item Nos. 44, 64, 66 and 66-A should not have been allowed by the lower Court. This question is discussed in paragraph 65 of its judgment. Mr. Govinda Menon who appeared in this case on behalf of some of the respondents did not oppose this contention as he said that the clients for whom he was appearing had no concern with this claim made on behalf of the appellant. It was urged in the end that costs should not have been awarded against the plaintiff when it had substantially succeeded in the suit. The last three questions being of minor importance we would like to

NARAYANAN
v.
CHATHUKUTTI.
—
ABDUR
RAHMAN J.

address ourselves to start with on the first question that is by far the most important one to be determined in this appeal.

In view of decisions of this Court in *Achuta v. Kali*(1), *Kanna Pisharodi v. Kombi Achen*(2) and *Unnian v. Rama*(3) it was not disputed that a jenmi was entitled to set-off the arrears of rent due to him without any regard to limitation against the kanom amount and the value of improvements. Nor was it, in view of *Kunhi Krishnan v. Kunhi Pennu*(4), contested that the plaintiff could have lost his right to set-off even if a decree for rent had been obtained in its behalf, provided that it had not become barred by time on the date on which the present suit was instituted. But it was contended that, if a decree for arrears of rent had been obtained by a jenmi and it was allowed to be barred by time, the jenmi would not retain the right to have it set-off against one kanom amount and the value of improvements. The question to decide is whether this contention is correct.

Our attention has not been drawn to any decision in which this question had directly arisen for decision but reliance was placed on certain observations of DEVADOSS J. in *Kunhi Krishnan v. Kunhi Pennu*(4) (which were admittedly in the nature of *obiter*) and of KRISHNAN J. in a decision by a Division Bench of this Court in *Naraina Rao v. Shivu Rao*(5). The question in our view really turns on a correct interpretation of section 6 (2) which reads as follows :—

“ If in such a suit the court finds any sum of money due by the defendant to the plaintiff for rent or otherwise in respect

(1) (1884) I.L.R. 7 Mad. 545.

(3) (1885) I.L.R. 8 Mad. 415.

(2) (1885) I.L.R. 8 Mad. 381.

(4) A.I.R. 1927 Mad. 189.

(5) (1918) I.L.R. 41 Mad. 1043.

NARAYANAN
v.
CHATHUKUTTI.
—
ABDUR
RAHMAN J

of the tenancy, the court shall set-off such sum against the sum found due under sub-section (1) and shall pass a decree, declaring as the amount payable to him on ejectment the amount (if any) remaining due to the defendant after such set-off.”

The words italicised by us are, in our opinion, important and it cannot be reasonably argued that arrears of rent will not remain due even if a decree has been passed in regard to them, but which has remained unsatisfied. There is a great deal of difference between a decree becoming unenforceable in a Court of law by lapse of time and thus making it impossible for a decree-holder to realise his dues by a process of Court and a decree becoming satisfied. Limitation in such cases bars the remedy but does not extinguish the right. The unpaid rent must still be regarded as due although it may not be possible for the person to whom the rent is due to bring a suit again for realising that debt from his debtor. If limitation cannot prevent a debt which is uncovered by a decree from being claimed by a jenmi by way of set-off against the kanom amount and improvements, as held in *Achuta v. Kali*(1), *Kanna Pisharodi v. Kombi Achen*(2) and *Unnian v. Rama*(3), and if the mere passing of a decree, if it is alive, does not on the ground of merger or any other principle of law debar a plaintiff, as held in *Kunhi Krishnan v. Kunhi Pennu*(4), from getting a set-off under the aforesaid section of the Tenants' Improvements Act, there can be nothing, in our opinion, which can be held to debar a plaintiff from getting a set-off in spite of the fact that the decree had become barred by time. It is instructive to compare the words “ amount due by the plaintiff to the defendant ” in this sub-section

(1) (1884) I.L.R. 7 Mad. 545.
(3) (1885) I.L.R. 8 Mad. 415.

(2) (1885) I.L.R. 8 Mad. 381.
(4) A.I.R. 1927 Mad. 189.

NARAYANAN
v.
CHATHUKUTTI.
—
ABDUR
RAHMAN J.

with the words "legally recoverable" in Order VIII, rule 6, Civil Procedure Code. It has been held that if the defendant's claim is barred by the law of limitation at the date of suit it cannot be pleaded by way of set-off under the provisions of the Code of Civil Procedure; but the Courts have in construing that section confined that rule to a legal set-off merely, while in cases of equitable set-off claimed by a defendant no such exception has been engrafted for the simple reason that in granting equitable set-off the Court is not necessarily confined to the limits introduced in Order VIII, rule 6, Civil Procedure Code. The ordinary cases between lessors and lessees may be different. It has been held in a Madras case, *Vyavan Chetty v. Srimath Deivasikamani Nataraja Desikar*(1), that it was not open to a lessee to claim by way of equitable set-off an unliquidated claim for damages which was barred at the date of suit. The same rule cannot however be applied to a kanom where the landlord is declared bound by the statute to pay for improvements effected by the tenant during the period of his tenancy which is usually twelve years and a tenant has to be made liable to pay the whole of the rent due by him to his landlord before a decree declaring the amount payable to him for improvements can be passed only after the set-off for rent in respect of the tenancy has been allowed to the landlord. We are aware of the dictum of DEVADOSS J. in *Kunhi Krishnan v. Kunhi Pennu*(2) where he said that a decree that was barred by limitation could not be set-off but we really see no reason or principle on which, in view of the clear words of 6 (2) of the Tenants' Improvements Act, it can be supported.

(1) (1915) I.L.R. 39 Mad. 939.

(2) A.I.R. 1927 Mad. 189.

Reliance was placed by Mr. Govinda Menon on the observations of KRISHNAN J. in *Naraina Rao v. Shivu Rao*(1) where that learned Judge accepted the principle of the American law given by Jones in section 936 of his Treatise on Mortgages which was to the effect that:

"The merger of the note in a judgment does not extinguish the debt and the mortgage continues a lien till it is satisfied or the judgment is barred by statute of limitation."

The other learned Judge PHILLIPS J. constituting the Division Bench was not however prepared to go to that extent. He observed as follows:—

"It would appear that under American law the respondent's contention is correct (vide Jones on Mortgages, section 936) but the position is not so clear either in English or Indian law, for it would appear from a passage in XXI Halsbury Laws of England 325 that the original charge would still remain unless the decree became satisfied and it is questionable whether a decree that has become barred by limitation is on the same footing as a decree that has been satisfied."

Since there was no question of set-off in *Naraina Rao's* case(1), such as is being claimed by the plaintiffs in the present suit, it is unnecessary in the circumstances to consider the observations of KRISHNAN J. more closely. The decision in that case can be no authority for the contention that if the decree for rent had been obtained the amount decreed would cease to be due as rent under the Compensation for Tenants' Improvements Act even if the decree is barred by limitation. In our opinion, the decision of their Lordships of the Judicial Committee in *Hewanchal Singh v. Jawahir Singh*(2) goes to show that there could have been no merger in spite of the decree having been passed in

(1) (1918) I.L.R. 41 Mad. 1043.

(2) (1888) I.L.R. 16 Cal. 307.

NARAYANAN
v.
CHATHUKUTTI.
—
ABDUR
RAHMAN J.

NARAYANAN
v.
CHATHUKUTTI.
—
ABDUR
RAHMAN J.

favour of the mortgagee for certain interest so as to preclude him from claiming the same amount in a redemption suit instituted against him subsequently by the mortgagor. The judgment of their Lordships of the Privy Council may have been, as remarked by the learned Judges in *Imdad Hasan Khan v. Badri Prasad*(1), very brief; but the summary of the decision of the Judicial Commissioner against which the appeal was taken to the Privy Council given in the facts of that case and the argument addressed to their Lordships of the Judicial Committee leave no room for doubt as to the contention advanced before them and as to the view which ultimately prevailed. The mortgagee in *Imdad Hasan's* case(1) had, in the words of the learned Judges of the Allahabad High Court, "preferred to seek one remedy" and his debt should have been on this principle regarded by their Lordships of the Privy Council in the Calcutta case to have become merged in the decree and was only payable under the decree and not otherwise. But it was not so held by their Lordships.

The relationship between the parties in the present case is really that of a mortgagor and mortgagee and in taking an account between the parties which section 6 (2) contemplates, the plaintiff who is in the position of a mortgagor would, in our opinion, and in accordance with the language of that sub-section, be entitled to a set-off even in regard to a decree that was barred by limitation.

The other questions need not detain us long. It was contended on behalf of the appellant that the decree in favour of his client was not barred by limitation. This contention was based on the fact that

(1) (1898) I.L.R. 20 All. 401, 407.

an application for execution was presented by him on 7th August 1933 but it was returned by the Court on 10th August 1933 to rectify certain defects that existed in the petition. It was not re-presented by him. Relying on certain decisions of this Court it was argued that the application for execution which was according to law should not have been returned and the effect of the wrongful return by the Court was that the application should be deemed to be pending. We do not however agree with that contention. Whatever may have been the effect of the order of the execution Court, if it was not justified, it cannot be said in this case that the order passed by the execution Court on 10th August 1933 was an unjustifiable or a wrong order. The claim for costs made by the petitioner was obviously in excess of what was actually due to him and the application had therefore to be returned for amendment. Moreover, certain draft sale papers had not been produced and they were required to be produced. The execution Court had given three weeks' time for amendment and for the production of the papers and having failed to comply with the proper order of the Court within the time given to him he cannot advance the contention that the application which had been with him throughout should have been deemed to be pending.

The improvements to which objection has been taken by the appellants should not have been in our opinion allowed in regard to items 64, 66 and 66-a although the grant in regard to item 44 appears to be justified. As for the last item, the tenants appear to have built the compound walls and unless the plaintiff had shown that they had only repaired the old walls compensation should have been and was rightly granted. In regard to item 64 however the onus was

NARAYANAN
v.
CHATHUKUTTI.
—
ABDUR
RAHMAN J.

NARAYANAN
v.
CHATHUKUTTI.
—
ABDUR
RAHMAN J.

on the defendants to establish that they had effected the improvements for which they could have claimed compensation and not for the plaintiff Dewaswom to show that the trees had not been grown by the tenants. That would be the proof of negative fact and unless the law required the plaintiff to prove a negative fact, which it did not, it should have been proved by the defendants. Similarly the statement of D.W. 4 should not have been, in the absence of the *marupat*, accepted in regard to items 66 and 66-a.

As for costs there is no reason why we should interfere with the discretion exercised by the Court below. Ordinarily the mortgagor is liable to pay the costs of the mortgage in a redemption suit. But in the circumstances of the case, the Court had decreed only a portion of the costs in regard to court-fee and in regard to the expenses of a commission incurred by them. In other respects, they were directed to bear their own costs. There is no reason why we should interfere with that discretion.

The result is that the appeal will be accepted to the extent that the item covered by the decree in Original Suit No. 487 of 1921 would be allowed to be set-off as against the claim for improvements allowed to the defendants. The claim for improvements in regard to items 64, 66 and 66-a is disallowed. The plaintiff will have, in the circumstances, three-fourths of the costs of this appeal. Time for redemption is extended by three months from this date.

An application has been filed by Mr. Govinda Menon under section 15 of the Madras Agriculturists Relief Act (IV of 1938). It has been contended by Mr. Govinda Menon that since the amount of rents covered by the decree is being allowed by us for the first time, now, it should be deemed to have been

discharged as his client had in accordance with the provisions of section 15 of the Madras Agriculturists Relief Act deposited the sum due for Faslis 1347 and 1346 before the dates mentioned in that section. In view however of the decree that was passed in this case in July 1937 before the Agriculturists Relief Act came into force and which we are now only modifying by reducing the amount that was decreed in favour of the defendants under section 6 (2) of the Malabar Compensation for Tenants' Improvements Act (I of 1900) after the full set-off allowable to the plaintiff had been taken into consideration, we are of opinion that section 15 of the Agriculturists Relief Act, not being retrospective in character, can have no application and the amount due for improvement allowed to the defendants should have been decreed by the lower Court after the arrears of rent included in the decree that is now barred by limitation had been taken into account. Viewed thus the rent could not be regarded as due or payable after the Act came into force. The only decree that section 6 (2) of the Malabar Compensation for the Tenants' Improvements Act contemplates is one for improvements after the arrears of rent, etc., have been set-off. The rent would thus be wiped off in any case and cannot be held to have been decreed. It would therefore follow that the rents alone included in the sum of Rs. 1,960 for which the decree was passed excluding costs and interest would be deducted out of the improvements and the balance that is found to be due after the amount of rents has been deducted will remain payable to the defendants.

The parties are directed to bring in a draft decree.

V.V.C.

NARAYANAN
v.
CHATHUKUTTI.
—
ABDUR
RAHMAN J.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth and Mr. Justice Patanjali Sastri.

1941,
November 11
and
December 11.

SRI RAJAH RAVU SRI KRISHNAYYA RAO *alias*
SRI RAJAH RAVU VENKATA KUMARA MAHIPATI
KRISHNA SURYA RAO BAHADUR GARU AND
ANOTHER (PLAINTIFFS), APPELLANTS,

v.

RAJAH SAHEB MEHERBAN-I-DOSTAN SRI RAJAH
RAVU VENKATA KUMARA MAHIPATI SURYA RAO
BAHADUR GARU, MAHARAJA OF PITHAPURAM
(DEFENDANT), RESPONDENT.*

Indian Limitation Act (IX of 1908), arts. 120 and 109—Dispute about succession to zamindari—Recognition of one of the contestants by Collector as “landholder” within sec. 3, cl. 5, of the Madras Estates Land Act (I of 1908)—Entry into possession by him and collection of rents as “landholder”—Nature of receipt of rents—Final decision by civil Court in a suit by the other contestant recognizing the other contestant as being entitled to zamindari—Suit by first contestant for recovery of mesne profits—Art. 120 and not art. 109 applicable—Equitable jurisdiction of Courts to award interest—Expenses of management—Consolidated allowance—Principle underlying grant of.

P filed a suit for a declaration that V's adoption by the zamindarini of G was invalid and that he (P) as nearest reversioner was entitled to succeed to the estate on her death. The first Court declared the adoption to be invalid. V filed an appeal and the zamindarini died during the pendency of the appeal. Disputes arose as to who was entitled to be “recognized” as “landholder” within section 3, clause (5), of the Madras Estates Land Act (I of 1908). The disputes were settled by the Collector by an order, dated 12th January 1924, by which P was recognized as the landholder for the purposes of the Act. P entered upon possession of the estate and began to collect the rents and profits thereof. The suit was finally decided by the Privy Council on 15th July 1935

* Appeals Nos. 246 and 252 of 1937, 330, 364 and 365 of 1938.

by which V was declared to be the lawful proprietor of the estate. Thereupon V filed a suit against P for an account and payment of the rents, profits and other sums collected by P from the estate from 12th January 1924 to 7th September 1925 with interest at, nine per cent per annum from the respective dates of collection. P, *inter alia*, contended that under section 109 of the Indian Limitation Act the claim for rents and profits received more than three years before the suit was barred and that he was not liable to pay interest.

Held.—(i) The receipt of rents and profits by P under the Collector's order, dated 12th January 1924, was not wrongful in view of the provisions of section 67 of the Madras Estates Land Act and that article 109 of the Indian Limitation Act did not apply. The suit fell within article 120 of the Limitation Act, under which the time began to run when the right to sue accrued.

(ii) The right to sue accrued to V each time P received the rents, profits and other sums as “landholder” and V's claim to recover rents and profits received more than six years before the suit was barred by time.

(iii) The decision of the Privy Council did not bring about a new state of things and imposed no new obligation. It did no more than declare V's pre-existing title to the estate.

(iv) P who took the estate under the Collector's order cannot be assimilated to the position of an interim receiver appointed during the pendency of the previous litigation on the understanding that he should account for the rents and profits received in the course of such management in case V's title was upheld. His position is essentially different from the case of a person who takes possession under colour of a decree which is afterwards reversed.

(v) V's claim attracts the equitable jurisdiction of the Court to award interest and six per cent per annum on the net profits received by P will be a reasonable rate.

(vi) The trial Court, in awarding a consolidated allowance of ten per cent to P as expenses of management, without reference to the actual expenses of the management, did not act arbitrarily or unreasonably in view of the circumstances of the case.

APPEALS against the final decree of the Court of the Subordinate Judge of Cocanada, dated 25th March 1938, in Original Suit No. 65 of 1935.

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.

T. R. Venkatarama Sastri and N. A. Krishna Ayyar
for first appellant.

K. Rajah Ayyar and D. Naraswaraju for second
appellant.

*Advocate-General (Sir A. Krishnaswami Ayyar),
Ch. Raghava Rao and K. Subramanyam* for respondent.
Cur. adv. vult.

PATANJALI
SASTRI J.

The JUDGMENT of the Court was delivered by PATANJALI SASTRI J.—These are connected appeals arising out of a suit brought by two plaintiffs against the Maharaja of Pithapuram (hereinafter referred to as the defendant) for an account and payment of the rents and profits and other sums collected by him from a zamindari estate known as Gollaprolu and situate in the Godavari district, during a period of about eleven years and eight months from 12th January 1924 up to 7th September 1935. The plaintiffs estimated the amount due at Rs. 7,38,000 which they seek to recover with interest at nine per cent per annum from the respective dates of collection. The main defence was one of limitation in regard to sums received more than three years prior to the suit. The Court of the Subordinate Judge of Cocanada which tried the suit overruled the plea and passed a preliminary decree, dated 4th March 1937, directing the defendant to render an account of all sums received by him during the whole period but disallowing the claim for interest. The accounts were taken in due course and a final decree was passed on 25th March 1938. Appeal Suit No. 252 of 1937 has been brought by the defendant against the preliminary decree challenging the decision on the question of limitation and Appeal Suit No. 246 of 1937 is a cross-appeal by the plaintiffs raising the question of interest and certain other minor objections in regard to the same decree. Appeal Suits Nos. 330, 364 and 365 of 1938 are appeals preferred against the

final decree by the defendant, the first and second plaintiffs respectively.

The suit is an off-shoot of an earlier litigation which after a protracted and somewhat chequered career culminated in His Majesty's order in Council, dated 15th July 1935, in Privy Council Appeal No. 44 of 1930 adjudging in effect that the present first plaintiff is the lawful proprietor of the said Gollaprolu estate. It is unnecessary for the purposes of these appeals to state the facts relating to that litigation except in brief outline. The present defendant brought that suit in 1915 for a declaration that the present first plaintiff's adoption by Rani Ramayamma, the Zamindarini of Gollaprolu (hereinafter called the Rani), was invalid and he (the defendant) was the nearest reversioner entitled to succeed to the estate on her death. The District Court, Rajahmundry, after an elaborate trial decreed the suit in October 1920 declaring the adoption to be invalid. While an appeal against that decree preferred by the present first plaintiff was pending, the Rani died on 24th October 1923. Thereupon the defendant herein filed an application before the Collector of Godavari for the registry of the estate in his name as the proprietor thereof after the death of the Rani, the adoption having been held to be invalid by a Court of law. He also filed an application before that officer under section 3, clause (5), of the Madras Estates Land Act (I of 1908) for "recognizing" him as the "landholder" of the estate for the purposes of that Act. The present first plaintiff filed a counter-petition claiming that the estate should be registered in his name on the allegations that the District Court's decision declaring his adoption invalid could not be regarded as final, as he had appealed therefrom, and that, since the date of his adoption, he had been in

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
PATANJALI
SASTRI J.

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
—
PATANJALI
SASTRI J.

possession of the estate jointly with the Rani till her death and thereafter jointly with the second plaintiff, to whom the Rani had devised by her will her half share in the estate which was given to her absolutely under an ante-adoption agreement. Two other persons who also set up rival claims to the estate made a similar application for recognition as landholders. These disputes were settled by the Collector by an order, dated 12th January 1924, wherein he "recognized" the defendant as the landholder for the purposes of the Act, and the defendant accordingly entered upon possession of the estate and began to collect the rents and profits thereof. It may be mentioned here that an attempt was made in the Court below to show that the defendant had taken possession of the estate after the Rani's death by getting the tenants to attorn to him even before the Collector's order, but the learned Subordinate Judge found against him on the point and that finding has not been questioned before us.

The appeal preferred by the first plaintiff against the decree of the District Court, Rajahmundry, declaring his adoption to be invalid was in due course heard by a Division Bench of this Court in October 1926 and, as the Judges differed, an appeal was filed under the Letters Patent which was heard and disposed of by a Bench of three Judges in March 1928 where again there was a difference of opinion, the majority finding against the validity of the adoption and confirming the decree of the Court below. The first plaintiff thereupon preferred an appeal to His Majesty in Council which was heard in 1933 on the question whether certain evidence relating to the sonship of the defendant which had been excluded as inadmissible in the Courts here was admissible or not. Their

Lordships held that it was admissible and had been wrongly excluded, and remitted the case for a fresh finding on the question after taking that evidence also into consideration. In April 1934 this Court submitted its finding, on a consideration of the whole evidence, that the defendant was an *aurasa* son of his father, and their Lordships finally disposed of the appeal in June 1935 holding that the first plaintiff's adoption by the Rani was valid and dismissing the defendant's suit. The formal Order in Council was issued, as already stated, in July 1935. On application subsequently made by the plaintiffs, the Collector of Godavari cancelled the order whereby he recognized the defendant as the landholder, and directed the registry of the estate in the names of the plaintiffs recognizing them as the landholders thereof. This was on 7th September 1935. The plaintiffs having thus obtained possession of the estate brought the suit now under appeal in October 1935 for recovery of the rents and profits received by the defendant during the period of his possession and management of the estate in pursuance of the Collector's order, dated 12th January 1934.

The learned Subordinate Judge was of opinion that the defendant having entered into possession of the estate in pursuance of the Collector's order subject to the ultimate decision of the pending litigation between the parties, was, during the period of his possession, as "landholder", in the position of a *quasi* trustee coming under section 94 of the Indian Trusts Act, analogous to that of a party interim receiver in a suit or the holder of a succession certificate granted under section 373 of the Indian Succession Act. He held accordingly that the receipt of profits by the defendant was not wrongful and that article 109 of

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
—
PATANJALI
SASTRI J.

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.

PATANJALI
SASTRI J.

the first Schedule to the Indian Limitation Act on which the defendant relied was not applicable to the case.

The learned Advocate-General who appeared for the defendant in these appeals challenged the correctness of this conclusion and contended that, as the defendant was denying the plaintiffs' title to the estate and setting up a rival claim as the nearest reversionary heir entitled to succeed thereto, there could be no question of any fiduciary relationship between the parties and that, inasmuch as he received the rents and profits under an adverse claim of title which he ultimately failed to establish, such receipt was wrongful within the meaning of article 109 of the Limitation Act. This article prescribes for a suit for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant a period of three years from the time when the profits are received. This being a suit for the profits of immovable property belonging to the plaintiffs, the article would apply if the profits could be said to have been wrongfully received by the defendant, and the claim for rents and profits received more than three years before the suit would be clearly barred. The main debate at the Bar accordingly centered round the question whether, having regard to all the circumstances of the case, the defendant's receipt of the rents and profits was wrongful, the plaintiffs endeavouring to show that it was not, while the defendant maintained that it was.

The learned Advocate-General drew attention to the previous history of the article and contended that in the Limitation Acts of 1871 and 1877 the language used in the third column of article 109 read with the first column clearly indicated that the receipt of profits

by a person in possession under a decree of Court which was subsequently set aside on appeal was considered to be wrongful. He submitted that this position was in no way altered under the present Act notwithstanding the omission from the third column of the words

“ or where the plaintiff had been dispossessed by a decree afterwards set aside on appeal, when he recovers possession.”,

as the omission was merely due to the enactment of the Civil Procedure Code in the same year providing an exclusive remedy for restitution in such cases by way of an application under section 144. Reference was made to several decisions including the decision of the Privy Council in *Faroze Shah v. Akbar Khan*(1) which no doubt support this view. It seems to us, however, that it does not follow that the receipt of the profits by the defendant as “landholder” recognized by the Collector for the purposes of the Madras Estates Land Act should also be considered to be wrongful. In our opinion, the true nature of such receipt has to be determined with reference to the scope and effect of the Collector's order having regard to the relevant provisions of that Act.

It will be convenient here to call attention to these provisions. Section 3, clause (5) says :

“ 3. In this Act, unless there is something repugnant in the subject or context :—

(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 any provision of law.

Where there is a dispute between two or more persons as to which of them is the landholder for all or any of the purposes of this Act or between two or more joint landholders

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
PATANJALI
SASTRI J.

(1) (1939) 43 C.W.N. 897 (P.C.).

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.

PATANJALI
SASTRI J.

as to which of them is entitled to proceed and be dealt with as such landholder, the person who shall be deemed to be the landholder for such purposes shall be the person whom the Collector subject to any decree or order of a competent civil Court may recognize or nominate as such landholder in accordance with rules to be framed by the Local Government in this behalf."

Rule 2 of the Rules framed under this section provides :

"In cases of disputes between persons claiming against each other the ownership of the estate or the part thereof in question or any smaller interest therein conferring a right to present possession, the Collector shall make a summary inquiry into their respective claims and recognize as landholder the claimant who in his opinion is *prima facie* entitled to the present possession of the estate or part thereof in question."

And section 67 provides :

"Where rent is due to a landholder, the receipt for any payment on that account of the person recognized or nominated under sub-section 5 of section 3 as the landholders for the purpose of receiving rent or of the person authorized to receive the rent shall be a sufficient discharge for the rent, and the person liable for the rent shall not be entitled to plead in defence to a claim by a person so recognized or nominated that the rent is due to a third person. But nothing in this section shall affect any remedy which any third person may have against the landholder so recognized or nominated."

It is manifest that the object underlying these provisions is to provide machinery for the smooth management of an estate pending settlement of disputes relating thereto by a competent civil Court so as, on the one hand, to enable the rents falling due during the pendency of the disputes to be duly collected without being allowed to get time barred and, on the other, to enable the tenants to obtain a valid discharge on payment of the rent, whichever party may ultimately succeed in establishing his claim in the

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.

PATANJALI
SASTRI J.

civil Courts. For this purpose the Collector is empowered to make a summary enquiry under the rules made in that behalf and recognize as "landholder" the person who is *prima facie* entitled to the present possession of the estate, and the person so recognized is authorized to demand and collect the rent giving a valid discharge therefor. In other words, the person who is "recognized" by the Collector as "landholder" for all or any of the purposes of the Act becomes thereby clothed with full authority to do all acts required to be done for such purpose or purposes, and such acts are made binding upon whichever party is ultimately held by a civil Court to be entitled to the possession of the estate. And if it is found that the person so recognized is not entitled to possession, he will be liable to deliver possession of the estate and pay over the rents and other sums received by him, subject to all just allowances, to the person who is declared by the civil Court to be so entitled. In other words, he will be liable to account for the rents and profits received as if he were a trustee (see sections 94 and 95 of the Indian Trusts Act), although there can be no question of trust or strict fiduciary relationship between parties who claim the estate adversely one to the other. This, we conceive, is the position under an order made by the Collector recognizing a person as landholder for the purposes of the Madras Estates Land Act, and it is essentially different from the case of a person who takes possession under colour of a decree of Court which is afterwards reversed, for, the latter cannot be regarded authorized to collect the rents on behalf of the rightful claimant as he cannot give a valid discharge, and the receipt of the profits by him, however *bona fide* and excusable, cannot be regarded as other than wrongful.

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.

PATANJALI
SASTRI J.

We are therefore of opinion that the receipt of the profits by the defendant under the Collector's order, dated 12th January 1924, was not wrongful and that article 109 of the first schedule to the Limitation Act does not apply to the facts of this case. No other article having been suggested as being applicable, the suit must fall within article 120 under which the time begins to run when the right to sue accrues.

The question accordingly arises as to when the plaintiffs' right to sue for the profits received by the defendant accrued. It must be remembered that the defendant was setting up title to the estate in himself and his claim had been held to be valid by a competent Court. It must also be borne in mind that the Collector's order recognizing him as landholder was based upon that adjudication, though an appeal had been preferred therefrom. It is thus clear, that the defendant throughout received the rents and profits of the estate in his own alleged right and not in acknowledgment of the plaintiffs' right. No doubt we have expressed the view that, having regard to the provisions of section 67, the legal effect of the Collector's order recognizing the defendant as landholder of the estate was to make his receipt binding on the plaintiffs and, therefore, lawful and not wrongful even in the absence of the legal title in the defendant, but this is subject to the important proviso contained in that section itself that any remedy which the true owner may have against the landholder recognized by the Collector shall not be affected. The result is that the plaintiffs could have sued the defendant for an account of the profits received from the estate whenever such profits were received, the Collector's order notwithstanding. In other words, a right to sue accrued to the plaintiffs each time the defendant received the rents and profits

as landholder, and it follows that the plaintiffs' claim to recover the profits received more than six years before the suit is barred by time. The bar will apply both to receipts and to the various claims for expenses.

In support of the view taken by the lower Court that no portion of the suit claim is barred, Mr. Venkatarama Sastri, the learned Counsel for the plaintiffs, advanced two lines of argument. Firstly he urged that the plaintiffs could not have successfully maintained a suit for the profits so long as the decision of the trial Court in the previous litigation negating their title to the estate stood unreversed and, as the plaintiffs' title was upheld only in their appeal to the Privy Council, their right to sue for the profits received by the defendant in the interim accrued once for all only after His Majesty's Order in Council was issued in July 1935. Reliance was placed on the following observation of their Lordships of the Judicial Committee in *Bassu Kuar v. Dhum Singh*(1) :—

“ It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not.”

That was a case where a debtor entered into an arrangement with his creditor whereby certain villages were to be sold to the latter and the debt was to be set off against the price but the arrangement fell through, a suit for specific performance by the debtor having been ultimately dismissed. When the creditor subsequently sued for the debt within three years of this decree, but more than three years after the debt became due, the debtor who was previously insisting that the debt had been paid by virtue of the contract pleaded the bar of limitation. Their Lordships overruled the plea holding that the decree imposed a new

(1) (1888) I.L.R. 11 All. 47, 56 (P.C.).

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.

PATANJALI
SASTRI J.

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
PATANJALI
SASTRI J.

obligation on the debtor to pay the amount of the debt either under section 65 of the Contract Act by way of restoring the advantage received under the agreement of sale which was discovered to be void or as money paid upon an existing consideration which afterwards failed. Their Lordships pointed out that it was common ground to both the disputants that there was a contract made between them for the sale of the villages and the retention of the debt by the debtor as part payment of the price, their difference having related to other matters, and they accordingly took the view that, until the agreement had been ultimately brought to an end by a decree of Court, the creditor was in the position of a person whose claim had been satisfied by the substitution of the land for the debt. In such circumstances it might have been a "perfectly vain litigation" if the creditor had filed a suit on the basis of the old debt due on dealings between the parties; for, if the contract was upheld he could only have the lands and if, as it happened, it was found to be unenforceable, he would be entitled to recover the amount due on a new and distinct basis. We are therefore of opinion that the observation relied upon must be understood with reference to the facts of the particular case and not as laying down a general rule that, whenever a person finds an impediment in the way of his successfully asserting his right to relief, his cause of action is suspended and the course of time interrupted until such impediment is removed or that a fresh cause of action arises on its removal. The other decision, *Mussumat Ranees Surno Moyee v. Shooshce Mokhee Burmonia*(1), relied on by Mr. Venkatarama Sastri is more or less of the same type. A patni taluk was sold for arrears of rent but the sale was subsequently

(1) (1868) 12 M.I.A. 244.

set aside for some irregularity and the landlord had to refund the amount realised to the purchaser. He subsequently sued for the same arrears and their Lordships held that the suit was not barred though instituted beyond the prescribed period computed from the original cause of action for the rent, the ground of decision being that the original claim for rent having been satisfied by the patni sale, there was a fresh cause of action on the setting aside of the sale and the refund of the purchase money in respect of which the landlord was entitled to a fresh period of limitation. These decisions do not, in our opinion, support the general proposition contended for before us that, where the rights of parties have been subjected to adjudication by a competent civil Court, limitation for other suits based on such rights should be computed from the date of their final determination. On the other hand, their Lordships have more than once pointed out that Courts have no power, on considerations of hardship or equity, to invent new grounds of exemption from the bar of limitation not recognized by the statute; see *Soni Ram v. Kanhaiya Lal*(1), *Magbul Ahmad v. Pratap Narain Singh*(2), *Muthu Korakkai Chetty v. Madar Ammal*(3) and *Sundaramma v. Abdul Khadar*(4) where the subject is more fully discussed.

In the present case there is nothing to warrant the view that His Majesty's Order in Council dismissing the defendant's previous suit "brought about a new state of things and imposed a new obligation" on the defendant. It did no more than declare the first plaintiff's pre-existing title to the estate by holding his

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
PATANJALI
SASTRI J.

(1) (1913) I.L.R. 35 All. 227 (P.C.).
(2) (1935) I.L.R. 57 All. 242, 250 (P.C.).
(3) (1919) I.L.R. 43 Mad. 185 (F.B.).
(4) (1932) I.L.R. 56 Mad. 490 (F.B.).

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
—
PATANJALI
SASTRI J.

adoption by the Rani to be valid, and it cannot be said that this adjudication gave rise to a fresh cause of action for the plaintiffs to sue for the entire profits received by the defendant. It is true that any suit for profits brought by the plaintiffs during the pendency of the previous litigation could not be decreed so long as the decision of the District Court, Rajahmundry, upholding the defendant's title to the estate stood unreversed, and would have been stayed under section 10 of the Civil Procedure Code pending the final determination of the question of title in the earlier litigation; but to suggest, as learned Counsel for the plaintiffs did, that the plaintiffs were not bound to institute such a futile suit would seem rather to beg the question; for it could hardly be regarded as futile when it was necessary under the law to institute such suit, if only to be stayed, in order to save the plaintiffs' claim from the bar of limitation.

The next contention of Mr. Venkatarama Sastri was that, having regard to the circumstances under which the defendant was recognized by the Collector as landholder, he must be regarded as having assumed management of the estate as an interim receiver during the pendency of the previous litigation on the understanding that he should account for the rents and profits received in the course of such management in case the plaintiffs' title was upheld, or, in other words, that the defendant was liable on the basis of a contract, to render an account of the profits received by him during the whole period of his management. The learned Counsel urged that the defendant having alleged in paragraph 9 of his application to the Collector (Exhibit B.1)

"that it is just that he should be recognized as the landholder for the purposes of the Madras Estates Land Act subject to the ultimate result of the litigation now pending",

and the Collector having nominated him as landholder on the basis of such allegation, the defendant must be deemed to have been placed in management on the terms that he should account for the profits at the termination of the litigation in case it went against him, and cited the decision of one of us reported as *Sitaramaswami v. Mahalakshamma*(1). In that case, the parties to a pending litigation regarding the validity of a will agreed that the defendant who was already in possession of the land in dispute should retain possession till the termination of the litigation and then deliver possession to the plaintiff with mesne profits in case the latter's claim to the property under the will was upheld. The plaintiff having succeeded in establishing his title, brought a suit for an account of the profits and, on a plea of limitation being raised, it was held that article 120 applied and the right to sue accrued only on the adjudication of the Court on the question of title. This decision would no doubt have application here if it was established that the defendant entered upon management of the estate under an arrangement that he should collect the rents of the estate and render an account of such collections to the plaintiffs if the latter succeeded in the pending litigation. But we do not consider that the defendant undertook any such liability in this case when he got himself recognized as landholder by the Collector. The statement in paragraph 9 of Exhibit B-1 as to the recognition as landholder being subject to the ultimate result of the pending litigation amounts to nothing more than a reference to the proviso contained in section 3, clause 5, itself which expressly provides that the Collector's order shall be subject to any decree or order of a competent civil Court. Whether the

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
—
PATANJALI
SASTRI J.

(1) A.I.R. 1936 Mad. 170.

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
—
PATANJALI
SASTRI J.

defendant said so or not, the Collector's order (Exhibit F) could operate only subject to the result of the pending litigation, and we are unable to spell out of the allegations in Exhibit B-1 any undertaking by the defendant to account for the profits received by him as landholder. Nor can we import into the Collector's order, even reading it with the defendant's application as we were asked to do, any implied terms as to such accounting. The decision cited has therefore no application to the facts of this case. On the other hand, the Nagpur High Court held in *Shri Mahadeoji v. Baldeo Prasad*(1) that, even in the case of a person who was placed in management of certain properties under an express agreement that possession should be delivered back after the conclusion of a litigation then pending, the right to sue for an account of the profits arose under article 120 of the Limitation Act not at the termination of the litigation but at each receipt of the profits, and that the claim for profits received more than six years prior to the suit was barred. However that may be, there is no basis here, as we have already observed, for the suggestion that there was an undertaking by the defendant to render an account of the profits on the termination of the previous litigation in favour of the plaintiffs, and we accordingly reject this contention.

In the plaintiffs' cross appeal only two questions were argued before us. In the first place, it was urged that the learned Subordinate Judge erred in disallowing the plaintiffs' claim to interest on the profits collected by the defendant. The learned Subordinate Judge held that as the plaintiffs did not sue for "mesne profits" which as defined in the Civil Procedure Code would include interest, but sued only

(1) A.I.R. 1941 Nag. 181.

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
—
PATANJALI
SASTRI J.

for an account of the rents and profits received by the defendant, they were not entitled to claim interest under the Interest Act (XXXII of 1839) and he relied on *Nanchappa Goundan v. Ittichathara Mannadiar*(1) in support of that view. There was considerable divergence of opinion in the Courts in India as to when interest could be awarded independently of the provisions of that Act which contained a proviso to the effect that "interest shall be payable in all cases in which it is now payable by law". It is now settled, however, by the decision of the Privy Council in *Bengal-Nagpur Railway Company, Limited v. Ratanji Ramji*(2) that the proviso authorises the Court to award interest in cases in which the Court of equity exercises jurisdiction to allow interest. Their Lordships quote the observations of Lord TOMLIN in *Maine and New Brunswick Electrical Power Co. v. Hart*(3) where he 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."

The test would therefore seem to be whether in the particular case a Court of equity would recognize the claim for interest. We have already held that, having regard to the provisions of sections 94 and 95 of the Indian Trusts Act, the defendant is under a liability to account for the profits received by him as if he were a trustee for the plaintiffs. The plaintiffs' claim therefore attracts the equitable jurisdiction of the Court to award interest in such cases and we hold accordingly that the plaintiffs are entitled to interest at six per cent per annum on the net profits received by the defendant.

(1) (1929) I.L.R. 53 Mad. 549.

(2) I.L.R. [1938] 2 Cal. 72 (P.C.). (3) [1929] A.C. 631, 660.

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
—
PATANJALI
SASTRI J.

The next point argued relates to the allowance of ten per cent of the collections made by the defendant as expenses of management. It was contended that such a consolidated allowance without reference to the actual expenses of management shown in the defendant's accounts is unwarranted, and that an account should be taken of actual charges. It was, however, represented by the plaintiffs' learned Counsel that his clients were prepared to accept this allowance if it included what are called "law charges" which the defendant claims separately in his appeal from the final decree and, as we are holding that the bulk of the law charges, namely, all those relating to the proceedings for recovery of rent must be regarded as covered by this percentage allowance, the point loses much of its importance. It appears, however, that though a separate establishment was maintained for the estate in question, its management was supervised and controlled by the higher officers of the defendant's own Pithapur Zamindari such as the Dewan, Engineer, etc. The learned Subordinate Judge has, apparently in view of the difficulty of working out a just allocation of the salaries of those officers which were borne entirely by the Pithapur Zamindari and in order to avoid a protracted enquiry into the various items of expenses shown in the accounts, fixed a percentage allowance to cover all expenses of management including such supervision charges as a matter of administrative convenience. Reference was made in this connection on behalf of the defendant to *Secretary of State for India in Council v. Sarojekumar Acharjya Chaudhuri*(1) where, in dealing with a case arising in Bengal, their Lordships observed at page 62 that a ten per cent allowance for expenses of collection was

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
—
PATANJALI
SASTRI J.

customary in ascertaining mesne profits and that it was not necessary to adduce evidence regarding the actual expenses of collection. We are of opinion that, having regard to all the circumstances of the case, the course adopted by the learned Subordinate Judge has much to commend it, and we are not prepared to interfere with his discretion as it has not been shown to have been exercised arbitrarily or unreasonably.

Turning now to the appeals preferred against the final decree, we find that though the two plaintiffs have filed separate appeals, they raise the same questions for consideration while the defendant has raised certain other objections to the final decree in his appeal. We will now proceed to deal with the various points argued in these appeals.

The first point raised relates to a sum of Rupees 17,408-12-7 representing the arrears of rent which fell due prior to the death of the Rani. The learned Advocate-General contended that this amount, though collected by the defendant under colour of the Collector's order, stood on a different footing from the collections made in respect of rents falling due subsequently to such order, as the Collector's order had no retrospective operation over such arrears, and that the suit so far as it relates to this sum must be deemed to be one for profits wrongfully received by the defendant within the meaning of article 109 of the Limitation Act. It is not necessary to enter into this question in view of our decision that the plaintiffs are not entitled to claim profits received more than six years prior to the suit as admittedly the whole of this amount was collected before that period.

The next point relates to what has been called the "law charges". In the course of his possession and management of the estate the defendant had to file

(1) (1934) L.R. 62 I.A. 53, 62; I.L.R. 62 Cal. 499.

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
PATANJALI
SASTRI J.

suits from time to time for recovery of the rents due from tenants and thus to incur various expenses incidental to Court proceedings. The defendant had also occasion to institute two suits of a special character, one against a railway company for damages due to floods caused by the railway embankment and the other against certain persons called the Chelikani family for a declaration that the lower rate of rent fixed by a previous landholder in respect of the lands in their possession was not binding upon the defendant under section 26 of the Madras Estates Land Act. The suit against the railway company resulted in a decree for the payment of Rs. 4,164-15-4 by the company which was duly recovered and it appears that a sum of Rs. 1,127 was paid out of the amount recovered to certain tenants as their share of the compensation for the damage caused to their holdings. The defendant's accounts show that the expenses incurred in connection with the first of these litigations amounted to Rupees 2,355-9-0 and that those relating to the second amounted to Rs. 7,438-8-3. There is no dispute about these figures. The plaintiffs, while they claim the rents recovered through Court as well as the sum of Rs. 4,164-15-4 referred to above less Rs. 1,127 paid to the tenants, contend that the defendant is not entitled to the deduction of the expenses incurred in connection with the rent suits and the two litigations referred to above on the ground that all these expenses must be deemed to be included in the ten per cent deduction for expenses of management allowed under the preliminary decree.

The judgment under appeal is by no means free from obscurity in regard to this item. In one place (paragraph 29) the learned Subordinate Judge would seem to disallow the claim for these expenses, but in

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
PATANJALI
SASTRI J.

another place (paragraphs 32 and 47) he would seem to allow their deduction to the extent of the amounts realised through Court. Both parties are, however, agreed that the effect of the decree of the lower Court is to allow the expenses relating to the rent suits and to disallow those relating to the other litigations, the plaintiffs' claim for the amount recovered from the railway company being also disallowed, and it was on this footing that the question under this item has been argued before us. As already observed the plaintiffs contend that all these expenses must be deemed to be covered by the ten per cent allowance for expenses of management, and they also claim the amount recovered by the defendant from the railway company, while the defendant maintains that the entire law charges should be allowed as a legitimate deduction in addition to the management expenses. We consider that neither view can be accepted as entirely correct. Suits and other proceedings for recovery of rent are a normal feature of zamindari administration and it will not be unreasonable to regard the expenses relating to them as expenses of management of the estate. And a deduction on a percentage basis having been allowed for such expenses, it seems to us that the defendant cannot claim a further deduction on account of rent suits under the head "law charges". The expenses relating to the litigation connected with the railway company and the Chelikani family would, however, seem to stand on a different footing. They are litigations occasioned by some special circumstances and the expenses relating to them cannot be regarded as expenses ordinarily incidental to the management of a zamindari. It is not disputed that these litigations were instituted on justifiable grounds and proved beneficial to the estate. We consider therefore that the

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
—
PATANJALI
SASTRI J.

defendant is entitled to credit for the expenses shown in the accounts to have been incurred in respect of these litigations so far as the claim is not barred by limitation. He will have of course to account for the amount recovered from the railway company less Rs. 1,127 paid to the tenants as aforesaid.

The defendant next claims a sum of Rs. 2,516-8-7 as expenses relating to the Survey and Record of Rights carried out by him in respect of the estate. It is objected on behalf of the plaintiffs that this deduction not having been provided for in the preliminary decree which, in addition to the percentage allowance for expenses of management, specifically provides for certain other items of deduction, it is not open to the defendant to claim this sum in the appeal against the final decree as he has not challenged the preliminary decree in regard to this matter in his appeal against that decree. We see no force in this technical objection as all these appeals have been heard together and the points raised can be dealt with as arising in one or other of them as may seem appropriate. Apart from this, it is urged that this sum must also be regarded as included in the ten per cent allowance for expenses of management and could not be claimed separately. We cannot agree. Survey and preparation of record of rights cannot be regarded as acts ordinarily done in the course of the management of a zamindari. They are special operations carried out once and for all and result in great benefit to the estate. The expenses relating to them are in the nature of capital expenditure incurred for the benefit of the estate and there is no apparent reason why the defendant should not be allowed credit for such expenses so far as the claim is not barred by limitation.

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
—
PATANJALI
SASTRI J.

The next item is a claim by the defendant for expenses incurred by him for the construction of certain common *calingulas* or irrigation weirs which serve both the Pittapur and Gollaprole estates. Under an arrangement with the previous proprietor of the Gollaprole estate providing that the expenses relating to the *calingulas* should be borne by the proprietors of both estates in certain proportion, the defendant claims a sum of Rs. 5,173-2-0. In the lower Court Rs. 7,028-6-6 was claimed under this head but the defendant now admits that Rs. 5,173-2-0 is the correct sum due. The learned Subordinate Judge has refused to go into this matter on the ground that it was reserved for determination in a separate suit by consent of parties embodied in a memorandum filed in Court. In paragraph 18 of the preliminary judgment it is stated that

“ the dispute regarding the keys and *kalingas* referred to in the memos will have to be decided in a separate suit as desired by learned Counsel on both sides ”.

This statement is not correct as the memorandum refers only to the dispute regarding the keys of the *calingulas*. That the learned Judge below has fallen into an error is now conceded on behalf of the plaintiffs who agree to this claim being allowed to the extent to which it is established. The actual amount due will have to be ascertained in the lower Court.

The last point raised relates to a sum of Rs. 5,102-1-4 which the plaintiffs claim as interest actually received by the defendant on investments made out of the rents collected. This claim is put forward only as an alternative to the plaintiff's general claim for interest on all sums collected by the defendant as landholder, and it is urged that, if it is held that the defendant is not chargeable with interest

KRISHNAYYA
RAO
v.
MAHARAJA OF
PITHAPURAM.
—
PATANJALI
SASTRI J.

on the profits received by him, he should be held accountable at least for this sum as it was actually received by him. The learned Subordinate Judge has held that the preliminary decree having generally disallowed interest, this claim could not be entertained in the final decree proceedings. As we have held that the plaintiffs are entitled to interest in respect of all the collections made by the defendant, this claim calls for no consideration.

In the result the appeals are allowed in part and the decree will be modified in accordance with the directions contained in this judgment. The parties will pay and receive proportionate costs throughout.

[These appeals having been set down to be mentioned this day the Court made the following order]:—

As the materials are not available here for drafting the amended final decrees, the cases will be remitted to the lower Court for this purpose. The lower Court will also apportion the costs between the first and second plaintiffs.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Horwill.

IN RE D. K. REDDY (ACCUSED), PETITIONER.*

Code of Criminal Procedure (Act V of 1898) ss. 480 and 486 (1)—Contempt of Court—Summary action by Sub-Magistrate—Appeal to District Magistrate—Latter has no power to direct first class Magistrate subordinate to him to hear appeal.

1941,
October 15.

Where a Sub-Magistrate takes summary action for contempt of Court and imposes a sentence under section 480, Criminal Procedure Code, an appeal against that sentence lies only under section 486 (1) of the Code to the District Magistrate; and the District Magistrate has no right to direct such an appeal to be heard by a Magistrate of the first class subordinate to him.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Subdivisional Magistrate, Bellary, dated 7th May 1941 and passed in Criminal Appeal No. 16 of 1941 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Rayadrug in Miscellaneous Case No. 1 of 1941.

K. S. Jayarama Ayyar and C. K. Venkata Narasimham for petitioner.

Public Prosecutor (V. L. Ethiraj) for the Crown.

ORDER.

HORWILL J.—The petitioner was alleged to have committed contempt of Court; and the Sub-Magistrate who was presiding over that Court took summary action under section 480, Criminal Procedure Code, and sentenced the petitioner to a fine of Rs. 15. He preferred an appeal under section 486, Criminal Procedure Code. In the first instance, he preferred

HORWILL J.

* Criminal Revision Case No. 741 of 1941 (Criminal Revision Petition No. 696 of 1941).

D. K. REDDY, *In re.*
HORWILL J.

it to the Subdivisional Magistrate. On an objection taken by the Prosecuting Sub-Inspector, the Subdivisional Magistrate held that he had no jurisdiction to hear the appeal. The petitioner then approached the District Magistrate, who held that the Subdivisional Magistrate had power. When the matter came back to the Subdivisional Magistrate, the Prosecuting Sub-Inspector again raised the objection, but the Subdivisional Magistrate felt that his hands had been tied by the District Magistrate and so overruled the objection. The Prosecuting Sub-Inspector then went again to the District Magistrate, who passed an order which is not on the record, but which presumably was to the effect that the Subdivisional Magistrate had power to hear the appeal. The short point that arises here is whether the Subdivisional Magistrate had jurisdiction or no.

An appeal lies against a sentence imposed under section 480 only under section 486 (1); for section 407, which is the general section granting a right of appeal from second class magistrates, applies only to persons convicted *on a trial* held by a Magistrate. As the petitioner was not convicted on a trial, he would have had no right of appeal at all were it not for section 486 (1). The appeal against the sentence under section 480 lies—in the words of section 486 (1)—“to the Court to which decrees or orders made in such Court are ordinarily appealable”. Section 407 (1) makes an appeal ordinarily lie to the District Magistrate; for he has to hear all appeals from second or third class magistrates if they are not transferred under section 407 (2)—vide *Eroma Variar v. Emperor* (1), which was followed by JACKSON J. in *Sivaswami Palankondan v. Perumal Palaiyondan* (2).

(1) (1903) I.L.R. 26 Mad. 656 (F.B.). (2) 1931 M.W.N. (Cr.) 262.

The remaining question that has to be considered is whether the District Magistrate has a right to direct such an appeal to be heard by any magistrate of the first class subordinate to him. It is argued by the learned Public Prosecutor that section 486 (2) gives such a power; for that sub-section says:

“The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under this section. . .”

Most of the provisions of Chapter XXXI could properly be applied to appeals under section 486; but this particular sub-section 2 of section 407 says:

“The District Magistrate may direct that any appeal *under this section* . . . shall be heard by any Magistrate of the first class subordinate to him . . .”;

so that the District Magistrate has power to direct the transfer from his file to that of the first class Magistrate only appeals under section 407 (1), i.e., appeals from convictions on a trial. That sub-section could not therefore be properly applied to an appeal under section 486 (1).

The Subdivisional Magistrate having acted without jurisdiction, this petition is allowed and the District Magistrate ordered to take the appeal on his file and to dispose of it according to law.

V.V.C.

D. K. REDDY,
In re.
HORWILL J.

APPELLATE CIVIL—FULL BENCH.

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

KANNEPALLI CHINNA VENKATA CHELAMIAH
SASTRI (FIRST DEFENDANT), APPELLANT,

v.

MEDURU ANNAPOORNAMMA AND ANOTHER
(PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Indian Limitation Act (IX of 1908), sec. 19—Endorsement on promissory note of payment without appropriation towards principal or interest—Payment endorsed “towards promissory note”—“Towards”, meaning of. Such endorsement, acknowledgment of liability within sec. 19.

An endorsement on a promissory note in the following words, “paid Rs. 350 towards this promissory note and endorsed the payment hereon”, can be read as an acknowledgment of liability within the meaning of section 19 of the Limitation Act.

The use of the word “towards” in itself implies that more remains to be paid; in other words, that the payment is made on account of a larger sum due under the instrument. This amounts to an acknowledgment of liability within the meaning of section 19 of the Limitation Act.

Rama Shah v. Lal Chand(1) distinguished.

Ramayya v. Anjayya(2) approved and affirmed.

Case law reviewed and discussed.

APPEAL against the decree of the Court of the Subordinate Judge of Chicacole, dated 27th September 1937 and passed in Original Suit No. 82 of 1936.

The appeal came on for hearing in the first instance before LEACH C.J. and KUPPUSWAMI AYYAR J. who made the following

* Appeal No. 28 of 1938.

(1) I.L.R. [1940] Lah. 470 (P.C.).

(2) I.L.R. [1942] Mad. 405.

ORDER OF REFERENCE TO A FULL BENCH:—

In this case the endorsements on the promissory note in suit are relied on to save limitation. On 15th February 1931 an endorsement was made in these words: “paid Rs. 23 (rupees twenty-three) towards this promissory note and endorsed the payment hereon.” On 10th January 1934 there was an endorsement expressed in the same words in respect of a sum of Rs. 350. In *Ramayya v. Anjayya*(1) a Bench of this Court (WADSWORTH and PATANJALI SASTRI JJ.) held that an endorsement in the following words, “paid on the 15th September 1938, towards this promissory note, Rs. 2”, could be read as an acknowledgment under section 19 of the Limitation Act and that the decision of the Privy Council in *Rama Shah v. Lal Chand*(2) was confined merely to section 20 of that Act. The learned Advocate for the appellant says that this decision is wrong. He points out that the Privy Council in *Rama Shah v. Lal Chand*(2) considered and approved the decision of the Full Bench of the Allahabad High Court in *Udaypal Singh v. Lakshmi Chand*(3) where the Allahabad High Court considered the question of the application of section 19. Without entering upon a discussion of these cases it is obvious that a substantial question arises, namely, whether section 19 of the Limitation Act can be successfully pleaded in a suit on a promissory note where there are endorsements of the nature of those made in this case. In these circumstances we refer to a Full Bench this question:

“Whether an endorsement on a promissory note in these words, ‘paid Rs. 250 towards this promissory note and endorsed the payment hereon’, can be read as an acknowledgment of liability within the meaning of section 19 of the Limitation Act?”

The appeal then came on for hearing before the Full Bench constituted as above.

ON THE REFERENCE:

Advocate-General (Sir A. Krishnaswami Ayyar) and K. Umamaheswaram for appellant.—An endorsement on a

(1) I.L.R. [1942] Mad. 405.

(2) I.L.R. [1940] Lah. 470 (P.C.).

(3) (1935) I.L.R. 58 All. 261 (F.B.).

VENKATA
CHELAMIAH
v.
ANNA-
POORNAMMA.

promissory note in the terms that a certain sum is paid towards the promissory note does not amount to an acknowledgment of liability within section 19 of the Indian Limitation Act. For the purpose of saving limitation an acknowledgment of liability under the section must be an acknowledgment of subsisting liability. A mere acknowledgment of payment of money does not amount to such acknowledgment. An endorsement of payment without specifying whether the payment is made for interest as such or for part payment of principal does not amount to an admission that a further sum is due; see *Udaypal Singh v. Lakshmi Chand*(1), particularly the observations of SULAIMAN C.J. at page 271. The judgment of SULAIMAN C.J. is concurred in by the other Judges and BAJPAI J. refers to section 19 at page 306. The decision in *Udaypal Singh v. Lakshmi Chand*(1) is cited with approval in the decision of the Privy Council in *Rama Shah v. Lal Chand*(2). Though there is no express decision in that case as regards section 19 by the Privy Council, the trend of the discussion shows that the Privy Council do not consider that endorsements such as those in the present case would amount to acknowledgments of liability under that section. The observations of SULAIMAN C.J. in *Udaypal Singh v. Lakshmi Chand*(1) were before their Lordships of the Judicial Committee and all the elaborate discussion about section 20 of the Limitation Act would have been unnecessary if their Lordships considered that the question of acknowledgment of liability under section 19 of the Act was open before them.

[LEACH C.J.—The Privy Council do not deal with the question now under discussion. The question regarding the applicability of section 19 was neither placed before them nor considered by them.]

Considering then the point apart from the Privy Council decision, it is submitted that the endorsements in question do not amount to acknowledgments of subsisting liability. The term "towards" does not indicate an acknowledgment of further liability. The words "paid towards the debt or promissory note" are quite consistent with the position

(1) (1935) I.L.R. 58 All. 261, 271 (F.B.).
(2) I.L.R. [1940] Lah. 470 (P.C.).

that the payment is in satisfaction of the debt or the promissory note and that no further balance remains due.

[LEACH C.J.—"Towards" means and implies that something is left over and that what is paid is not the full amount due.]

No payment can, by mere implication, amount to an acknowledgment of further liability. The burden is upon the person relying on an endorsement to establish that it is such an acknowledgment and it depends on the express terms of the endorsement. No extraneous evidence is permissible; see *Lutchumanan Chetty v. Mutta Iburaki Marakkayer*(1) and *Udaypal Singh v. Lakshmi Chand*(2). It is submitted that the decisions in *Visvanatha Santhasingaro v. Ramchandra Mardraja Deo*(3), *Jaganadha Sahu v. Rama Sahu*(4), *Ramakrishna Chetty v. Venkatasubbiah Chetty*(5), *Venkatakrishniah v. Subbarayudu*(6) and *Ramayya v. Anjayya*(7) are not correct. The decision in *Visvanatha Santhasingaro v. Ramchandra Mardraja Deo*(3) proceeds upon a view of the acknowledgment being an implied promise to pay, which is not sound. In the decision in *Jaganadha Sahu v. Rama Sahu*(4), *Visvanatha Santhasingaro v. Ramchandra Mardraja Deo*(3) is simply purported to be followed and there is no further discussion of the point. The case reported as *Ramakrishna Chetty v. Venkatasubbiah Chetty*(5) is not of much assistance. It is stated there that the Court is bound by the previous decisions and that the particular endorsement was made with the intention of extending limitation. Intention of parties in regard to the endorsement is not a relevant factor at all. In *Venkatakrishniah v. Subbarayudu*(6), the Court takes into consideration evidence other than the actual terms of the endorsement, which is not permissible in law. The recent decision of WADSWORTH and PATANJALI SASTRI JJ. in *Ramayya v. Anjayya*(7) expressly states that, if the matter were *res integra*, the conclusion might have been different. Other cases that may be referred to are *Nagendran Chetty v. Kuppusami Aiyen*(8), *Krishnaswami Naicker v. Thiruvengada*

VENKATA
CHELAMIAH
v.
ANNA-
POORNAMMA.

(1) (1869) 5 M.H.C.R. 90.
(2) (1914) 17 M.L.T. 78.
(3) (1914) 17 M.L.T. 139.
(4) (1914) 17 M.L.T. 139.
(5) I.L.R. [1942] Mad. 405.
(6) (1935) I.L.R. 58 All. 261 (F.B.).
(7) (1914) 17 M.L.T. 80.
(8) (1916) I.L.R. 40 Mad. 698.
(9) (1916) 4 L.W. 148.

VENKATA
CHELAMIAH
v.
ANNA-
POORNAMMA.

Mudaliar(1) and *Chandukutti v. Moosan*(2). In *Isri Prasad Tewari v. Chandrabhan Prasad Tewari*(3) the Allahabad High Court held that an endorsement of payment in respect of a debt did not amount to an acknowledgment within section 19. There is a reference in this case to an unreported decision of SULAIMAN C.J., which seems to suggest that the words "paid towards a debt" may amount to such an acknowledgment; but the decision was based upon the interpretation of the particular words used in the endorsement in that case. It must be admitted that there is no direct decision holding that an endorsement in these words, viz., "paid towards the debt" does not amount to an acknowledgment of liability though there have been decisions to the contrary effect.

K. V. Krishnaswami Ayyar and *C. Ramarao* for first respondent.—The same view as that taken by the Madras High Court in *Venkatakrishniah v. Subbarayudu*(4) has been taken by other High Courts also; see *Ganesh Narhar v. Dattatraya Pandurang*(5), *Tayerali v. Garabad Sadu*(6), *Prasanna Kumar Roy v. Niranjan Roy*(7), *M. K. Kasiviswanathan Chettyar v. R. M. S. L. Lakshmanan Chettyar*(8) and *Bur Singh v. Sikri Brothers*(9). The observations of SULAIMAN C.J. in *Udaypal Singh v. Lakshmi Chand*(10) are not in conflict with the above view. Even accepting these observations in full, it is submitted that the endorsements now under consideration amount to acknowledgments of liability within section 19 of the Limitation Act. The decision in *Ramayya v. Anjayya*(11) has been recently followed by VENKATARAMANA RAO and ABDUR RAHMAN JJ. in the unreported decision in Appeal Suits Nos. 48, 202, 204 and 248 of 1938 and 313 to 319 of 1939.

Second respondent was not represented.

LEACH C.J.—The OPINION of the Court was delivered by LEACH C.J.—When the judgment of the Full Bench of the Allahabad High Court in *Udaypal Singh v. Lakshmi*

- | | |
|---------------------------------|--|
| (1) (1934) 68 M.L.J. 63. | (2) A.I.R. 1936 Mad. 616. |
| (3) I.L.R. [1939] All. 200. | (4) (1916) I.L.R. 40 Mad. 698. |
| (5) (1922) I.L.R. 47 Bom. 632. | (6) A.I.R. 1939 Bom. 252. |
| (7) (1921) I.L.R. 48 Cal. 1046. | (8) [1937] Ran. 421. |
| (9) A.I.R. 1940 Lah. 106. | (10) (1935) I.L.R. 58 All. 261 (F.B.). |
| (11) I.L.R. [1942] Mad. 405. | |

Chand(1) and the judgment of the Privy Council in *Rama Shah v. Lal Chand*(2) are examined, it is quite clear that there is nothing in the judgment of the Judicial Committee to throw doubt on the long line of decisions of this Court referred to in *Ramayya v. Anjayya*(3). The case of *Rama Shah v. Lal Chand*(2) had reference to section 20 of the Limitation Act and there is nothing in the judgment which can be deemed to be by way of interpretation of section 19 beyond the statement that section 19 is not to be read as based upon the theory of implied promise. Section 19 applies to an acknowledgment of liability in writing and, in deciding whether the words used constitute an acknowledgment, the Court can only have regard to the words used.

In the course of his judgment in *Udaypal Singh v. Lakshmi Chand*(1) SULAIMAN C.J. observed:

"It is equally obvious that where a payment is made without any specification and the debtor does not signify whether he is making the payment of interest as such or of part payment of the principal, there is really no admission on his part that any further sum is still due from him, and there is therefore no acknowledgment of liability on his part."

We are in full agreement with this statement. If, for instance, on the back of a promissory note are written by the maker the words, "paid Rs. 10", the endorsement cannot be construed as being anything more than a statement of the payment. The sum of Rs. 10 may constitute all which remains due in respect of the debt evidenced by the instrument. Where, however, the endorsement is as it was in the present case, "paid Rs. 350 towards this promissory note and endorsed the payment hereon", the position is altogether different. The use of the word "towards"

- (1) (1935) I.L.R. 58 All. 261, 271 (F.B.). (2) I.L.R. [1940] Lah. 470 (P.C.).
(3) I.L.R. [1942] Mad. 405.

VENKATA
CHELAMIAH
v.
ANNA-
POORNAMMA
LEACH C.J.

VENKATA
CHELAMIAH
v.
ANNA-
POORNAMMA.
LEACH C.J.

in itself implies that more remains to be paid; in other words, that the payment is made on account of a larger sum due under the instrument. This amounts to an acknowledgment of liability within the meaning of section 19 of the Limitation Act.

In the course of the judgment delivered by him in *Ramayya v. Anjayya*(1) WADSWORTH J. referred to the line of cases of this Court on the question and stated that the judgment in *Lutchumanan Chetty v. Mutta Iburaki Marakkayer*(2) provided an exception. This is not in fact the case. There the endorsement consisted of these words, "Rs. 50 paid", and the Court pointed out that the writing imported a simple payment of Rs. 50 and that oral evidence was not admissible to add to its meaning. The judgment in that case can only be regarded as being in conformity with the judgment in *Udaypal Singh v. Lakshmi Chand*(3) and, as we have already indicated, the judgment in the latter case does not affect the question now before the Court. It is interesting to learn that four months after SULAIMAN C.J. had delivered the judgment in *Udaypal Singh v. Lakshmi Chand*(3) he had to consider whether an endorsement in these words, "Having paid Rs. 10 towards the amount due on the document I have made this endorsement", was an acknowledgment of liability within section 19 and the learned Chief Justice held that it was. There is no essential difference between that endorsement and the endorsement which we are now considering. The latter judgment of SULAIMAN C.J. was not reported, but it is referred to in the judgment delivered by a Bench of the Allahabad High Court in *Isri Prasad Tewari v. Chandrabhan Prasad Tewari*(4).

(1) I.L.R. [1942] Mad. 405.

(3) (1935) I.L.R. 58 All. 261 (F.B.).

(2) (1869) 5 M.H.C.R. 90.

(4) I.L.R. [1939] All. 200, 204.

VENKATA
CHELAMIAH
v.
ANNA-
POORNAMMA.
LEACH C.J.

It is not necessary to refer in detail to the other decisions of this Court on the question. Sufficient reference is made to them by WADSWORTH J. in his judgment in *Ramayya v. Anjayya*(1). It may, however, be added that the opinion of this Court is shared by the High Courts of Calcutta, Bombay, Lahore and Rangoon; see *Prasanna Kumar Roy v. Niranjana Roy*(2), *Tayerali v. Garabad Sadu*(3), *Bur Singh v. Sikri Brothers*(4) and *M. K. Kasiviswanathan Chettyar v. R. M. S. L. Lakshmanan Chettyar*(5). In fact there does not appear to be any decision to the contrary. The learned Advocate-General has not been able to refer us to one.

We consider that the decision in *Ramayya v. Anjayya*(1) is correct and consequently we answer this reference in the affirmative. The costs of this reference will be made costs in the appeal.

[After the expression of the above opinion, the appeal came on for further hearing before LEACH C.J. and BYERS J. who held on a consideration of the evidence that the plaintiff's claim on the promissory note was not proved satisfactorily. The suit was accordingly dismissed and the appeal was allowed with costs throughout.]

N.S.

(1) I.L.R. [1942] Mad. 405.

(2) (1921) I.L.R. 48 Cal. 1046.

(3) A.I.R. 1939 Bom. 252, 256.

(4) A.I.R. 1940 Lah. 106.

(5) [1937] Ran. 421.

INCOME-TAX REFERENCE.

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

1941,
December 5. THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER.

v.

PAPAMMAL, ADMINISTRATRIX OF THE ESTATE OF THE LATE
RAJA RAMANATHA REDDIAR BY AGENT, V. A. LAKSHMI-
NARASIMHA AYYAR, SRIRANGAM, RESPONDENT.*

Indian Income-tax Act (XI of 1922), ss. 4-A (a) (ii), 4-A (a) (iii) and 4-B—"British India," meaning of Person residing in Burma before 1937, resident of British India within sec. 4-B in considering residence during ten or seven years referred to therein—Government of India Act, 1935, ss. 293 and 311—General Clauses Act (X of 1897), sec. 3 (7).

For the year of assessment, 1939-40, P was assessed to income-tax as the administratrix of her husband's estate in respect of income arising both in British India and Burma. P resided at Rangoon in Burma, during the relevant periods; but the estate owned a house in Srirangam in the Madras Presidency, which was reserved for her occupation during her occasional visits to the Presidency. P stayed in Srirangam in the years 1934, 1936 and 1938, each time making a stay of more than three months. The income-tax authorities held that P was a resident of British India within the meaning of sections 4-A (a) (ii) and 4-A (a) (iii) of the Indian Income-tax Act and that she was also "ordinarily resident" in British India within the meaning of section 4-B of the Act. Section 4-A (a) (ii) was applied because P had maintained a dwelling house in Srirangam throughout the year previous to the year of assessment and section 4-A (a) (iii) because she had been in

* Original Petition No. 215 of 1941.

Rangoon for a period amounting to more than 365 days during the four years preceding the year of account. Section 4-B was held to apply as P had been in Rangoon in nine out of the ten years preceding the year of account and she had also been in Rangoon for a period amounting to more than two years in the seven years preceding that year. It was contended on behalf of P that she was not "ordinarily resident" within the meaning of section 4-B on the ground that Burma ceased to be part of British India on 1st April 1937 and that in defining the term "British India" in that section regard can only be had to what was British India in the year of account.

Held: Section 4-B of the Income-tax Act must be read in the light of the definition of "British India" in the General Clauses Act. The term "British India" must be read as applying to British India as it stood before 1st April 1937 when considering residence during the ten or seven years referred to in section 4-B. The income-tax authorities were therefore right in holding that P was ordinarily resident in British India and assessing her to tax on that basis.

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

M. Subbaroya Ayyar (with him *K. G. Srinivasa Ayyar*) for respondent.—The assessee is not liable to tax in respect of the income accruing in Burma. Burma ceased to be part of British India on 1st April 1937 and income arising in Burma thereafter is foreign income for purposes of the Indian Income-tax Act. It is conceded that the assessee is resident in British India within section 4-A (a) and that her British Indian income is assessable to tax. But she is not "ordinarily resident" within the meaning of section 4-B and her income in Burma, in the absence of its receipt in British India, is consequently not assessable. In considering whether the assessee is "ordinarily resident" in British India her residence in Rangoon prior to 1st April 1937 cannot be taken into account. Sections 4-A and 4-B were newly enacted and introduced in the Income-tax Act in February 1939 and the words "British India" occurring in those sections must be construed to mean British India as understood on that date. Section 311 of the Government of India Act, 1935, defines British India and it is this definition which applies to the case. A fiscal enactment like the Income-tax Act must be construed strictly and the amendments introduced into it in 1939, which seek to impose

COMMISSIONER
OF INCOME-TAX,
MADRAS
v.
PAPAMMAL.

COMMISSIONER
OF INCOME-TAX,
MADRAS
v.
PAPAMMAL.

on assessee's an enlarged liability, must also be interpreted strictly. The words occurring in a new legislation, especially in a taxing statute, must be construed in the manner in which they are understood on the date of such legislation. Residence in British India within the meaning of section 4-B therefore means residence in British India excluding Burma which had ceased to be part of British India at the time of its enactment. The definition of "British India" in section 3 (7) of the General Clauses Act as modified by the Government of India (Adaptation of Indian Laws) Order, 1937, is not applicable to section 4-B; firstly, because section 293 of the Government of India Act, 1935, empowers modifications by Orders in Council of existing Indian laws only and not of subsequent enactments; and secondly, because the words "as respects the period before the commencement of Part III of the Government of India Act, 1935," in section 3 (7) of the General Clauses Act must be held to mean "as regards transactions and matters before the commencement of Part III" and the definition does not affect matters arising subsequently. The decision in *Commissioner of Income-tax, Madras v. Valliammai*(1) is relied on by the Income-tax authorities, but that case deals with a different question relating to the assessment for the year of account 1936-37 and does not throw light on the interpretation of "British India" in section 4-B of the Income-tax Act.

K. V. Sesha Ayyangar for petitioner.—The decision in *Commissioner of Income-tax, Madras v. Valliammai*(1) is in point. The question that arose there was whether in respect of the assessment for the year 1937-38 loss from the assessee's business in Burma during the year of account 1936-37 could be claimed by way of deduction in the ascertainment of the total income and it was held that it could be. The interpretation of the words "British India" came up for consideration and arguments similar to those advanced now on behalf of the assessee were put forward in that case and negatived. *Commissioner of Income-tax, Madras v. Valliammai*(1) has been followed by the Bombay High Court in *In re Rawji Dhanji & Co.*(2). Section 311 of the Government of India Act, 1935, must be read subject to section 293 of that Act and to the Government of India (Adaptation of

(1) I.L.R. [1939] Mad. 388.

(2) 1939 I.T.R. 1.

COMMISSIONER
OF INCOME-TAX,
MADRAS
v.
PAPAMMAL.

Indian Laws) Order, 1937, promulgated in pursuance thereof. Both the General Clauses Act and the Income-tax Act were in existence at the time of the promulgation of the said Order. The definition of "British India" in section 3 (7) of the General Clauses Act is therefore applicable to section 4-B of the Income-tax Act and governs the present case. To suggest that, because section 4-B of the Income-tax Act was enacted subsequent to the Adaptation Order of 1937 referred to above, the said definition is not applicable and that the words "British India" must be interpreted differently in section 4-B would involve the anomaly that the same words will have different meanings in the Act according as the amendments therein were made before or after 1937. Further, if regard be had to the context in section 4-B of the Income-tax Act it will be clear that the definition of "British India" in section 3 (7) of the General Clauses Act is apposite and is applicable to it. Burma was part of British India prior to April 1937 and a person residing in Burma during the years previous to April 1937 must be considered to have resided in fact in British India in those years. The contention that for purposes of section 4-B a person residing in Burma previous to 1937 cannot be held to be a resident of British India during that period is opposed to actual fact and results in anomaly.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by LEACH C.J.—The assessee is the widow of the late Raja Ramanatha Reddiar and is the administratrix of his estate. Chidambaram Reddiar, the father of Raja Ramanatha Reddiar, founded a business in Rangoon and this was carried on by his son after his death. The late Raja died in Rangoon in 1932, possessed of large assets some of which were in Burma and some in the Madras Presidency. The assets in the Madras Presidency included immoveable property in the Trichinopoly District. Raja Ramanatha Reddiar had previously married one Parvathi Ammal who in 1915 purchased a house in Srirangam. This house has been regarded as ancestral property and is reserved

LEACH C.J.

COMMISSIONER
OF INCOME-TAX,
MADRAS
v.
PAPAMMAL.
LEACH C.J.

for the occupation of the assessee during her occasional visits to the Presidency. She stayed there in 1934, 1936 and again in 1938, each time making a stay of more than three months. For the year of assessment 1939-40 the assessee made a return of the income of the estate to the Income-tax Officer, Salem, and in this she showed an income of Rs. 65,276 from money lending in British India and Rs. 14,950 as remittance of profits brought into British India from Rangoon. She contended that she was not resident in British India, but this contention the Income-tax Officer overruled. He held that she was resident in British India within the meaning of sections 4-A (a) (ii) and 4-A (a) (iii) of the Indian Income-tax Act. Section 4-A (a) (ii) was held to apply as she had maintained a dwelling house in Srirangam throughout the year previous to the year of assessment. It was held that section 4-A (a) (iii) applied because she had been in Rangoon for a period amounting to more than 365 days in the four years preceding the year of account. Burma was part of British India until 1st April 1937 when it became separate by reason of the provisions of the Government of India Act, 1935. The Income-tax Officer further held that the assessee was "ordinarily resident" in British India within the meaning of section 4-B as she had been in Rangoon in nine out of the ten years preceding the year of account and as she had also been in Rangoon for a period amounting to more than two years in the seven years preceding that year. The result was that the Income-tax Officer assessed the assessee for the year 1939-40 on a total income of Rs. 1,15,180 of which Rs. 70,458 was regarded as income earned in British India and Rs. 44,722 as income earned in Burma. The Appellate Assistant Commissioner confirmed the order of the Income-tax

Officer, and at the request of the assessee the Commissioner has referred to this Court under the provisions of section 66 (2) the following questions:—

"(i) Whether for the purpose of section 4-A (a) of the Indian Income-tax Act being in Burma during any periods prior to 1st April 1937 when Burma was part of British India amounts to being in British India during those periods?

(ii) If the answer to the first question be in the affirmative, whether on the facts of this case the petitioner can be found to be resident and ordinarily resident in British India for the year of assessment 1939-40?"

Under the Indian Income-tax Act a person is assessed for a particular year on the income received by him in the previous year. Section 4 states what the total income of the year of account shall be deemed to include. If a person is resident in British India during the year of account, all income, profits and gains which accrue or are deemed to arise in British India during that period are taxable and similarly all income accruing or arising outside British India, but there is a proviso to the effect that in the case of a person not "ordinarily resident" in British India income, profits and gains which accrue or arise to him without British India shall not be included, unless they are derived from a business controlled in or a profession or vocation set up in India or unless they are brought into or received in British India by him during the year of account. The assessee here says that she is not ordinarily resident in British India and is entitled to the benefit of the proviso in respect of the Burma income until it is brought into British India.

Residence in British India is defined in section 4-A. Clause (a) (ii) of the section states that for the purposes of the Act an individual is resident in British India in any year if he maintains or has maintained for

COMMISSIONER
OF INCOME-TAX,
MADRAS
v.
PAPAMMAL.
LEACH C.J.

COMMISSIONER
OF INCOME-TAX,
MADRAS
v.
PAPAMMAL.
LEACH C.J.

him a dwelling place in British India for a period or periods amounting in all to one hundred and eighty-two days or more in that year and is in British India for any time in that year. Clause (a) (iii) says that an individual is resident in British India in any year if he, having within the four preceding years been in British India for three hundred and sixty-five days or more, is in British India during the year of account otherwise than on an occasional or casual visit. The learned Counsel for the assessee has conceded that by reason of the maintenance of the family house in Srirangam he cannot dispute the contention of the income-tax authorities that the assessee was resident in British India during the year of account, but in order to bring her within the Act in respect of the Burma income it must be shown that she was "ordinarily resident" in British India in that year.

Section 4-B (a) reads as follows:—

"An individual is not 'ordinarily resident' in British India in any year if he has not been resident in British India in nine out of the ten years preceding that year or if he has not during the seven years preceding that year been in British India for a period of, or for periods amounting in all to, more than two years."

On behalf of the assessee it is said that, in defining the term "British India," regard can only be had to what was British India in the year of account, and that on the first day of that year Burma had ceased to be part of British India. It is admitted that, if the term must be read as applying to British India as it stood before 1st April 1937 when considering residence during the ten or the seven years referred to in section 4-B (a), the assessee is out of Court, but reliance is placed on section 311 of the Government of India Act, 1935, which defines "British India" as meaning all territories for the time being comprised within the

Governors' Provinces and the Chief Commissioners' Provinces. If this were the definition to be applied the assessee would be on sure ground, but the argument overlooks the words which precede the definition given in the section. The section opens thus:

"In this Act and, unless the context otherwise requires, in any other Act the following expressions have the meanings hereby respectively assigned to them, that is to say. . . ."

This statement leaves it open to the Court to examine the Income-tax Act and find out what is meant by the term "British India" in section 4-B of the Income-tax Act, and in these circumstances regard must be had to what is said in section 3 of the General Clauses Act. Section 3 (7) of that Act says:

"In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context, 'British India' shall mean as respects the period before the commencement of Part III of the Government of India Act, 1935, all territories and places within His Majesty's dominions which were for the time being governed by His Majesty through the Governor-General of India or through any Governor or officer subordinate to the Governor-General of India, and as respects any period after that date means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces, except, that a reference to British India in an Indian law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar."

This definition was inserted in the General Clauses Act by the Government of India (Adaptation of Indian Laws) Order, 1937, which was promulgated under the provisions of section 293 of the Government of India Act, 1935. Can there be any doubt that this definition is the guide to what is meant by "British India" in section 4-B of the Income-tax Act? In our opinion there can be no doubt.

COMMISSIONER
OF INCOME-TAX
MADRAS
v.
PAPAMMAL.
LEACH C.J.

COMMISSIONER
OF INCOME-TAX,
MADRAS
v.
PAPAMMAL.
LEACH C.J.

The learned Counsel for the assessee has pointed to section 293 of the Government of India Act and says that this indicates that the Adaptation Order cannot affect any Act which came into force after the promulgation of the Order. Section 293 so far as is relevant reads as follows:—

“His Majesty may by Order in Council to be made at any time after the passing of this Act provide that, as from such date as may be specified in the Order, any law in force in British India or in any part of British India shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of this Act and, in particular, into accord with the provisions thereof which reconstitute under different names governments and authorities in India and prescribe the distribution of legislation and executive powers between the Federation and the Provinces.”

The important words here are “His Majesty may by Order in Council to be made at any time after the passing of this Act,” and by reason of the power conferred by this section His Majesty has by Order in Council amended the General Clauses Act which applied to the Income-tax Act. If section 4-B of the Income-tax Act is to be read in the light of the definition of “British India” in the General Clauses Act, as we consider it must be, there can be no doubt that the Income-tax authorities have formed the correct opinion of the law.

What we have said is sufficient to dispose of the reference, but there is a decision of this Court which supports in full the opinion which we have expressed. The case is *Commissioner of Income-tax, Madras v. Valliammai*(1). There the assessee, who resided

(1) I.L.R. [1939] Mad. 388.

in British India, owned a saw mill in Burma. In the year of account, 1936-37, the saw mill business resulted in a loss and the assessee claimed to be entitled to deduct from her income assessable in the following year what she had lost in Burma during the year of account. Burma became separated from India on the first day of the year of assessment. It was held that she was entitled to deduct the loss suffered in Burma from her other profits. In that case the Commissioner of Income-tax referred this question:

“Whether the decision of the Assistant Commissioner that the loss of Rs. 8,863 incurred by the petitioner in Burma in the year of account 1936-37 is not allowable as a deduction in the year of assessment 1937-38 is correct in law?”

The Commissioner of Income-tax contended that, as the combined effect of section 3 and of sub-section 1 of section 4 was to render the tax for the year 1937-38 leviable in respect of the income, profits and gains which in the previous year accrued, arose or were received in British India and as Burma was no longer a part of British India, the loss suffered in Burma was not deductible, in other words, regard could only be had to what was British India in the year of assessment. The Court refused to accept this contention and said that as the tax was charged on the income of the previous year regard must be had to what was British India in the year of account. This decision was followed by the Bombay High Court in *In re Rawji Dhanji & Co.* (1).

The question referred in this case will be answered in the manner indicated, and as the assessee has failed she must pay the Commissioner's costs, Rs. 250.

N.S.

(1) 1939 I.T.R. 1.

COMMISSIONER
OF INCOME-TAX,
MADRAS
v.
PAPAMMAL.
LEACH C.J.

APPELLATE CIVIL.

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

1942,
January 16.

BEHARA VIYYAMMA AND FOUR OTHERS (DEFENDANTS
6 AND 10 TO 13), APPELLANTS,

v.

AYYAGARI VEERA VENKATA SATYA
SURYAPRAKASA RAO, MINOR BY MATERNAL
AUNT AND NEXT FRIEND VADDIPARTI RAMAYAMMA
AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT),
RESPONDENTS.*

*Hindu law—Adoption—Widow—Receiving adopted boy
through agents appointed by her for that purpose—Valid.*

An adoption ceremony is not invalid merely because the widow who made the adoption did not herself receive the boy direct from the hands of the natural father but through agents appointed by her for that purpose.

Vijiarangam et al v. Lakshuman et al(1), *Shamsing v. Santabai*(2) and *Sayamalal Dutt v. Saudamini Dasi*(3) referred to.

APPEAL against the decree of the Court of the Subordinate Judge of Cocanada in Original Suit No. 5 of 1931.

P. Somasundaram and *P. Suryanarayana* for appellants.

G. Balaparameswari Rao for first respondent.

Second respondent was not represented.

JUDGMENT.

LEACH C.J.

LEACH C.J.—The main question in this appeal is whether the first respondent is the adopted son of one Suryaprakasa Rao, an inamdar of Tirupathi in the

Godavari District. Suryaprakasa Rao died in the year 1914 and it is the first respondent's case that his widow adopted him as a son to her deceased husband in 1928, the consent of the nearest sapinda having been obtained. The appeal also challenges the validity of three alienations made by the widow before the adoption. The Subordinate Judge held that the adoption of the first respondent was valid and that the alienations were not binding on him. The suit was filed by the first respondent for a declaration that his adoption was valid and for an order setting aside the alienations. The appellants are the sixth defendant who bought 1.36 acres of land from the widow, the legal representatives of one Peda Subbanna in whose favour the widow executed a usufructuary mortgage of another property, and the legal representatives of another person named Subbanna who was also a mortgagee of land belonging to Suryaprakasa Rao's estate.

The appellants challenge the correctness of the finding of the Subordinate Judge that the first respondent was validly adopted on two grounds. In the first place, they say that, when the widow adopted the first respondent, she was unchaste and therefore under Hindu law could not adopt a son to her husband. In the second place, they say that the adoption ceremony was not valid because the widow did not herself receive the boy direct from the hands of the natural father, but through agents appointed by her for this purpose. In *Sayamalal Dutt v. Saudamini Dasi*(1), the Calcutta High Court held that a Hindu widow who was living in concubinage and was in a state of pregnancy resulting from such concubinage was incompetent to receive a son in adoption to her deceased

VIYYAMMA
v.
SURYAPRAKAS
RAO.
LEACH C.J.

* Appeal No. 157 of 1940.

(1) (1871) 8 Bom. H.C.R. 244. (2) (1901) I.L.R. 25 Bom. 551.

(3) (1870) 5 Beng. L.R. 362.

(1) (1870) 5 Beng. L.R. 362.

VITYAMMA
v.
SURYAPRAKASA
RAO.
LEACH C.J.

husband. The Court has been informed that there is no decision of this Court on the question; but I think that it may be taken that a Hindu widow cannot lawfully adopt in the circumstances like those set out in the report of *Sayamalal Dutt v. Saudamini Dasi*(1). It is not necessary to consider to what length the Hindu law goes in this respect, because it is quite clear that the evidence in this case does not prove that the widow was unchaste at the time she made the adoption.

When her husband died in the year 1914 the widow was only eleven years of age. The village school master, the priest and the karnam have all given evidence on this question and they are in agreement that the widow was not living, and according to them she had never lived, an immoral life.

The appellants rely on a statement of the widow herself when in the witness box. The statement is to the effect that four years after her husband's death, she lived with one Venkatachalapathy. The Subordinate Judge has refused to believe this because the widow has now repudiated the adoption and is supporting the alienees. Even if it were true that four years after her husband's death she became the mistress of the person mentioned, that in itself would not mean she could not make a valid adoption in the year 1928. I will assume for the purposes of this case that her evidence as to what happened four years after her husband's death is true; but before the appellants can succeed on this point, they must show that she was living an immoral life in 1928. Admittedly the evidence does not go to this extent. In fact, Behara Tammiraju, the third witness called for the contesting defendants, stated that the widow had repented of

what she had done. Mr. Somasundaram for the appellants has very properly stated that the Hindu law will not regard a widow as unchaste because of her conduct many years before the adoption. The appellants have entirely failed to prove immorality against the widow in recent years, and I have no hesitation in concurring in the opinion of the Subordinate Judge that the widow was not precluded from making a lawful adoption of a son to her deceased husband.

Admittedly the natural father was asked to give his son in adoption. He consented and the *dhatta homam* ceremony was performed. The natural father and the adoptive mother were present at the giving and taking of the boy and during the *dhatta homam* ceremony. The boy was actually handed over by the natural father to one Ayyagari Ramachendrudu and his wife who were authorized by the widow to receive the boy from him and, having received the boy, they handed him to the widow. The plea of invalidity here is based entirely on the fact that the widow did not receive the boy direct from the hands of the natural father. This plea I find myself unable to accept. The essentials here are the giving by the natural father of the boy and the acceptance of him by the adoptive parent, and in this case there was a giving and an acceptance. On 15th October 1928, that is, some two months after the adoption, the widow executed a deed in which she made the boy's natural father his guardian. This deed contains the following statement:—

“I had the said boy with me and, on 18th August 1928 I requested you to give him in adoption as the son to my husband according to the Hindu Dharma Sastras; consenting thereto you gave the said boy to me and so I received him

VITYAMMA
v.
SURYAPRAKASA
RAO.
LEACH C.J.

(1) (1870) 5 Beng. L.R. 362.

VITYAMMA
v.
SURYAPRAKASA
RAO.
LEACH C.J.

and after causing all the ceremonies, namely, *Dhatta homams*, *Bhootha karma*, *namakaranam*, etc., to be duly performed and after giving (the boy) the name of Ayyagari Veera Venkata Satya Sooryaparakasa Rao, I have chosen (the boy) as the son and the *kartha* of my husband and myself."

The question whether the father could appoint an agent to give the boy in adoption on his behalf was raised in the Bombay High Court in the case of *Vijiarangam et al v. Lakshuman et al*(1) and it was held that an agent could act in this respect. In the course of his judgment in that case WEST J. observed :

"The gift and acceptance in such a case must, as Sir T. Strange (I, 95) has observed be manifested by some overt act; and here Yeshvadabai did not in person hand over her son to Savitri. But she commissioned her uncle to do this, being at the time too unwell to attend the ceremony herself. The Hindu law recognizes the vicarious performance of most legal acts; the object of the corporeal giving and receiving in adoption is obviously to secure due publicity (Colebrook's Digest, Book V. T. 273, commentary), and Yeshvada's employing her uncle to perform this physical act, which derived its efficacy from her own volition accompanying it, cannot, we think, deprive it of its legal effect. We hold, therefore with the learned Judge, that the adoption is proved and effectual."

This decision was approved of by the Bombay High Court in *Shamsing v. Santabai*(2). In that case a Hindu father had been converted to Muhammadanism. He had a son and it was arranged that the son should be given in adoption. For this purpose he delegated authority to his brother. The Court held that the delegation was lawful and that the adoption which followed was lawful. In my opinion these decisions are correct and, if a natural father can lawfully authorize another to give his son in adoption, it must follow that the adoptive parent can

delegate someone to accept the child in adoption on his or her behalf. If this were not so, what would be the position when through accident or illness the natural father or the adoptive parent could not be present in person to do what is necessary? There could be no adoption. In the present case the adoptive mother, having appointed agents to receive the boy, was herself present and accepted the boy through the hands of her representatives who were sitting close to her. Here again I have no hesitation in concurring in the finding of the Subordinate Judge that there was a lawful giving and taking and that the *dhatta homam* ceremony was properly performed.

The contentions of the appellants that the Subordinate Judge was wrong in setting aside three of the alienations can be disposed of in very few words. The properties were sold or mortgaged for the payment of "sundry debts" or "for family expenses". There is no evidence as to what the sundry debts were, whether they were debts which had been incurred on behalf of the estate or whether they were debts of the deceased or the widow's personal debts, and there is no evidence as to what the family expenses were. Further, the alienees made no attempt to satisfy themselves that the raising of the moneys was necessary for the purposes of the family. In these circumstances the Subordinate Judge was quite right in holding that the alienations were not binding on the adopted son.

The appeal fails and will be dismissed with costs in favour of the first respondent.

BELL J.—I agree.

G.R.

(1) (1871) 8 Bom. H.C.R. 244.

(2) (1901) I.L.R. 25 Bom. 551.

VITYAMMA
v.
SURYAPRAKASA
RAO.
LEACH C.J.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Kuppuswami Ayyar.

1941,
December 16.

KARAMSETTI GURAVIAH (APPELLANT), APPELLANT,

v.

V. RANGAIAH, OFFICIAL RECEIVER, NELLORE, AND
TWO OTHERS (RESPONDENTS), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sec. 51 (3)—Applicable to sales effected before order of adjudication only—Code of Civil Procedure (Act V of 1908), ss. 47 and 104 (2) and O. XXI, r. 90 and O. XLIII, r. 1 (j)—Property sold in execution of mortgage decree subsequent to adjudication of judgment-debtor—Official Receiver not made party in execution—Application by Official Receiver to set aside sale, dismissed—Appeal against order—Appeal allowed—Second appeal lies against appellate order—Execution sale held invalid.

Property of a judgment-debtor was sold in execution subsequent to his adjudication as an insolvent. The decree-holder alleged that he had no knowledge of the adjudication. The Official Receiver thereupon applied under Order XXI, rule 90, Civil Procedure Code, to set aside the sale. The application was dismissed by the trial Court but, on appeal, the District Judge reversed the decision. A second appeal to the High Court was preferred and dismissed. On appeal under the Letters Patent,

held: (i) The preliminary objection that no second appeal lies in the case must be overruled.

Anantharama Iyer v. Kuttimalu Kovilamma(1) followed.

(ii) Section 51 (3) of the Provincial Insolvency Act applies only to sales which have taken place before the order of adjudication.

Mallikarjuna v. Official Receiver, Kistna(2) followed.

* Letters Patent Appeal No. 16 of 1940.
(1) (1916) 30 M.L.J. 611. (2) I.L.R. [1938] Mad. 1063.

Judgment in *Muthan Chettiar v. Venkituswami Naicken*(1) on the point in question treated as *obiter* and not followed.

(iii) The second appeal was rightly dismissed.

GURAVIAH
v.
RANGAIAH.

APPEAL under clause 15 of the Letters Patent against the order of KING J., dated 22nd April 1940 and made in Appeal Against Appellate Order No. 153 of 1938 preferred to the High Court against the order of the District Court of Nellore, dated 24th March 1938 and made in Civil Miscellaneous Appeal No. 30 of 1937 (Execution Application No. 692 of 1936 in Original Suit No. 109 of 1931, District Munsif's Court, Kani-giri).

K. Umamaheswaram for appellant.

K. Kuppuswami and *R. Ramamurthi Ayyar* for respondents.

The JUDGMENT of the Court was delivered by LEACH C.J.—This is an appeal under the Letters Patent from a decision of KING J. dismissing an appeal which the appellant had filed challenging the correctness of an order passed by the District Judge of Nellore. The respondent, who is the Official Receiver of Nellore, says that no appeal lay to this Court from the order of the District Judge and this question has been argued first.

LEACH C.J.

On 15th January 1935 the appellant obtained a final decree for sale in a suit which he had filed against the second respondent to enforce a mortgage. In the month of August in that year the second respondent was adjudicated an insolvent. The appellant, who says he had no knowledge of the adjudication, proceeded to execute his decree, and on 17th August 1936 the property was sold by the Court. The appellant was the

(1) (1936) I.L.R. 59 Mad. 928.

GURAVAIAN
v.
RANGAIAH.
LEACH C.J.

purchaser. On 16th September 1936 the first respondent filed an application under Order XXI, rule 90, of the Code of Civil Procedure, in which he asked for an order setting aside the sale on the ground that he had received no notice of it and also because the sale had resulted in substantial loss to him as the representative of the estate of the judgment-debtor. The execution proceedings had taken place in the Court of the District Munsif of Kanigiri and consequently the first respondent's application was made in that Court. The District Munsif held that the Official Receiver was not a necessary party to the proceedings and that there had been no substantial injury caused by the sale. The first respondent appealed to the District Judge who reversed both the findings of the District Munsif.

The first respondent says that no appeal lies from the decision of the District Judge by reason of sub-section 2 of section 104 of the Code of Civil Procedure, the appeal to him being from an order which fell within Order XLIII, rule 1 (j). The questions between the appellant and the first respondent were, however, questions which also fell within the purview of section 47 of the Code. There was the decree-holder on the one side and the Official Receiver, representing the judgment-debtor, on the other. In these circumstances the appellant claims the right of a second appeal. That a second appeal does arise in such circumstances was recognised by a Bench of this Court in *Anantharama Iyer v. Kuttimalu Kovilamma*(1) and a similar decision has been given by the Calcutta High Court; see *Dineshchandra Ray Chaudhuri v. Jahanali Biswas*(2). The judgment in *Anantharama Iyer v.*

(1) (1916) 30 M.L.J. 611.

(2) (1934) I.L.R. 62 Cal. 457.

Kuttimalu Kovilamma(1) is binding on us and decides against him the preliminary objection taken by the first respondent.

The decision of KING J. dismissing the second appeal was based on the judgment of this Court in *Mallikarjuna v. Official Receiver, Kistna*(2) where it was held that sub-section 3 of section 51 of the Provincial Insolvency Act only applies to sales which have taken place before the order of adjudication. Learned Counsel for the appellant admits that this decision is against him, as is also the decision of another Bench of this Court, namely, that given in *Anantharama Iyer v. Kuttimalu Kovilamma*(1). He says, however, that a contrary opinion was expressed by VENKATASUBBA RAO J., sitting with CORNISH J., in *Muthan Chettiar v. Venkituswami Naicken*(3), and in these circumstances he asks that the question be referred to a Full Bench. The judgment of VENKATASUBBA RAO J. in *Muthan Chettiar v. Venkituswami Naicken*(3), in so far as it deals with the question now under discussion, was entirely *obiter*, and the observations of VENKATASUBBA RAO J. were fully discussed in the judgment of BURN J. in *Mallikarjuna v. Official Receiver, Kistna*(2). We see no necessity for a reference to a Full Bench, especially as the last mentioned case is supported by the judgment of this Court in *Anantharama Iyer v. Kuttimalu Kovilamma*(1).

The appeal fails and will be dismissed with costs.

N.S.

(1) (1916) 30 M.L.J. 611.

(2) I.L.R. [1938] Mad. 1063.

(3) (1936) I.L.R. 59 Mad. 928.

GURAVAIAN
v.
RANGAIAH.
LEACH C.J.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao and
Mr. Justice Somayya.

RANGASAMI GOUNDER, PETITIONER,

v.

THE OFFICIAL RECEIVER, COIMBATORE,
AND SIX OTHERS, RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), ss. 34 and 110 and O. XXXIV—Suit on mortgage decreed by trial Court, but reversed by High Court on appeal—Valuation for purposes of leave to appeal to Privy Council—Amount with interest calculated up to date of decree of trial Court—Subsequent interest discretionary and not to be taken into account—Same principle applicable to money as well as mortgage claims.

In the case of a plaintiff, whose suit for recovery of money with interest is dismissed by the High Court on appeal from the decree of the trial Court, the value for the purposes of leave to appeal to His Majesty in Council under section 110 of the Civil Procedure Code is the amount with interest calculated up to the date of the decree of the trial Court.

No further interest can be added in computing the valuation, the reason being that the grant of subsequent interest is in the discretion of the Court under section 34 of the Civil Procedure Code and that further interest which may or may not be allowed is no part of the subject-matter in dispute for purposes of section 110 of the Civil Procedure Code.

The same principle applies to claims upon mortgages. The grant of interest subsequent to the date fixed for payment in the preliminary decree in a mortgage suit is not obligatory but discretionary, such interest being granted under section 34 of the Civil Procedure Code. Consequently interest subsequent to the date fixed for payment in the preliminary decree cannot be taken into consideration in determining the valuation for the purposes of leave to appeal to the Privy Council

* Civil Miscellaneous Petition No. 5899 of 1941.

1941,
December 19.

in cases where the suit upon the mortgage is dismissed by the High Court on appeal.

The question whether, after the amendment of Order XXXIV of the Civil Procedure Code in 1929, grant of interest even subsequent to date of suit in respect of mortgage claims is not discretionary, left open.

Case law reviewed and discussed.

PETITION under sections 109 and 110 and Order XLV, rules 2, 3 and 8, of the Code of Civil Procedure, 1908, praying that in the circumstances stated therein the High Court may be pleased to grant leave to the petitioner therein to appeal to His Majesty in Council against the decree of the High Court in Appeal Suit No. 195 of 1938 (Original Suit No. 232 of 1936, Sub-court, Coimbatore).

S. Muthia Mudaliar for petitioner.

C. S. Venkatachari and D. Ramaswami Ayyangar for first respondent.

Other respondents were not represented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by SOMAYYA J.—This is an application for leave to appeal to His Majesty in Council against the decree and judgment of this Court which reversed the decree of the Subordinate Judge of Coimbatore.

Being a reversing judgment the applicant will be entitled to the leave asked for if the value of the subject-matter of the suit and of the subject-matter in dispute in appeal to His Majesty in Council are both of the value of Rs. 10,000 or upwards. In the Court below the suit valuation was Rs. 10,000 and, therefore, the first requisite is satisfied. The only question is whether the second condition is also satisfied. The lower Court gave a decree for a sum of Rs. 4,000 for principal, Rs. 5,625 for interest and Rs. 1,060-3-0

RANGASAMI
v.
OFFICIAL
RECEIVER,
COIMBATORE.

SOMAYYA J.

RANGASAMI
v.
OFFICIAL
RECEIVER,
COIMBATORE.
SOMAYYA J.

for costs, in all making up Rs. 10,685-3-0 calculated up to 3rd February 1938. The sixth defendant appealed to this Court. He valued the appeal at Rs. 9,665 made up of Rs. 9,625 decreed for principal and interest up to 3rd February 1938 plus Rs. 40 further interest up to 25th February 1938, the date of the presentation of the appeal. The amount of costs decreed was not included in the valuation of the appeal and no court-fee was paid thereon as it is not necessary to include costs in the value of the appeal. If the appeal succeeds, the direction as to costs made by the trial Court will automatically be set aside.

The contention on behalf of the respondent is that the value of the subject-matter involved in the appeal to His Majesty in Council is not Rs. 10,000 and upwards because the valuation of the appeal is only Rs. 9,665. His contention is that the interest accruing subsequent to the date of the decree of the lower Court cannot be calculated in arriving at the amount. The appeal was disposed of on 26th February 1941. By that time, apart from costs, the amount due as per the decree of the lower Court amounted to over Rs. 11,000 because the amount decreed carried interest at six per cent per annum from the date fixed for payment, i.e., 3rd February 1938.

If the suit had been dismissed by the trial Court and had been decreed by the appellate Court, it is undoubted and it is not disputed that for a defendant's further appeal the value of the claim as it stood on the date of the decree of the High Court would be the sum to be taken into consideration for this purpose. That is the decree which he would appeal against. Is there any reason to apply a different rule in the case of a plaintiff-appellant? The real

loss to the plaintiff which he seeks to restore by appealing to His Majesty in Council is the amount which he was deprived of by the decree in appeal as on the date of its decree. On the date when the High Court passed its decree, he was entitled to over Rs. 11,000 apart from costs. If this is the crucial date even for the plaintiff seeking leave to appeal, then the applicant must succeed.

But the respondent contends that the question has been concluded by various decisions of the Judicial Committee and of this and the other High Courts, and it is urged that the effect of those decisions is that, in the case of a plaintiff whose suit is dismissed by the High Court on appeal, the value for the purposes of leave to appeal to His Majesty in Council is the amount calculated up to the date of the decree of the lower Court and that further interest cannot be added. Now, the reason underlying the decisions which take this view is that the grant of subsequent interest is within the discretion of the Court and that therefore the further interest which may or may not be allowed is not part of the claim for the purpose of section 110, Civil Procedure Code. In the case of suits where the plaint valuation is in question, it has been held by the Judicial Committee in *Manganna v. Mahalakshamma*(1) that subsequent interest or subsequent mesne profits will not be calculated. Prior to 1874, appeals to the Privy Council were governed by the Order in Council of the 10th April 1838. The words then were "amount or value of the subject-matter in dispute in appeals to Her Majesty in Council". The other requisite that the plaint also must involve a like sum was not there. On the wording of the Order in Council of the 10th April 1838, there are several decisions the effect of which

RANGASAMI
v.
OFFICIAL
RECEIVER,
COIMBATORE.
SOMAYYA J.

(1) (1929) I.L.R. 53 Mad. 167, 170 (P.C.).

RANGASAMI
v.
OFFICIAL
RECEIVER,
COIMBATORE.
SOMAYYA J.

is summarised by the Judicial Committee in *Manganna v. Mahalakshamma*(1), on page 170, thus :

"Up to 1874, appeals to the Privy Council were governed by the Order in Council of the 10th April 1838. The words then were 'amount or value of the subject-matter in dispute in appeals to Her Majesty in Council.' Upon that there were decisions of the Privy Council that interest on money claims and mesne profits of immovable property subsequent to the date of the suit, but awarded by the decree, might be reckoned, but none subsequent to that date."

In a case where a suit was dismissed by the trial Court but decreed on appeal, it is the amount calculated up to the date of the appellate decree that determines the question.

In *Goorooopersad Khoond v. Juggutchunder*(2) the Judicial Committee dealt with a case where on the date of the decree of the High Court the sum decreed against the defendant was over Rs. 10,000. Their Lordships said this on page 168 :

"Now, where the appeal is from the whole decree and the decree has given an amount, including interest up to the date of the decree, which exceeds Rs. 10,000, it is clear that the matter which is in dispute in the appeal must exceed the sum of Rs. 10,000 ; for the question to be tried upon the appeal must be whether the decree is or, is not, right, that is to say, whether the decree has or has not properly ordered payment of a sum exceeding Rs. 10,000. Where, therefore, at the date of the judgment the sum which is recoverable under the decree of the Sudder Court is an amount exceeding Rs. 10,000, there, in their Lordships' judgment, the case clearly falls within the terms of the Order in Council."

Then on page 169 they said :

"Their Lordships must not, of course, be understood to intimate that the Sudder Courts ought to give leave to appeal in cases in which the specified amount of Rs.10,000 can only be reached by the addition of interest subsequent to the decree."

(1) (1929) I.L.R. 53 Mad. 167, 170 (P.C.).
(2) (1860) 8 M.I.A. 166, 168, 169.

RANGASAMI
v.
OFFICIAL
RECEIVER,
COIMBATORE.
SOMAYYA J.

Here it is laid down that the amount decreed by the appellate Court including interest up to the date of its decree is the amount to be taken for the purpose of granting leave to appeal to His Majesty in Council. Interest subsequent to the date of the High Court decree should not be calculated. Mr. Muthiah Mudaliar argues that, if this is the rule laid down for the defendant-appellant, the same rule ought to apply to a case of a plaintiff-appellant.

We think there is considerable force in this argument and, if the matter rested upon principle, we should be inclined to hold in favour of the applicant.

The respondent's argument that the matter is set at rest by the subsequent decisions of the Judicial Committee and of this and other High Courts has now to be examined.

The first decision relied upon is that of the Privy Council in *Manganna v. Mahalakshamma*(1). That was a case dealing with the question whether "the amount or value of the subject-matter of the suit in dispute in the Court of first instance must be ten thousand rupees or upwards". It was urged that interest subsequent to the date of suit should be included for calculating the value of the subject-matter of the suit. The plaintiff got a decree in the trial Court but lost on appeal. She was the applicant and it was clear that, unless interest between the date of the plaint up to the date of the decree of the trial Court was added, the sum of Rs. 10,000 would not be reached. The Judicial Committee held that this cannot be done and approved the decision of this Court in *Subramania Ayyar v. Sellammal*(2).

There is nothing in this decision that touches the question with which we are dealing. As stated

(1) (1929) I.L.R. 53 Mad. 167 (P.C.). (2) (1915) I.L.R. 39 Mad. 843.

RANGASAMI
v.
OFFICIAL
RECEIVER,
COIMBATORE.
—
SOMAYYA J.

already, the plaintiff in this case asked for a decree for Rs. 10,000.

The next decision relied upon is that of this Court in *Venkatathirisami Naidu v. Appaswami*(1). In that case the plaintiff filed a suit for over Rs. 10,000 but the trial Court gave a decree for a sum less than Rs. 10,000. The defendant appealed and the plaintiff preferred a memorandum of cross-objections. The whole suit was dismissed by the High Court. The plaintiff filed an application for leave to appeal to His Majesty in Council. The value of both the appeal and the memorandum of cross-objections as on the date of the trial Court's decree was less than Rs. 10,000, but if to this was added interest from the date of the decree of the trial Court up to the date of the decree of the High Court, the value was over Rs. 10,000. The question was whether he was entitled to do so. The learned Judges held that he was not and pointed out the difference between a case of a defendant seeking to file an appeal against the decree of the High Court and that of a plaintiff seeking to do so. The view expressed is that interest subsequent to the date of the *plaint* is within the discretion of the Court under section 34 of the Code of Civil Procedure and that therefore interest subsequent to the date of the *plaint* "cannot be deemed to be part of his claim against the defendant, or, to employ the language of section 110, Civil Procedure Code, part of the subject-matter in dispute on appeal to His Majesty in Council". Then they say :

"If the plaintiff's suit is dismissed by the Court on appeal, the maximum value to be attached to his appeal to the Privy Council is the value of his suit as stated in the

(1) (1933) I.L.R. 56 Mad. 886.

plaint and accepted by the trial Court; and it can make no difference whether that Court allowed in whole or in part or dismissed it altogether."

According to this judgment, if the suit is for Rs. 10,000 and the decree is for Rs. 8,000 it is Rs. 8,000 which is the value of the subject-matter of the dispute in appeal to His Majesty in Council. They do not even allow the interest from the date of suit up to the date of the first Court's decree to be added because the grant of interest subsequent to the date of the *plaint* is discretionary.

This decision appears to go too far. The respondent does not urge that interest from the date of the *plaint* to the date of the first Court's decree should be excluded. Suppose the suit is for Rs. 12,000 with interest at six per cent from the date of *plaint* and the Court gave a decree two years after the *plaint* for Rs. 9,500 with interest at six per cent thereon from the date of suit so that the amount decreed on the date of the decree is over Rs. 10,000, would the case satisfy the requirements if that decree is reversed on appeal?

The next decision relied upon is that of the Patna High Court in *Brijmohan Singh v. Choudhury Bhuneshwar Prasad Singh*(1). The Judges follow the reasoning of the Judges in *Venkatathirisami Naidu v. Appaswami*(2) and there is nothing further by way of independent reasoning. They dissented from a decision of DAWSON MILLER C.J. and COUTTS J. in *Ramyad Singh v. Rambilas Singh*(3) and held that, where the Court is not bound to grant post-*plaint* interest under some statute, as in the case of *Bank of New South Wales v. Owston*(4), subsequent interest

(1) (1941) I.L.R. 20 Pat. 481 (S.B.). (2) (1933) I.L.R. 56 Mad. 886.
(3) (1921) 2 Pat. L.T. 463. (4) (1879) 4 App. Cas. 270.

RANGASAMI
v.
OFFICIAL
RECEIVER,
COIMBATORE.
—
SOMAYYA J.

RANGASAMI
v.
OFFICIAL
RECEIVER,
COIMBATORE.
SOMAYYA J.

cannot be included where the plaintiff seeks to prefer an appeal to His Majesty in Council.

The respondent relies on another decision of the Judicial Committee in *Doorga Doss Chowdry v. Ramanauth Chowdry*(1). That was an application for leave to appeal from a decree of the Sudder Court, dated 23rd October 1857, which reversed that of the Zillah Court. The Plaintiff lost on appeal and he sought leave to appeal from the decree of the Sudder Court which corresponds to the High Court. From the facts it appears that the suit claim was as laid in the plaint for recovery of Rs. 9,274-6-0 including interest due up to that date. The decree of the trial Court was that the defendant should pay the plaintiff the total sum of Rs. 9,274-6-0 and interest on the principal sum during the period when the suit was pending trial and for costs together with interest on the consolidated sum from that day to the date of realization. The Sudder Court reversed the decree of the Zillah Court on 29th February 1860. In dealing with the plaintiff's application, the Judicial Committee said this :

"The amount absolutely decreed by the Court is Rs. 9,274-6-0, the interest added to that for the time specified, at 8 per cent, would, according to the petitioner's calculation, raise the sum due to Rs. 9,310 ; that is under the appealable sum. It has been determined a short time ago by their Lordships in the case of *Maharajah Sutteeschunder Roy v. Guneschunder*(2) that the Sudder Courts have no authority under the Order in Council of the 10th April 1838, to add the interest accruing subsequent to the decree to the capital sum decreed for the purpose of reaching the appealable amount ; here the interest, under any circumstances, would not be sufficient, for, to arrive at the necessary amount, you must add, as you seek to do, the costs. Now, the costs of a

(1) (1860) 8 M.I.A. 262, 264.

(2) (1860) 8 M.I.A. 164, 168.

suit are no part of the subject-matter in dispute and cannot be used for the purpose. . . . Their Lordships are clearly of opinion that the sum in issue in this suit is not sufficient to bring the case within the Order in Council, . . ."

This seems to lay down that it is the amount calculated up to date of the decree of the trial Court that determines the question as regards the plaintiff who lost on appeal. This decision seems to be in point though it is difficult to see how this decision is reached from a consideration of the earlier decision on pages 164 to 168 of the same report. If the earlier decision is to be applied, the sum calculated up to the date of the decree of the High Court should determine the question. But apparently they took Rs. 9,274-6-0 the sum mentioned in the plaint plus interest up to the date of the decree of the trial Court ; and the sum on that date was only Rs. 9,310 ; see page 264. This sum is stated to determine the question. Though this decision is referred to in the later decisions and in the text books as an authority for the proposition that costs should not be included, we are bound to follow this decision.

The next question argued is that, in the case of mortgage decrees like the present case, the Court is bound to grant interest and that therefore the decisions just referred to do not apply and that this case is governed by the decision of the Judicial Committee in *Bank of New South Wales v. Owston*(1). If the grant of interest is obligatory, then it seems to us that the decision just cited would apply. So, this takes us to the next question whether the award of interest is compulsory after the date fixed for payment by the lower Court. The decision of the Judicial Committee in *Thakurain Kusum Kumari v.*

RANGASAMI
v.
OFFICIAL
RECEIVER,
COIMBATORE.
SOMAYYA J.

(1) (1879) 4 App. Cas. 270.

RANGASAMI
v.
OFFICIAL
RECEIVER,
COIMBATORE.
SOMAYYA J.

Debi Prosad Dhandhanian(1) clearly lays down that the grant of interest subsequent to the date fixed for payment in a mortgage suit is not obligatory. Mr. Venkatachariar goes further and argues that the Court is not bound to grant interest at the contract rate even from the date of the plaint and relies upon the observations of the Federal Court in *Jaigobind Singh v. Lachmi Narain Ram*(2) but we consider it unnecessary to go into that question. It is enough to point out that, prior to the enactment of the Civil Procedure Code in 1908, there was no provision in the old Transfer of Property Act for grant of interest subsequent to the date fixed for payment. When the Civil Procedure Code was enacted in 1908, the provisions regulating procedure in mortgage suits were transferred from the Transfer of Property Act to the Civil Procedure Code. Order XXXIV, rule 4, which provides for a preliminary decree in a suit for sale, ran thus :

"In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in clauses (a), (b) and (c) of sub-rule (i) of rule 2, and further directing that the mortgaged property or a sufficient part thereof and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest and the balance, if any, be paid to the defendant or other persons entitled to receive the same."

Though the grant of subsequent interest was not provided for in rule 2, this rule recognized that subsequent interest may also be granted because it makes a provision for paying to the mortgagee the amount of subsequent interest when the sale proceeds come in.

(1) (1935) I.L.R. 15 Pat. 210 (P.C.).

(2) [1940] F.C.R. 61.

There has been a subsequent amendment in 1929 which made further changes with which we are not now concerned. The Judicial Committee pointed out in *Thakurain Kusum Kumari v. Debi Prosad Dhandhanian*(1) that, before the amendment in 1929, grant of subsequent interest, i.e., grant of interest subsequent to the date fixed for payment, was made under section 34 of the Civil Procedure Code and that the law is the same even after 1929. This decision is conclusive on the question and we cannot hold that the grant of interest subsequent to the date fixed for payment is obligatory. We hold that the grant of such interest is only under section 34, Civil Procedure Code, which leaves it to the discretion of the Court to grant it or not. If this is so, the case falls within the principle of *Venkatathirisami Naidu v. Appaswami*(2) and *Brijmohan Singh v. Choudhury Bhuneshwar Prasad Singh*(3) and of the Judicial Committee in *Doorga Doss Chowdry v. Ramanauth Chowdry*(4).

To sum up, the grant of interest subsequent to the date fixed for payment is discretionary and it was grantable under section 34, Civil Procedure Code, prior to 1929; in this respect the law is the same even after 1929. Therefore even if the Judicial Committee in this case reverses the decision of this Court, it might, having regard to the facts of this case, refuse to award interest from the date fixed for payment in the lower Court. Therefore, what may or may not be awardable is not to be included in the claim. It is not part of the claim as held in *Venkatathirisami Naidu v. Appaswami*(2). The question might arise whether after the amendment of 1929 even interest after the date of suit does not come within section

RANGASAMI
v.
OFFICIAL
RECEIVER,
COIMBATORE.
SOMAYYA J.

(1) (1935) I.L.R. 15 Pat. 210 (P.C.). (2) (1933) I.L.R. 56 Mad. 886.
(3) (1941) I.L.R. 20 Pat. 481 (S.B.). (4) (1860) 8 M.I.A. 262.

RANGASAMI
v.
OFFICIAL
RECEIVER,
COIMBATORE.

34, Civil Procedure Code, and whether the grant of interest at the contract rate up to the date fixed for payment is obligatory, but we do not wish to go into that question.

We therefore hold that the applicant is not entitled to the leave asked for and dismiss the petition with costs.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao.

SARADAMBAL (THIRD RESPONDENT), APPELLANT,

v.

S. SUBBARAMA AYYAR (PETITIONER), RESPONDENT.*

Hindu Women's Rights to Property Act (XVIII of 1937), sec. 3, cls. (2) and (3)—Nature of interest taken by widow under—Rule of survivorship put an end to—Property in her hands liable for the payment of her husband's debts and liable to be attached by her husband's creditors.

Under section 3 (2) of the Hindu Women's Rights to Property Act, 1937, a widow of an undivided member of a Hindu joint family takes the same interest in the joint family property (excepting such properties as would fall under the category of agricultural lands) as her husband himself had, subject to the restrictions placed on her powers by section 3 (3) of the Act. That sub-section leaves the right to partition untouched but restricts the right of alienation because the nature of the interest which she takes is a Hindu woman's estate. The Act has taken away the rule of survivorship and allowed the property to descend to the deceased's wife. The property taken by her is liable for the payment of her husband's debts and is liable to be attached by her husband's creditors.

* Appeal Against Appellate Order No. 195 of 1940.

SARADAMBAL
v.
SUBBARAMA
AYYAR.

APPEAL against the order of the District Court of Coimbatore dated 6th September 1939 and made in Appeal Suit No. 187 of 1939 preferred against the order of the Court of the District Munsif of Kollegal, dated 27th February 1939 and made in Execution Petition Register No. 352 of 1938 in Original Suit No. 1138 of 1935 on the file of the Court of the District Munsif of Coimbatore.

V. Subramanyam for appellant.

V. C. Viraraghavan for respondent.

Cur. adv. vult.

JUDGMENT

VENKATARAMANA RAO J.—This appeal raises a question relating to the construction of section 3, clause 2, of the Hindu Women's Rights to Property Act, 1937. The relevant facts are few. On 18th December 1935 the plaintiff obtained a decree for money in Original Suit No. 1138 of 1935 on the file of the District Munsif of Coimbatore against the first defendant. Subsequent to the date of the decree the first defendant died. His wife, the third defendant, was brought on record as his legal representative. The plaintiff sought to implead the brother and the brother's son of the first defendant besides the third defendant, but the Court allowed only the third defendant to be brought on record and dismissed the application against the brother and the brother's son. The order passed by the learned District Munsif is to the following effect:—

“To implead the widow he relies upon the Act XVIII of 1937 by which a widow obtains an interest of her deceased husband. I do not think that the decree-holder can go both against the widow and against the brother and the brother's son. As the decree-holder is relying upon the Act XVIII of 1937 I must presume that the widow has taken the husband's

VENKATA-
RAMANA RAO J.

1941,
October 3.

SARADAMBAL
v.
SUBBARAMA
ATTAR.

VENKATA-
RAMANA RAO J.

property and his interest in the joint property. The widow will therefore be added as legal representative and the brother and the brother's son are struck off the record."

The third defendant filed a statement of objections objecting to the execution being issued against her. She stated that her husband before his death left a will in her favour in and by which he gave certain immoveable properties to her for her maintenance which included also the suit properties and therefore they were not liable to be attached. The learned District Munsif took the view that the fact that the properties were given to her for her maintenance would not exonerate her from liability to pay her husband's debt and he therefore allowed the execution to issue. On appeal, the learned District Judge took the view that, if the properties were self-acquired, the will must be regarded as operative; but if the properties were regarded as joint family properties the share of the husband which vested in the third defendant under the Hindu Women's Rights to Property Act was liable to be attached. He confirmed the decision of the learned District Munsif.

On appeal Mr. Vedanta Subramanian, on behalf of the third defendant, contends that the view of the learned District Judge in regard to the Married Women's Rights to Property Act is not sound. His contention is that under the said Act the property would be taken by the third defendant free from the liability to pay her husband's debt and that it was not the intention of the Act to enlarge the rights of the creditors. The question is whether this contention is tenable. In view of the recent decision of the Federal Court *In re The Hindu Women's Rights to Property Act*(1) that the said Act does not regulate

SARADAMBAL
v.
SUBBARAMA
ATTAR.

VENKATA-
RAMANA RAO J.

succession to agricultural lands in the Governor's Provinces of the properties that were attached which comprise 23 items in the schedule to the execution petition, only two items, namely items 22 and 23, will be governed by the Act. The provisions of the Act which are relevant for the present discussion are clauses 2 and 3 of section 3 which run thus :

"2. When a Hindu governed by any school of Hindu law other than the Dayabhag school or by customary law dies intestate having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section 3, have in the property the same interest as he himself had.

3. Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner."

Under section 3 (2) the interest taken by the widow is the same interest as the husband himself had, that is, the interest of an undivided member of a joint family in the joint family property. The said interest is capable of definition and so far as this Presidency is concerned, it is liable to separation by partition and alienable *inter vivos* for valuable consideration and liable to be seized in execution of a decree for the personal debts of the member. Giving the language its plain meaning, the widow takes that interest subject to the rights and obligations attached to that interest and subject to the restrictions placed on her powers by clause 3 of the Act. That clause leaves the right to partition untouched but restricts the right of alienation because the nature of the interest which she takes is a Hindu woman's interest. What a Hindu woman's interest is, is well defined in Hindu law; that is, she is competent to alienate that interest only for purposes sanctioned by Hindu law and that interest

(1) [1941] F.C.R. 12.

SARADAMBAL
v.
SUBBARAMA
AYYAR.
—
VENKATA-
RAMANA RAO J.

is liable to be seized in execution of decrees for the payment of the debts of the last male owner. Taking both the clauses together the property taken by her is liable for the debts of her husband. The contention of Mr. Vedanta Subramanian is that, as the husband died undivided and the creditor has not taken any steps during his lifetime to attach the said property, his remedy is lost. It is true that if the Act had not been passed, as the husband died without leaving a male issue, the property would have gone by survivorship to his undivided brother and his brother's son and the doctrine of survivorship would prevent the creditor from attaching that property. But the Act has taken away that rule of survivorship and allowed the property to descend to his wife. Once the rule of survivorship no longer operates, there is nothing to preclude a creditor from attaching the property. Though the interest she takes is a limited interest of a Hindu woman's, she is conferred the same status as that of a male owner. Even in the case of a female who takes a Hindu woman's estate, the inheritance vests in her for the time being as fully as it vests in any male succeeding to the property but only with a restricted right of alienation. As pointed out by the Judicial Committee in *Moniram Kolita v. Keri Kolitani*(1)

"the whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest".

If for instance an undivided member dies leaving a son and also his widow, the property would devolve upon both of them and though, so far as the widow is concerned, her interest is limited, no such limitation can be placed upon the interest taken by the son. It

(1) (1880) I.L.R. 5 Cal. 776, 789 (P.C.).

cannot be said that the interest of the son is attachable but not that of the widow. The fact that a right of partition is conferred upon the widow goes to show that the property is taken by her subject to all the rights and liabilities which the husband would have had because it is the same interest that is conferred upon her. Therefore, giving the language its plain meaning, the property taken by her must be held to be liable for the payment of her husband's debts and is liable to be attached by the plaintiff. The view taken by the learned District Judge is therefore correct. The learned District Munsif will issue execution in the light of the observations contained in the judgment. I direct each party to bear his own costs in this appeal.

G.R.

SARADAMBAL
v.
SUBBARAMA
AYYAR.
—
VENKATA-
RAMANA RAO J.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Happell.

THE FIRM OF BHIMAJI MOTIJI CARRYING ON BUSINESS
AT CHAMPAGALLI, BOMBAY, (RESPONDENT), APPELLANT,

1941,
December 18.

v.

THE OFFICIAL RECEIVER, BELLARY, (PETITIONER),
RESPONDENT.*

Provincial Insolvency Act (V of 1920), sec. 51—"The benefit of the execution", meaning of—Property sold in execution of decree—Property purchased by decree-holder with leave to bid and set off—Application by Official Receiver for payment of sale price—Decree-holder not entitled to restore property instead of paying price.

In an application by an Official Receiver under section 51 of the Provincial Insolvency Act for payment to him of the

* Appeal Against Order No. 219 of 1940.

BHIMAJI
MOTJI,
FIRM OF
v.
OFFICIAL
RECEIVER,
BELLARY.

amount of the sale price of the property purchased by a decree-holder after obtaining leave to bid and set off, in execution of his decree against the judgment-debtor who was adjudicated insolvent, it is not open to the decree-holder to state that instead of paying the price he would restore the property itself to the Official Receiver.

"The benefit of the execution" within the meaning of section 51 represents the bids made at a sale or the assets realised otherwise in the course of execution. It refers, in other words, to money and section 51 provides that money which is so realised shall in certain circumstances be paid to the decree-holder and in certain other circumstances to the Official Receiver. There is no scope under section 51 for the passing of an order directing or permitting the decree-holder to restore to an Official Receiver property which the former has purchased at an execution sale.

Venkata Sivayya v. Suryanarayana(1) followed.

Henry Merieu v. Official Receiver, Madura(2) doubted.

APPEAL against the order of the District Court of Bellary, dated 10th October 1939 and made in Interlocutory Application No. 89 of 1938 in Insolvency Petition Nos. 14 of 1928 and 14 of 1930.

V. S. Narasimhachar for appellant.

A. Bhujanga Rao and *D. R. Krishna Rao* for respondent.

KING J. The JUDGMENT of the Court was delivered by KING J.—The subject-matter of this appeal is a claim by the Official Receiver under section 51 of the Provincial Insolvency Act for the payment to him of the amount of the bid of the decree-holder in execution of his decree against the judgment-debtor who was adjudicated insolvent. The learned District Judge of Bellary has passed an order calling upon the decree-holder to pay him the amount of his bid less the costs of the execution, and the decree-holder now appeals.

(1) 1938 M.W.N. 841.

(2) A.I.R. 1935 Mad. 907.

It is not seriously disputed at the hearing before us that section 51 of the Provincial Insolvency Act must govern the decision of this appeal. Nor does the appellant seriously dispute that on the question of the date of the insolvency of the judgment-debtor his rights must give way before those of the Official Receiver. What he does say, however, is that the benefit of the execution does not consist in the bid which he made but consists in his ownership of the property which he purchased, and therefore he is prepared not to pay to the Official Receiver the amount which he offered for the land but to restore the land itself to the Official Receiver. The learned District Judge holds that such a solution of the rights of the parties may be equitable but that there is no provision in the Act for carrying it into effect. We were at first much attracted by the argument in favour of the appellant that, if the land which he has purchased and for which he did not need actually to pay any money into Court as he was permitted to set off the purchase against his claim in execution is restored to the Official Receiver, then the appellant derives no benefit from the execution and therefore the purposes of section 51 have been fulfilled. On the other hand, it appears upon further reflection that such a procedure would in effect nullify section 51. What is the practical result of permitting the appellant to convey the land which he purchased to the Official Receiver? It is this, that the whole execution proceedings are as if they were cancelled. The judgment-creditor is in the same position as he was before the execution proceedings began with the same claim against the insolvent. The insolvent is in the same position with his debt still unsatisfied to the same extent. The Official Receiver is in the same position because, if

BHIMAJI
MOTJI,
FIRM OF
v.
OFFICIAL
RECEIVER,
BELLARY.
KING J.

BHIMAJI
MOTJI,
FIRM OF
v.
OFFICIAL
RECEIVER,
BELLARY.
—
KING J.

there had not been this execution, he would have been entitled to take possession of the property which had vested in him, and that is what it is now proposed by the appellant that he should be allowed to do. All the parties therefore occupy precisely the same position as if there had been no execution at all. That being so, it would appear that the "effect of the insolvency on antecedent transactions", to quote from the heading in the Act just before section 51, would be that, if the decree-holder purchases any property, the antecedent transaction is cancelled. That seems to us to be a matter which is simple enough to have been stated in simple language in the Act itself. There is on the other hand an indication in section 51 that the intervention of insolvency in circumstances like these can never bring about a practical cancellation of the execution proceedings because sub-section 3 says that a person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the Receiver. The language of this section is very wide. "A person" will include a decree-holder purchaser and a stranger purchaser and there is the expression "in all cases". We think accordingly that the only logical way of interpreting section 51 is in this way, that the benefit of the execution represents the bids made at a sale or the assets realised otherwise in the course of execution. It refers in other words to money and section 51 decides that money which is so realised shall in certain circumstances be paid to the decree-holder and in certain other circumstances be paid to the Official Receiver. There does not seem to us to be any scope under section 51 for the passing of an order directing a decree-holder to restore to an Official Receiver property which he has purchased at an execution sale.

This matter has to be decided without very much assistance from the authorities. We have been referred only to two cases. In *Henry Merieu v. Official Receiver, Madura*(1) PANDRANG ROW J. had to deal with a case in which the point at issue was whether money should be paid by the decree-holder purchaser to the Official Receiver under section 51. PANDRANG ROW J. decided that it should not be paid for two reasons, the first being that the execution sale itself was a nullity and therefore had to be set aside. The second reason, which we may say, with respect, was hardly necessary to be put forward in order to dispose of the case, was that, when a Court has granted permission to a decree-holder to bid without actually depositing the money in Court, it is a breach of faith on the part of that Court to call upon the decree-holder later at the instance of the Official Receiver to pay money to the Official Receiver in cash. There is no attempt by PANDRANG ROW J. to analyse section 51 and, with respect, although the situation may be an unfortunate one from the point of view of the decree-holder, we do not think that the good faith of the Court is at all involved in an interpretation of section 51, which interpretation it is obligatory upon us to attempt. The other decision is one of VENKATARAMANA RAO J. in *Venkata Sivayya v. Suryanarayana*(2). There the learned Judge observes that having regard to the language of section 51, sub-section 3, no difference ought to be made between a decree-holder purchaser and a stranger purchaser. If the decree-holder has purchased property in good faith, the purchase by him should be upheld. The fact that he had notice of the insolvency would not indicate an absence of good faith on his part. In

BHIMAJI
MOTJI,
FIRM OF
v.
OFFICIAL
RECEIVER,
BELLARY.
—
KING J.

(1) A.I.R. 1935 Mad. 907.

(2) 1938 M.W.N. 841.

BHIMAJI
MOTJI,
FIRM OF
v.
OFFICIAL
RECEIVER,
BELLARY.
—
KING J.

that case VENKATARAMANA RAO J. upheld the claim of the decree-holder purchaser under section 51 (3) to retain the property which he had purchased. We do not think it possible that in the practical working of a simple section like section 51 the decree-holder should be permitted to decide whether he should pay to the Official Receiver the money which he paid for the property or restore the property itself. As VENKATARAMANA RAO J. has said, the only disability under which the decree-holder purchaser lies is that he will not be entitled to the benefit of the execution, that is, he cannot set off the amount of the decree debt against the purchase price, but he is bound to pay the amount of the purchase money into Court just like any other stranger purchaser. We with respect prefer to follow this second and later decision and, in our opinion, the learned District Judge's order is right. This appeal must fail and is dismissed with costs.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Kunhi Raman.

DUPAGUNTA SUBRAMANIAM (PETITIONER), PETITIONER,

v.

GOVINDA PETAR SATYANADHAM AND ANOTHER
(RESPONDENTS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 60—Employee in a municipality drawing Rs. 100 a month as salary—Decree obtained against him by creditor—Arrangement to collect Rs. 15 a month out of salary in satisfaction of decree—Legality of.

An arrangement made by an employee of a municipality, who was drawing a salary of Rs. 100 a month, that his creditor

who had obtained a decree against him might take Rs. 15 per month out of his salary in satisfaction of the decree, is not enforceable in law as it is in contravention of section 60 of the Civil Procedure Code. The provisions of that section, which are imperative, are intended to give protection to persons, like the employee in this case, on grounds of public policy and not merely to confer a personal benefit upon them; and so the employee here cannot waive the privilege given to him by the section.

Case-law reviewed.

Post Master General, Bombay v. Chenmal Mayachand(1) 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 Bezwada, dated 31st October 1940 and made in Execution Petition No. 182 of 1940 in Small Cause Suit No. 99 of 1938.

M. Appa Rao for petitioner.

G. Satyanadham in person.

D. R. Krishna Rao amicus curiae.

JUDGMENT.

KUNHI RAMAN J.—An interesting question of law under section 60 of the Code of Civil Procedure arises for determination in this civil revision petition. Since the respondent was not represented by an Advocate, Mr. Krishna Rao was asked to assist the Court by appearing as *amicus curiae* and he has very kindly placed before the Court all the authorities relevant to the point involved in the case.

The question which the Court below had to decide was, whether an arrangement made by an employee of the Bezwada Municipality, who was drawing a salary of Rs. 100 a month, that his creditor who had obtained a decree against him might take Rs. 15 per month out of his salary in satisfaction of the decree, is

KUNHI
RAMAN J.

1941,
December 18.

* Civil Revision Petition No. 182 of 1940.

(1) I.L.R. 1941] Bom. 415.

SUBRAMANIAM
v.
SATYANADHAM.
—
KUNHI
RAMAN J.

enforceable in law. The agreement between the parties was reduced to writing and Exhibit A is the document that was relied on in the Court below. It professes to be a salary assignment deed which *prima facie* is opposed to the provisions of section 6 of the Transfer of Property Act which prohibits assignment of salary or pension. In the body of the document, as already indicated, the creditor was given the power of collecting Rs. 15 a month out of the debtor's salary. To enforce this agreement, an execution petition was filed in the lower Court by the petitioner here, who is the decree-holder, for attaching Rs. 15 per month out of the salary of the judgment-debtor who is the respondent here. Although notice was served on the judgment-debtor, he did not choose to appear in the Court below. The learned Subordinate Judge, however, has held that, although the agreement was proved, the object of the agreement was opposed to public policy, inasmuch as the provisions of section 60 of the Civil Procedure Code which prohibit attachment of salary of persons getting a salary of Rs. 100 and less than Rs. 100 a month are based upon public policy and therefore an agreement in contravention of these provisions cannot be upheld by a Court of law.

The decree-holder has filed this petition for revising the order and his learned Counsel, Mr. Appa Rao, argues that it is open to a judgment-debtor in the position of the defendant to waive the right conferred on him by section 60 and that therefore the agreement, Exhibit A, is strictly enforceable in law. In support of this contention he relies upon two decisions of the Lahore High Court. The first is reported as *Jagan Nath v. Allah Dad*(1) and it was followed by a later decision reported as *Rajnitar Kumar v. Chetan Lal*(2).

(1) A.I.R. 1939 Lah. 539.

(2) A.I.R. 1940 Lah. 65.

Both these decisions are of single Judges of that High Court who have followed the principle recognized in an earlier decision of the same High Court reported in *Chittar Mal v. Mt. Ram Devi*(1), which is a decision of a Bench of two Judges. That decision, however, related to agricultural land which was sought to be attached and sold contrary to the provisions of section 60 of the Code. The view taken in Lahore is that section 60 imposes a prohibition against forcible attachment of property and that it is open to a person, who has obtained the consent of the party for whose protection provision is made in section 60, to effect an attachment contrary to the provisions of the section. Mr. Krishna Rao, the learned Counsel who appears as *amicus curiae*, invites the attention of the Court to a recent decision of a Bench of the Bombay High Court reported as *Post Master General, Bombay v. Chenmal Mayachand*(2) in which the question has been fully considered and the view taken by the Lahore High Court has been dissented from. In the leading judgment reliance was placed upon a passage in Halsbury's Laws of England, Hailsham Edition, Volume IV, page 471, section 869 :

"There are some choses in action which have never been assignable; and, broadly speaking, it may be said that the ground of their non-assignability is denoted by that comprehensive expression 'public policy'. Thus public policy forbids that effect should be given to assignments of pensions and salaries of public officers payable to them for the purpose of maintaining the dignity of their office or to assure a due discharge of its duties."

The judgment goes on to state as follows :—

"The question then is whether it is open to a person to contract himself out of these provisions or to waive their benefit. It is no doubt a general rule that any one may

SUBRAMANIAM
v.
SATYANADHAM.
—
KUNHI
RAMAN J.

(1) A.I.R. 1935 Lah. 164.

(2) I.L.R. [1941] Bom. 415.

SUBRAMANIAM
v.
SATYANADHAM.
—
KUNHI
RAMAN J.

renounce a law introduced for his own benefit. But that rule applies only to rights and benefits of a personal and private nature created under an agreement or granted by law. There is a clear distinction between a contractual or a statutory right created in favour of a person for his own benefit and a right which is created on the ground of public interest and policy. The rule of waiver cannot apply to a prohibition based on public policy."

BROOMFIELD J. in his concurring judgment says :

"If the privilege is purely personal, if the interests of third parties are not affected and in particular if there is no question of public interest or policy, no doubt the maxim *quilibet potest renunciare juri pro se introducto* is good law. But where a privilege is conferred for reasons of public policy, it is very well settled that it cannot be waived."

In a case which arose under the Presidency Towns Insolvency Act, *Official Assignee, Madras v. D'Silva*(1), in dealing with the question whether the Official Assignee can intercept the salary of an official who draws a salary below the limit prescribed by section 60 of the Code, KRISHNASWAMI AYYANGAR J. states as follows :—

"I doubt whether the law will permit him to do so, for it seems to me that it is against the fundamental principle underlying section 60 of the Insolvency Act and section 60, Civil Procedure Code, to allow him to seize any portion of an insolvent's salary which is below the attachable limit. as such a limit appears to my mind to have been fixed on public grounds to ensure the proper and efficient discharge of duty by a public servant."

In the case reported as *Ashutosh Sikdar v. Behari Lal Kirtania*(2) MUKERJI J. observes as follows, at page 74 :—

"When the object of the statute has been determined, if the statutory provision is not based on grounds of public policy, and is intended only for the benefit of a particular person or class of persons, the conditions prescribed by the

statute are not considered as indispensable and may be waived because every one has a right to waive, and to agree to waive, the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, and which may be dispensed with without infringement of any public right or policy. This rule is expressed by the maxim of law *quilibet potest renunciare juri pro se introducto* (Any one can renounce a law introduced for his own benefit) As was pointed out by Lord WESTBURY in *Hunt v. Hunt*(1) the words '*pro se*' was introduced into the maxim 'to show that no man can renounce a right of which his duty to the public and the claims of society forbid the renunciation.'"

In Mulla's commentaries on section 6 (f) of the Transfer of Property Act (Second Edition, page 66) the learned author says :

"It is opposed to public policy that a public officer should transfer the salary of his office, for the salary is given for the purpose of upholding its dignity and the proper performance of its duties."

Then the case of *Grenfell v. The Dean and Canons of Windsor*(2) is referred to and the following observations of Lord LANGDALE are quoted :—

"There are various cases in which public duties are concerned, in which it may be against public policy, that the income arising for the performance of those duties should be assigned; and for this simple reason, because the public is interested not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them."

A similar question relating to the provisions of sections 86 and 87 of the Civil Procedure Code came up before the Judicial Committee of the Privy Council in a case, *Gaekwar-Baroda State Railway v. Hafiz Habib-ul-Hag*(3). There the question was whether H.H. The Gaekwar of Baroda could be said to have waived the provisions of these sections because there was no objection taken at the trial to the absence

SUBRAMANIAM
v.
SATYANADHAM.
—
KUNHI
RAMAN J.

(1) I.L.R. [1942] Mad. 199.

(2) (1907) I.L.R. 35 Cal. 61, 74.

(1) (1862) 4 De.G.F. & J. 221; 45 E.R. 1168.

(2) (1840) 2 Beav. 544; 48 E.R. 1292. (3) I.L.R. [1938] All. 601 (P.C.).

SUBRAMANIAM
v.
SATYANADHAM.
KUNHI
RAMAN J.

of a certificate signed by a Secretary to the Government of India in token of the consent given by His Excellency the Governor-General. The suit was actually defended on the merits in the trial Court and evidence adduced on behalf of the Manager and Engineer-in-Chief of the State Railway but not on behalf of His Highness The Gaekwar of Baroda who was the party against whom the suit was filed in reality, though not in form. At page 613 of the judgment their Lordships state as follows in dealing with the contention that the objection must be deemed to have been waived:

"No one purported to appear in the suit on behalf of His Highness The Gaekwar of Baroda and there is no ground for saying that he waived his privilege. Further, as already pointed out, the provisions relating to this matter are statutory. They are contained in sections 86 and 87 of the Code of Civil Procedure, they are imperative and having regard to the public purposes which they serve, they cannot, in their Lordships' opinion, be waived in the manner suggested by the High Court."

The provisions of section 60 of the Civil Procedure Code, which are also imperative, are intended to give protection to persons in the position of the respondent in the present case on grounds of public policy and not merely to confer a personal benefit upon them. I have no hesitation in following the decision of the Bombay High Court referred to above, which is consistent with the principle laid down by their Lordships of the Privy Council in the case *Gaekwar-Baroda State Railway v. Hafiz Habib-ul-Hag*(1). In this view the finding of the Court below that the execution petition for attaching Rs. 15 out of the salary of the respondent should not be granted is correct and this civil revision petition must be dismissed.

V.V.C.

(1) I.L.R. [1938] All. 601 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Wadsworth and Mr. Justice
Patanjali Sastri.

SWAYAMPRABHAI AMMAL AND TWO OTHERS
(RESPONDENTS), PETITIONERS,

v.

D. MUTHUKRISHNA PADAYACHI (PETITIONER),
RESPONDENT.*

Madras Agriculturists Relief Act (IV of 1938), ss. 28 (1) and 28 (2) (b) and (c)—Rules framed under—Rule 2 providing remedy by application to Court, not ultra vires.

Rule 2 of the rules framed under Government Order No. 2634 (Development), dated 27th October 1939 in exercise of the powers under sections 28 (1) and 28 (2) (b) and (c) of the Madras Agriculturists Relief Act (IV of 1938) is not *ultra vires*. All that the rule purports to secure is an opportunity for parties to a contract to get an inexpensive, speedy and authoritative decision as to the extent to which the contract is modified by the Act. The procedure under the rule is intended to benefit those parties who do not want to file a suit but have difficulty in ascertaining how the Act affects their pre-existing contract.

No basic principle embodied in Order II, rule 2, of the Civil Procedure Code is offended by the said rule 2 of the Madras Agriculturists Relief Act. Nor is it bad by reason of the provisions of section 42 of the Specific Relief Act. The rule is not invalid for the reason that it offends against the general principles governing suits upon mortgages as embodied in Order XXXIV of the Civil Procedure Code.

Rule 2 which forms part of a group of rules containing a provision for a right of appeal is not rendered invalid by reason of such a provision. Assuming that the rule providing for an appeal can be successfully attacked, the invalidity of that rule would not carry the consequence that the whole of the body of rules would have to be deemed invalid.

* Civil Revision Petition No. 910 of 1941.

SWAYAMPRA-
BHAI
v.
MUTHU-
KRISHNA.

PETITION under section 115 of Act V of 1908, and section 224 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Cuddalore, dated 14th March 1941 and made in Original Petition No. 7 of 1940.

K. Srinivasan and K. S. Ramamurthi for petitioners.

T. M. Krishnaswami Ayyar and T. E. Ramabhadrachari for respondent.

WADSWORTH J. The JUDGMENT of the Court was delivered by the question whether rule 2 of the rules framed under Government Order No. 2634, Development, dated 27th October 1939 in exercise of the powers under section 28 (1) and section 28 (2) (b) and (c) of Madras Act IV of 1938 is *ultra vires*. The rule in question prescribes a procedure whereby, when any debt other than a decree debt is due by an alleged agriculturist, either the debtor or the creditor may apply to the Court for a declaration as to the amount of the debt, and it is provided that no such application shall be maintainable if any suit for the recovery of the debt be pending and further that, if while an application is pending a suit is filed for the debt, the application shall be dismissed. Rule 9 of the same rules gives a right of appeal and second appeal from any declaration under these rules.

We are concerned in the present case with an application by the son of a mortgagor for a declaration that the mortgage debt is discharged by reason of previous payments, applying the principles laid down in the Act. The lower Court dealt with the contention that the rules under which the application was made are *ultra vires*, by a preliminary finding against which the present revision is preferred. The respondent

does not object to the decision of this question at this stage, though ordinarily this Court will not entertain a revision against a mere finding, unless there are special circumstances rendering it desirable. It is conceded on both sides that it is most desirable to get an authoritative ruling on this point, not only for the decision of the particular case, but for the guidance of the lower Courts in other similar cases which are likely to occur.

Act IV of 1938 is intended to provide for the relief of indebted agriculturists and in section 7 the basic principle is laid down that, notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of the Act shall be scaled down in accordance with its provisions and that no sum in excess of the amount so scaled down shall be recoverable from the debtor. Section 18 indicates clearly that it is the duty of the creditor, after this Act came into force or even after the bill came under the discussion of the Legislature, to calculate his claim in accordance with the provisions of the Act on pain of being mulcted in costs. It is, however, in many cases a matter of considerable difficulty for either the creditor or the debtor to discover with any certainty what will be the effect of applying the provisions of the Act to a particular contract; and this was more especially so at the time when the present rules were promulgated which was before a long series of reported decisions had cleared many doubtful questions. It cannot be denied that in October 1939 many creditors must have found it extremely difficult, even with the help of competent legal advice, to decide what was the amount which they could justly claim having regard to the provisions of this Act.

SWAYAMPRA-
BHAI
v.
MUTHU-
KRISHNA.

WADSWORTH J.

SWAYAMPRA-
BHAI
v.
MUTHU-
KRISHNA.
—
WADSWORTH J.

Section 28 of the Act gives to the Provincial Government the power to make rules for carrying into effect the purposes of the Act and particularly to prescribe the form of applications under the Act and to remove any difficulty in giving effect to the provisions of the Act. Having regard to the difficulty just referred to, the Local Government in the rules now under consideration have laid down a procedure whereby either a creditor or a debtor can apply to the Court for a declaration of the amount of the debt affected by the Act. The rules provide for a very small court-fee and limit the enquiry to the question of what is the amount of such debt. It is contended that these rules, particularly rule 2 with which we are now concerned, are *ultra vires*. It is suggested that rule 2 is not a rule for one of the purposes contemplated under section 28. For the reasons already adumbrated, it will be apparent that at the time when these rules were promulgated there was a very widespread difficulty in giving effect to the provisions of the Act, at any rate without involving the parties in unnecessary expense and hardship. It is also suggested that this rule is inconsistent with the provisions of the Act. But we have not been shown how it is so inconsistent. The whole purpose of the rule is to work out the provisions of the Act in an inexpensive and expeditious manner.

The main contention against the rule has been based on the theory that it violates general principles of law and particularly that it is inconsistent with the principles underlying Order II, rule 2, of the Civil Procedure Code, and section 42 of the Specific Relief Act. It is difficult to see how Order II, rule 2, can be read as laying down any basic principle of law which must govern the formulation of rules of procedure

SWAYAMPRA-
BHAI
v.
MUTHU-
KRISHNA.
—
WADSWORTH J.

under a statute. No doubt it is the law that, when a man files a suit based on a particular cause of action, he must ask for all the reliefs which he can obtain with reference to that cause of action. But the procedure now under consideration is not a procedure intended to give to either party the power to enforce his rights on a particular cause of action. The right of suit is left intact and if a suit intervenes, while the application is pending, the procedure under the rule comes to an immediate stop. All that this procedure under the rules purports to secure is an opportunity for parties to a contract to get an inexpensive, speedy and authoritative decision as to the extent to which the contract is modified by this rather drastic legislation. The procedure is in fact intended to benefit those parties who do not want to file a suit but have difficulty in ascertaining how the new statute affects the pre-existing contract. We do not see how any basic principle embodied in Order II, rule 2, is offended by the rule; nor can we see how this rule is bad by reason of the provisions of section 42 of the Specific Relief Act. Section 42 of the Specific Relief Act relates only to suits and not to applications. According to the view held by this Court, vide *Ramakrishna v. Narayana*(1), section 42 is not exhaustive even of declaratory suits and it certainly contains nothing to indicate that no kind of application can lie for a mere declaration, if the law otherwise provides for such an application. Without going into detail we may remark that there are many instances of special statutory provisions for pure declarations which do not come within the four corners of section 42, and we can see no reason why this rule providing for the

(1) (1914) I.L.R. 39 Mad. 80.

SWAYAMPRA-
BHAI
v.
MUTHU-
KRISHNA.

WADSWORTH J.

ascertainment by the Court in an appropriate judicial proceeding of the effect on a particular debt of the provisions of the new Act and the declaration of the result should be deemed invalid by reason of the provisions of section 42 of the Specific Relief Act.

The further contention is that the rules provide for a right of appeal and second appeal, that this provision is invalid and that, if it is invalid, the whole of the rules must be deemed to be bad. We understand that the question of the validity of rule 9 which gives the right of appeal is shortly to come before this Bench in a case in which it is directly in issue. It is not therefore desirable for us to express an opinion on this question. But even conceding that the rule providing for an appeal can be successfully attacked, we do not consider that the invalidity of that rule would carry the consequence that the whole of the body of rules would have to be deemed invalid. The provision for a right of appeal is quite separate from the provision giving the machinery for the ascertainment of the amount of the debt by the Court of first instance. It is not a case in which the rule alleged to be invalid is so inextricably mixed with the rest of the rules that a declaration of its invalidity would necessarily destroy the whole fabric of the rules. Even taking away this right of appeal, there remains a complete and effective procedure for the rapid and inexpensive determination of the effect of the Act upon a particular debt, and even without an appeal the procedure would be subject to the control of this Court in revision, just as the procedure under sections 19 and 20 of the Act has also been held to be subject only to control in revision. We do not think that any challenge to the validity of rule 9 is sufficient to throw

a doubt as to the validity of the main body of these rules.

Lastly it is suggested that rule 2 is bad because it offends against the general principles governing suits upon mortgages as embodied in Order XXXIV of the Civil Procedure Code. It is pointed out that the rule provides only for notice to the opposite party and does not contain any provisions regarding the impleading of all persons interested in the mortgage security, settlement of priorities and so on. It must, however, be remembered that the only thing which can be done under these rules is to declare the amount of the debt. If for the purpose of determining the amount of the debt, it is necessary to determine the indebtedness of other persons interested in the contract, no doubt the Court would give notice to those persons and go into their rights to the extent necessary to decide the only matter in issue. Possibly there may be cases in which the determination of the amount of the debt may involve questions of considerable difficulty and enquiries of some elaboration. But that is not a reason for holding the procedure to be invalid, more especially as the parties can at any time put an end to the proceeding by filing a suit wherein all the rights connected with the contract can be elaborately worked out.

We are therefore of opinion that for none of the reasons urged before us it can be properly said that rule 2 is *ultra vires*. We therefore dismiss the petition with costs.

We must decline to give a certificate under section 205 of the Government of India Act.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth and Mr. Justice
Patanjali Sastri.

1942,
January 22.

PERUMALLA VENKAYYA (RESPONDENT), PETITIONER,

v.

BATCHU PULLAYYA (PETITIONER), RESPONDENT.*

Madras Agriculturists Relief Act (IV of 1938), sec. 28—Rules framed under—Rule 9 providing for rights of appeal and of second appeal from order under rule 7, not ultra vires.

Rule 9 of the rules framed by the Provincial Government under section 28 of the Madras Agriculturists Relief Act (IV of 1938) and promulgated in Government Order No. 2734 (Development), dated 27th October 1939, is not *ultra vires*.

The rule, which prescribes that the order of a Court declaring the amount of a debt under rule 7 shall be subject to appeal and second appeal as if it were a decree in an original suit, is valid. The contention that a right of appeal is a right which can never be conferred by a rule unless there is an express power in the statute to make rules for that purpose is not sound.

The validity of a rule is to be determined not so much by ascertaining whether it confers rights or merely regulates procedure but by determining whether the rule is in conformity with the powers conferred under the statute and whether it is consistent with the statute, reasonable, and not contrary to general principles.

Rule 9 is one which is a reasonable and convenient qualification of the procedure prescribed and it does not offend against any principle of law. It is not inconsistent with anything in the Act itself and it is properly framed for carrying into effect the purposes of the Act and removing difficulties in giving effect to its provisions.

Accordingly, a revision petition to the High Court against an order under rule 7, of a District Munsif is not maintainable.

* Civil Revision Petition No. 1972 of 1941.

Nagappa v. Annapoorani(1) and *The Attorney-General v. Sillem*(2) distinguished.

Blackwood v. London Chartered Bank of Australia(3) referred to.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the decree of the Court of the District Munsif of Gurzala in Original Suit No. 97 of 1940.

K. Bhimasankaram for petitioner.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for respondent.

The JUDGMENT of the Court was delivered by WADSWORTH J.—This petition is preferred against a decision under the rules framed by the Provincial Government under section 28 of Madras Act IV of 1938 and promulgated in Government Order No. 2734 (Development), dated 27th October 1939.

An objection to the maintainability of the revision petition was raised on the ground that rule 9 of these rules provides a right of appeal and that when there is a right of appeal there can be no revision. This objection is met by the contention that rule 9 of the rules is itself *ultra vires* of the Provincial Government and that, therefore, it must be deemed that there is no valid right of appeal, with the result that the right of revision is the only remedy by an aggrieved person.

The question first to be determined is, therefore, whether rule 9 is beyond the powers of the Provincial Government. We decided yesterday in *Swayamprabhai v. Muthukrishna*(4) that the main procedure laid down in these rules for the determination of the amount of a debt, other than a decree debt, due by an alleged

(1) I.L.R. [1941] Mad. 261 (F.B.).

(2) (1864) 10 H.L.C. 704; 11 E.R. 1200.

(3) (1874) L.R. 5 P.C. 92.

(4) I.L.R. [1942] Mad. 647.

VENKAYYA
v.
PULLAYYA.
WADSWORTH J. agriculturist, by an application to the Court, was a procedure which could properly be prescribed under the rule-making powers conferred by section 28 of the Act. In disposing of that matter we refrained from expressing any opinion as to the validity of rule 9 which prescribes that the order of the Court declaring the amount of the debt under rule 7 shall be subject to appeal and second appeal as if it were a decree in an original suit. The argument before us is that, granting that the enactment of a cheap and expeditious procedure for determining the amount of the debt affected by the provisions of this Act was a regulation for carrying into effect the purposes of the Act or for removing a difficulty in giving effect to the provisions of the Act, it was not a necessary incident of such a procedure to prescribe a right of appeal and that a right of appeal is a substantive right which cannot properly be conferred by a rule and should be implicit in the provisions of the statute itself. A Full Bench of this Court decided in the case of *Nagappa v. Annappoorani*(1) that rule 8 of the rules relating to the procedure for dealing with debts embodied in decrees which are to be modified under Act IV of 1938, was *ultra vires* on the ground that it adds to the procedure laid down in section 19 of the Act a power of appeal which the Legislature did not see fit to prescribe. It was observed that, in making a rule providing for such appeals, the Provincial Government is not making a rule for carrying into effect the purposes of the Act, but it is adding something to the Act. Now the decision of the Full Bench does not, in our opinion, affect the disposal of the case before us. We are concerned not with the addition of a right of appeal

(1) I.L.R. [1941] Mad. 281 (F.B.).

to a procedure prescribed by the statute but with the insertion of a right of appeal in a procedure prescribed by rules under the statute. When once it is conceded that the Act provides rights without providing a remedy and that the power of the Provincial Government to make rules for carrying into effect the purposes of the Act and removing any difficulty in giving effect to its provisions warrants the promulgation of a procedure such as has been laid down in these rules, can it be said that the qualification of the remedy prescribed by the insertion of a right of appeal is something which is beyond the powers of the Provincial Government?

Mr. Bhimasankaram for the petitioner has contended that a right of appeal is a substantive right which should be granted only by statute and not by rule, or at any rate, if it is to be conferred by a rule, there must be specific authority in the statute itself for the exercise of the rule-making power so as to confer a right of appeal. No definite authority for this view has been quoted. The nearest case to the position for which Mr. Bhimasankaram has been contending is the case of *The Attorney-General v. Sillem*(1). But on examination, it does not appear that this decision is really an authority for his contention. In that case the House of Lords were dealing with a statute which conferred upon the revenue side of the Court of Exchequer the power to make rules governing its own procedure and their Lordships held that the rule purporting to have been framed under this rule-making power by the Court giving a right of appeal against its orders to the higher Courts was not within the powers conferred, the reason being that the lower

(1) (1864) 10 H.L.C. 704; 11 E.R. 1200.

VENKAYYA
v.
PULLAYYA.
WADSWORTH J.

Court could not by a rule affect the jurisdiction of the higher Courts and that any right of appeal must necessarily be conferred by an authority which can bind all the Courts affected by that right. There can be no question that with reference to Act IV of 1938, the Legislature has conferred upon the Provincial Government the power to make rules which will bind all the Courts of this Presidency. The contention that a right of appeal not being a mere matter of procedure but a substantive right it cannot be conferred by a rule, also seems to lack authority. As has been pointed out by the House of Lords in the case of *Blackwood v. London Chartered Bank of Australia*(1) the tests to apply in considering whether rules are within the powers of the rule-making authority under a statute are (i) whether the rules are reasonable and convenient for carrying the Act into full effect, (ii) whether the rules relate to matters arising under the provisions of the Act, (iii) whether they relate to matters not in the Act otherwise provided for, and (iv) whether they are consistent with the provisions of the Act. The validity of a rule is to be determined, not so much by ascertaining whether it confers rights or merely regulates procedure, but by determining whether the rule is in conformity with the powers conferred under the statute and whether it is consistent with the statute, reasonable, and not contrary to general principles.

No doubt, Act IV of 1938 nowhere contains any provisions for an appeal against a decision under that Act. But equally it contains no indication that an existing right of appeal should be nullified. Apart from the procedure prescribed for the modification of

(1) (1874) L.R. 5 P.C. 92, 108.

VENKAYYA
v.
PULLAYYA.
WADSWORTH J.

decrees for debt, the cancellation of sales and the reduction of undecreed rents, the Act is singularly lacking in provisions prescribing the procedure for giving effect to its substantive provisions. It lays down no procedure for working out the amount of any debt affected by the Act which has not yet come into Court. It would no doubt be open to the creditor to file a suit for the debt, leaving it to the Court to determine how the debt is to be scaled down as an incident to the passing of a decree. But this procedure involves the disadvantages that many parties would be driven to file suits, when there is no real question at issue between them except as to the way in which the Act is to be worked, and that the creditor, if he files his suit after the date prescribed in the Act, would be mulcted in costs if he claims more than is due under the Act. We have held that these circumstances made it most desirable to lay down a simple procedure which could be worked cheaply and speedily, whereby either party could get the amount of the debt determined without the necessity of filing an expensive and elaborate suit. No doubt, it would have been possible to confine such a procedure to a determination by the trial Court without any right of appeal. But had the rules contained no provision for an appeal, they would have been open to the very serious objection that the determination of the amount of the debt by the ordinary procedure of suit would be subject to appeal and in many cases to second appeal and that the rule providing for such a determination only by the Court of first instance would deprive the parties of their ordinary right of appeal which the law gives. It seems therefore that a most eminently reasonable and desirable feature of any procedure for the speedy and inexpensive determination of the amount of a debt

VENKAYYA
v.
PULLAYYA.
WADSWORTH J.

affected by this Act would be the normal right of appeal against the decision. Looked at in this way, it appears that the rule for a right of appeal does not really confer any new right, but preserves a right which exists under the ordinary procedure which is being shortened by the procedure prescribed in the rule.

It cannot, in our opinion, be contended successfully that no right of appeal can be prescribed by a rule unless the statute expressly authorizes the rule-making authority to provide for rights of appeal. There are very many instances in which the rule-making authority has exercised the power of prescribing or taking away rights of appeal in matters covered by the rules. There seems to be a very clear difference between giving a right of appeal under a new procedure enacted by a rule and adding a right of appeal to a statutory procedure which contains no such right. An instance in which a very elaborate code of procedure with a complete system of appeals has been enacted under rule-making powers is found in the Agency Rules framed under section 6 of the Scheduled Districts Act. Section 6 empowers the Local Government to regulate the procedure of the officers who are to administer civil and criminal justice and to direct by what authority any jurisdiction, powers or duties incident to the operation of any enactment for the time being in force shall be exercised or performed. It does not specifically empower the Local Government to prescribe what rights of appeal shall be conferred from decisions of these judicial officers. Rules 47 to 49 of the rules framed under this section give a complete series of rights of appeals which have been exercised for many years and have frequently come up before this Court without, so far as we are aware, their validity being questioned. We are, therefore, unable

to accept the contention that a right of appeal is a right which can never be conferred by a rule unless there is an express power in the statute to make rules for that purpose. It seems to us that the rule now in question is one which is a reasonable and convenient qualification of the procedure prescribed, that it does not offend against any principle of law, that it is not inconsistent with anything in the Act itself and that it is properly framed for carrying into effect the purposes of the Act and removing difficulties in giving effect to its provisions.

We therefore allow the preliminary objection and hold that an appeal does lie against a decision under rule 7 and that, therefore, there can be no revision. The petition is dismissed with costs.

N.S.

APPELLATE CRIMINAL.

Before Mr. Justice Horwill.

IN RE T. V. VENKATARAMA CHETTI (ACCUSED),
PETITIONER.*

1941,
October 23.

*Code of Criminal Procedure (Act V of 1898), sec. 526 - Transfer
—Adjournment—No power to direct costs to be paid.*

Where an accused person wanted to move the High Court for a transfer of his case from the Court of the Subdivisional Magistrate and intimated his intention to the Court,

held the Magistrate in passing orders under section 526 (8), Criminal Procedure Code, had no power to direct the petitioner to pay the costs of the day to the prosecution.

* Criminal Revision Case No. 685 of 1941 (Criminal Revision Petition No. 643 of 1941).

VENKATARAMA
CHETTI, *In re.*

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Subdivisional Magistrate of Kollegal dated 17th February 1941 and made in Calendar Case No. 1 of 1941.

S. Rajaraman for *K. K. Gangadhara Iyer* for petitioner.

Public Prosecutor (V. L. Ethiraj) for the Crown.

ORDER

HORWILL J.

HORWILL J.—The petitioner was desirous of moving this Court to transfer a case from the file of the Subdivisional Magistrate of Kollegal; and in compliance with the provisions of section 526 (8), Criminal Procedure Code, he intimated the fact to the Court. The Subdivisional Magistrate thereupon passed an order under section 526 (8) adjourning the case to 3rd March 1941, requiring the accused to execute a bond for Rs. 200 and fixing 3rd March 1941 as the date within which the High Court should be moved for transfer. He further directed that the petitioner should pay Rs. 39-8-0 as the costs of the day to the prosecution, because the petitioner had from time to time procured unnecessary adjournments and had delayed the application for transfer. The question that arises for consideration in this petition is whether the magistrate was competent to pass an order directing the petitioner to pay the costs of the day to the prosecution.

Under section 344, Criminal Procedure Code, the Court has power to grant an adjournment at the request of a party upon such terms as it thinks fit and "such terms" would, of course, include payment of costs to the other side. Where, however, a party to a proceeding is desirous of moving the High Court for

VENKATARAMA
CHETTI, *In re.*

HORWILL J.

transfer, it is not necessary for him to ask for an adjournment. All he has to do is to intimate to the Court that he intends moving the High Court for a transfer. The Court then has to fix a day within which the applicant has to move the High Court and the security which the applicant has to furnish. If he executes the bond, then the Court is bound to grant an adjournment. In doing so, he does not grant an adjournment under section 344, which permits the imposing of terms, but under section 526 (8) which leaves no option to the Court but to adjourn when once it has been intimated to the Court that the applicant intends to move the High Court for a transfer. The Subdivisional Magistrate had therefore no power to order the petitioner to pay the costs of the day to the prosecution. That being so, the order passed by the Subdivisional Magistrate on 17th February 1941 has to be set aside. The money paid by the petitioner will be refunded to him.

v.v.c.

APPELLATE CIVIL—FULL BENCH.

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

IN RE CHITTOOR KRISHNASWAMY, PETITIONER.*

Indian Bar Councils Act (XXXVIII of 1926), Ss. 8 and 14—Madras Bar Council Rules 1, 3, 16 and 22—Advocate enrolled in Rangoon before separation of Burma from India—Application for enrolment as Advocate of Madras High Court after separation—Compliance with rules framed by the Madras Bar Council—Bar Council recommending exemption under proviso to rule 16—Power to order enrolment—Further stamp fee need not be paid—Exemption under art. 30 of the Stamp Act (II of 1899).

The petitioner, an Indian born in Madras, obtained the degrees of Bachelor of Arts and Bachelor of Laws of

* Civil Miscellaneous Petition No. 1156 of 1942.

KRISHNA-
SWAMY,
In re.

the Rangoon University, and was enrolled as an Advocate of the Rangoon High Court about seventeen years ago. Since then he was practising in Burma. As the result of the invasion of Burma by the Japanese, he returned to Madras and applied for enrolment as an Advocate of the Madras High Court. The Madras Bar Council under the proviso to rule 16 of the Madras Bar Council Rules recommended exemption from strict compliance with its rules. On enrolment in the Rangoon High Court the petitioner had paid Rs. 500 as required by article 30 of the Indian Stamp Act and on the present application paid Rs. 50 as required by the rules of the Madras Bar Council.

Held (i) It was a fit case for granting an exemption under the proviso to rule 16 of the Madras Bar Council Rules, and the petitioner could be enrolled as an Advocate of the Madras High Court.

(ii) As at the time when the petitioner was enrolled in the Rangoon High Court, that Court had the status of an Indian High Court and, as he had paid the fee required by the Indian Stamp Act on that occasion, he came within the exemption contained in article 30 of that Act. Consequently the petitioner could be enrolled as an Advocate without the payment of any further fee.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court may be pleased to exempt the petitioner therein from complying with the requirement of the Madras Bar Council Rules and to exempt him from the payment of a fresh enrolment fee in the High Court.

Advocate-General (Sir A. Krishnaswami Ayyar) for the Crown.—The petitioner was enrolled as a member of the Bar of the Rangoon High Court and he practised there for about seventeen years. Owing to the recent invasion of Burma by the Japanese he has returned to Madras. He has filed this petition to be enrolled as an Advocate of the Madras High Court and the Bar Council has recommended his case to the High Court. [Sections 2, 8 and 9 of the Bar Councils Act and rules 1, 3, 16 and 22 of the rules framed by the Madras Bar Council were referred to.] The petitioner took the degrees of

KRISHNA-
SWAMY,
In re.

Bachelor of Arts and Bachelor of Laws of the Rangoon University which was a University in "British India" at the time he took the degrees. The requirement of rule 1, sub-clause 1, is satisfied but, as there is no reciprocity by the Rangoon High Court in the matter of enrolment of Advocates as stated in sub-clause 2 of that rule, the petitioner cannot be enrolled under that rule. Rule 3 requires that he should study in the chambers of an Advocate of the Madras High Court for one year. The petitioner has not complied with that rule. Exemption could be given to the petitioner under the proviso to rule 16 from strict compliance with the rules framed by the Madras Bar Council. He paid a fee of Rs. 500 at the time he was enrolled in the Rangoon High Court and, as required by the Madras Bar Council rules, he paid Rs. 50 on the present application.

T. R. Venkatarama Sastri for petitioner.—This is a fit case for exemption. The Bar Council recommended the case of the petitioner to the High Court. He practised for a long time in Burma and owing to the invasion by the Japanese he has come to the land of his birth and wants to practise in this High Court. [Section 14 of the Bar Councils Act was referred to.] At the time he was enrolled in the Rangoon High Court it was a High Court in "British India". He paid Rs. 500 when he was enrolled. He comes within the exemption provided in article 30 of the Indian Stamp Act and need not pay any further court-fee. The petitioner, in these extraordinary circumstances, may be granted exemption and enrolled as an Advocate of the Madras High Court.

The ORDER of the Court was delivered by LEACH C.J.—The petitioner who is an Advocate of the Rangoon High Court applies for enrolment as an Advocate of this Court. He is an Indian and was born in Madras, but hitherto he has only practised in Burma. As the result of the invasion of Burma by the Japanese he has returned to the land of his birth and wishes to practise his profession here. The petitioner holds the degree of Bachelor of Arts and the degree of Bachelor of Laws of the University of Rangoon and it was on these qualifications that he

LEACH C.J.

KRISHNA-
SWAMY,
In re.
LEACH C.J.

was enrolled as an Advocate of the Rangoon High Court some seventeen years ago.

When the Indian Bar Councils Act, 1926, came into force, Burma was a Province of British India and remained part of British India until the Government of India Act, 1935, came into operation on 1st April 1937. Until the separation took place the Rangoon High Court was a High Court within the meaning of the Bar Councils Act, but as the result of the separation the Act no longer applies to it. Section 8 (1) states that no person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the Advocates of the High Court maintained under the Act. Sub-section 2 says that the High Court shall prepare and maintain a roll of Advocates in which shall be entered the names of (a) all persons who were, as Advocates, Vakils or Pleaders, entitled as of right to practise in the High Court immediately before the date on which the section came into force; and (b) all other persons who have been admitted to be Advocates of the High Court under the Act. There is a proviso to this section to the effect that such persons shall have paid in respect of enrolment the stamp fee chargeable under the Indian Stamp Act, 1899, and a fee, payable to the Bar Council, which shall be ten rupees in the case of the persons referred to in clause (a) and in other cases such amount as may be prescribed. The rules of the Bar Council of Madras prescribe a fee of Rs. 50 "in other cases". Article 30 of the Indian Stamp Act requires a person on enrolment as an Advocate of an Indian High Court to pay a stamp fee of Rs. 500. On enrolment in the Rangoon High Court the petitioner paid the Rs. 500 and he has now paid the Rs. 50 required by the rules of the

Madras Bar Council. He asks to be enrolled as an Advocate of this Court as the result of a resolution of the Madras Bar Council passed under the proviso to rule 16 recommending exemption from strict compliance with its rules. He maintains that if he is enrolled no further stamp fee is necessary.

Rule 1 (i) of the Madras Bar Council Rules provides that a person who has taken the degree of Bachelor of Laws of any of the Universities established by law in British India or taken a degree in law of any other University which the Bar Council may by general or special order accept as equivalent to that degree, may be admitted as an Advocate of this Court. Rule 3 requires a person applying for admission under rule 1 (i) to have studied as a pupil in the chambers of an Advocate practising in the Madras High Court or in one of the district centres specified and requires him also to have passed the examination prescribed by rule 22; or to have practised as a Pleader in the Court of a District or a Subordinate Judge in the Presidency or in one of certain specified Courts outside the Presidency for a period of not less than five years immediately preceding the date of his application; or to have practised as a Pleader for not less than ten years in any other Court; or to have presided as a Judge of a civil Court in the Presidency for a period of not less than five years immediately preceding the date of his application.

Rule 1 (ii) states that an Advocate entered on the roll of Advocates of a High Court established by Letters Patent other than the High Court of Madras may be enrolled as an Advocate provided that there is reciprocity in this respect between the High Court in which the applicant has been enrolled and this Court. The petitioner cannot claim admission under rule 1 (ii)

KRISHNA-
SWAMY,
In re.
LEACH C.J.

KRISHNA-
SWAMY,
In re.

LEACH C.J.

because the Rangoon High Court has never reciprocated with this Court or in fact with any other Court in British India.

Having obtained the law degree of the Rangoon University at a time when that University was a University established by law in British India, the petitioner can claim admission under rule 1 (i), but in that case rule 3 comes into operation and naturally, having practised as an Advocate in the Rangoon High Court for seventeen years, he does not wish to study as a pupil in the chambers of an Advocate of this Court for a period of twelve months. Consequently the petitioner has to rely on the proviso to rule 16. That proviso is to the effect that the Bar Council may in special cases, for reasons to be recorded by it, recommend to the High Court for exemption a candidate not complying with all or any of the requirements of the rules and that, on such exemption being granted, he shall be deemed to have complied with the rules. The Madras Bar Council has considered the petitioner's case and has recommended to this Court that he may be enrolled without the necessity of complying with the requirements of its rules. We agree with the Bar Council that this is a fit case for granting an exemption and we direct that the petitioner be enrolled as an Advocate of this Court.

There remains to be considered the question whether the petitioner is required to pay the stamp fee referred to in article 30 of the Indian Stamp Act. That article exempts an Advocate who has already paid the required fee on enrolment in a High Court from payment of it when he is enrolled in another High Court. The term "High Court" of course must be deemed to be a High Court established in British India. The Rangoon High Court can no longer be

KRISHNA
SWAMY,
In re.

regarded as an Indian High Court, but it had that status when the petitioner was enrolled, and as he paid the fee required by the Indian Stamp Act on that occasion we consider that he comes within the exemption contained in the article. Consequently the petitioner will be enrolled without the payment of any further fee.

V.V.C.

APPELLATE CIVIL.

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

SOWDRA BAI AND TWO OTHERS (DEFENDANTS),
APPELLANTS,

v.

SARASWATHI AMMAL (PLAINTIFF), RESPONDENT.*

Indian Contract Act (IX of 1872), sec. 72—Mistake—Money paid under—Recovery of—Privity, if essential—Fraudulent misrepresentation—Two innocent parties—Loss on account of fraud by third party—Who to suffer loss—Underlying principle.

A falsely representing himself to be B, the owner of a certain property, induced C to lend him Rs. 2,000 on a mortgage of the property. A had no interest in the property and B had no knowledge of the fraud. Again A falsely representing himself to be B induced D to advance Rs. 3,500 on a second mortgage of the property. Out of this sum D agreed to pay Rs. 2,000 to C in discharge of the first mortgage. B's son was a party to this document. D had no knowledge of the fraud. Believing that A was B and that C was first mortgagee of the property he paid Rs. 2,000 to C. When the fraud was discovered D filed a suit against C for the recovery of Rs. 2,000 on the ground that he paid the sum in mistake of the facts.

* City Civil Court Appeal No. 43 of 1940.

1942,
February 6.

SOWDRA BAI
v.
SARASWATHI.

Held: D was entitled to recover the sum of Rs. 2,000 from C.

Case law reviewed and discussed.

APPEAL against the decree of the Court of the City Civil Judge, Madras, dated 13th August 1940, and made in Original Suit No. 38 of 1939.

C. S. Venkatachari for S. Rajam Ayyangar for appellant.

T. M. Krishnaswami Ayyar for K. V. Ramachandra Ayyar for respondent.

Cur. adv. vult.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—On 7th January 1938, one Gangadara Mudali falsely representing himself to be Govindaraja Mudali, the owner of a house and land known as No. 5, Muthia Naicken street, Purasawalkam, Madras, induced the appellants to lend to him Rs. 2,000 on a mortgage of the property. The real owner had no knowledge of the fraud. As Gangadara Mudali had no interest in the property the mortgage deed of course conferred no title. Again falsely representing himself to be Govindaraja Mudali, Gangadara Mudali induced the respondent on 11th February 1938 to advance Rs. 3,500 on a second mortgage of the property. Out of the Rs. 3,500 which the respondent agreed to advance she was to pay to the appellants Rs. 2,000 in discharge of the first mortgage. V. G. Sambasivamurthi Mudali, the son of Govindaraja Mudali, was a party to this second transaction, but again his father had no knowledge of what was happening. Believing that Gangadara Mudali was Govindaraja Mudali and that the appellants were first mortgagees of the property the respondent paid to them the Rs. 2,000. When the fraud was discovered

the respondent instituted the present suit in the City Civil Court to recover from the appellants the Rs. 2,000 as a payment made in mistake of the facts. The case was tried by the Principal Judge of the City Civil Court, who held that the respondent had paid the Rs. 2,000 to the appellants under a mistaken belief that the mortgage executed in her favour had been executed by the true owner and it was that mistake which had induced the payment. Consequently he granted the respondent a decree for the return of the payment of Rs. 2,000. The appeal is from this decision.

Section 72 of the Indian Contract Act states:

“A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.”

There is here no ambiguity. If money is paid to a person by mistake he is bound to repay it. That the Rs. 2,000 was paid by the respondent to the appellants in the mistaken belief that they were prior mortgagees is not open to question and, if the words used in section 72 are to be given their ordinary meaning, the decree must stand. For the appellants it is, however, contended that the case falls within the principle laid down in *Aiken v. Short*(1) and that under the English common law a payment made by mistake cannot be recovered unless there is some privity between the payer and the payee. Consequently it is said that the section should be read subject to the qualifications imposed by the common law. I will discuss these contentions presently, but before doing so I consider it desirable to quote the judgment of PARKE B. in *Kelly v. Solari*(2), as it appears to me that section 72 of the Contract Act

(1) (1856) 1 H. & N. 210; 156 E.R. 1180.

(2) (1841) 9 M. & W. 54; 152 E.R. 24.

SOWDRA BAI
v.
SARASWATHI.
LEACH C.J.

SOWDRA BAI
v.
SARASWATHI.
LEACH C.J. embodies the principle there stated, a principle which was approved of by the House of Lords in *R. E. Jones, Ltd. v. Waring and Gillow, Ltd.*(1). In *Kelly v. Solari*(2) PARKE B. said :

"I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the dictum of Mr. Justice BAYLEY, in the case of *Milnes v. Duncan*(3); and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it."

In his speech in *R. E. Jones, Ltd. v. Waring and Gillow, Ltd.*(1) Lord SHAW quoted in full the judgment of PARKE B. and it was accepted as governing the case. There a gross fraud had been perpetrated, as in this case.

The facts in *Aiken v. Short*(4) have nothing in common with the facts here. In 1846 one Edwin Carter made a will by which he gave his property to

(1) [1926] A.C. 670.

(2) (1841) 9 M. & W. 54; 152 E.R. 24.

(3) (1827) 6 B. & C. 671; 108 E.R. 598.

(4) (1856) 1 H. & N. 210; 156 E.R. 1180.

his eight brothers and sisters in equal shares. In 1847 the testator died. In 1850 one of the brothers, George Carter, borrowed £200 from one Francis Short, who died in 1853. The suit was by Short's widow who was the sole executrix of his will. George Carter was also indebted to a bank to which in 1855 he conveyed his interest in the estate of Edwin Carter, subject to charges previously created by him. As security for the loan of £200 obtained from Short, George Carter had mortgaged his interest in his brother's estate. After the conveyance to the bank the executrix of the will of Short applied to George Carter for payment of the £200. He referred her to the bank, which thereupon paid her the £200 in accordance with the terms of the conveyance which it had obtained from George Carter. After all this had happened, a later will of Edwin Carter was produced, and under it George Carter merely received an annuity of £100 which was to cease upon his making an assignment. The bank then applied to the executrix for repayment of the £200 and, as she refused to comply with the demand, a suit was instituted against her. It was held that the bank was not entitled to recover the money. In the course of his judgment BRAMWELL B. said :

"In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money."

It is to be borne in mind that George Carter owed £200 to the estate of Francis Short and in paying the executrix the bank was discharging a lawful debt. In the present case both the appellants and the respondent were victims of a gross fraud.

SOWDRA BAI
v.
SARASWATHI.
LEACH C.J.

SOWDRA BAI
v.
SABASWATHI.
LEACH C.J.

The Court of Appeal applied *Aiken v. Short*(1) in *Morgan v. Ashcroft*(2), but GREENE M. R. was disposed to think that the observations of BRAMWELL B. in *Aiken v. Short*(1) could not be taken to be an exhaustive statement of the law. He considered that they must be confined to cases where the only mistake is as to the nature of the transaction.

In the course of his argument on behalf of the appellants, Mr. C. S. Venkatachariar referred us to *Watson v. Russell*(3). In that case one Keys chartered a vessel belonging to the defendant, the hire being payable every four weeks in advance. It was a condition of the charter party that, in the event of non-payment of the hire, the owner was to be entitled to retake his ship. A sum of £120 was due and Keys applied to the plaintiff to assist him. Thereupon the plaintiff handed Keys a cheque for £60, made payable to the defendant or order, on the understanding that Keys should inform the defendant that the cheque was given on the condition that the vessel should be allowed to proceed on a certain voyage. Keys paid the cheque to the defendant, but did not tell him of the condition. As the whole of the £120 was not paid, the defendant took possession of his ship. Thereupon the plaintiff sued the defendant to recover the money. It was held that, as the defendant received the cheque without notice of any condition and for valuable consideration, the plaintiff was not entitled to recover. It may be mentioned that in *R. E. Jones, Ltd. v. Waring and Gillow, Ltd* (4), where *Kelly v. Solari*(5) was applied, Lord SHAW observed that *Watson v. Russell*(3) applied to a different set of circumstances and had no real bearing upon cases depending upon

(1) (1856) 1 H. & N. 210; 156 E.R. 1180.
(2) [1938] 1 K.B. 49.
(3) (1864) 5 B. & S. 968; 122 E.R. 1090.
(4) [1926] A.C. 670.
(5) (1841) 9 M. & W. 54; 152 E.R. 24.

SOWDRA BAI
v.
SABASWATHI.
LEACH C.J.

payments having been made under a mistake in fact. The class of cases ruled by *Watson v. Russell*(1) was in his opinion confined solely to that of payments made under a condition not communicated to the receiver, a condition as to the future conduct which it was hoped, expected or stipulated should follow the payment.

It is not necessary to decide whether under Indian law *Aiken v. Short*(2) and *Watson v. Russell*(1) would apply in cases where the facts are similar. It is sufficient to say that the facts in the present case are not analogous to the facts in either of those two cases. The observations of PARKE B. in *Kelly v. Solari*(3) are directly in point and they fit in with section 72 of the Contract Act.

In support of the contention that, if the respondent is entitled to proceed, she must show some privity between her and the appellants, stress has been laid on this passage in Addison's Law of Contracts [Eleventh Edition, page 462]:

"It is necessary in order to maintain this action, that a certain amount of money belonging to one person should have improperly come into the hands of another and that there should be some privity between them."

This statement is based on *Watson v. Russell*(1) and *Colonial Bank v. Exchange Bank of Yarmouth, Nova Scotia*(4). There is nothing in section 72 to suggest that it should only be applied when there is privity between the payer and the payee; but assuming that this is essential, I consider that the condition is fulfilled here. The appellants thought that they were the first mortgagees of the property and the

(1) (1864) 5 B. & S. 968; 122 E.R. 1090.
(2) (1856) 1 H. & N. 210; 156 E.R. 1180.
(3) (1841) 9 M. & W. 54; 152 E.R. 24. (4) (1885) 11 App. Cas. 84.

SOWDRA BAI
v.
SARASWATHI.
LEACH C.J.

respondent thought that she was the second mortgagee who was discharging a prior encumbrance. That there is privity between a first and second mortgagee has already been accepted by this Court; see *Askaram Sowkar v. Venkataswami Naidu*(1) and *Periaswami v. Ramaswami*(2). It is true that the appellants were not mortgagees but they regarded themselves as such. In my judgment there is here sufficient privity, if privity is an essential factor in this action.

For these reasons I consider that the decree passed by the trial Court is in accordance with law and I would dismiss the appeal with costs.

The respondent has filed a memorandum of cross-objections as the learned trial Judge directed the parties to pay their own costs. As the plaintiff succeeded she should have been given her costs. Therefore the memorandum of cross-objections should be allowed with costs.

G.R.

APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Kuppuswami Ayyar.*

M. C. A. R. C. S. CHOCKALINGA TEVAR FIRM
REPRESENTED BY ONE OF ITS PARTNERS M. C. CHOCKALINGA
THEVAR (PLAINTIFFS), APPELLANTS,

1941,
December 9.

v.

K. A. SANKARAPPA NAICKER AND ANOTHER
(DEFENDANTS 1 AND 2), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), sec. 11—Res judicata
—Applicable to appeals and miscellaneous proceedings—
Judgment in one suit on same matter becoming final during
pendency of appeal in another suit between same parties—
Appeal affected by res judicata by reason of such judgment.*

In a suit for the recovery of the balance of the price of goods sold and delivered, the defendants contended that the plaintiffs along with other creditors had agreed to a composition. The trial Court held that there was a completed agreement for a composition and passed a decree on that basis. The plaintiffs appealed. Meanwhile in a different suit in which the plaintiffs and the defendants were all parties it was held that the agreement for a composition was not completed and this decision was not challenged on appeal and consequently became final. In the appeal filed by the plaintiffs, it was thereupon contended by them that the decision in the second suit operated as *res judicata*.

Held: The rule of *res judicata* applies equally to appeals and miscellaneous proceedings as it does to original suits and where, after the commencement of the trial of an issue, a final judgment on the same issue is pronounced by a competent Court of jurisdiction in another case between the same parties it operates as *res judicata*.

(1) (1920) I.L.R. 44 Mad. 544.

(2) I.L.R. [1941] Mad. 53.

* Appeal No. 192 of 1939.

CHOCKALINGA
v.
SANKARAPPA.

There is nothing in the observations of the Full Bench in *Panchanada Velan v. Vaithinatha Sastrial*(1) to exclude from the operation of the rule of *res judicata* judgments coming into existence during the pendency of proceedings by way of appeal or revision if such judgments are allowed to become final.

Rangachariar v. Rangaswami Ayyangar(2) and *Krishnan Nair v. Kambi*(3) approved.

APPEAL against the decree of the Court of the Subordinate Judge of Madura in Original Suit No. 75 of 1938.

Advocate-General (Sir A. Krishnaswami Ayyar) and *T. S. Vydianatha Ayyar* for appellants.

T. V. Ramiah for first respondent.

K. Rajah Ayyar and *N. Sivaswami* for second respondent.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The appellants are a firm of merchants dealing in raw cotton at Tirumangalam and Virudhunagar. They filed the suit out of which this appeal arises in the Court of the Subordinate Judge of Madura to recover from the respondents the sum of Rs. 24,264-12-10 which they claimed to be the balance of the price of goods sold and delivered to the respondents. Their case was that the respondents had in partnership entered into the contracts with the appellants. The respondents denied that they were partners and averred that the appellants and their other creditors had agreed to a composition of twelve annas in the rupee, which precluded the appellants from recovering more. The Subordinate Judge held that the respondents had entered into the contracts in partnership, but he found for them on the question relating to the composition. Consequently he granted

(1) (1905) I.L.R. 29 Mad. 333 (F.B.). (2) (1935) I.L.R. 59 Mad. 777.
(3) 1937 M.W.N. 299.

the appellants a decree for Rs. 16,248-14-8, being three-fourths of Rs. 21,685-3-7 which he held to be the balance of the purchase consideration. The appellants have appealed against the finding that there was a completed agreement for a composition. The respondents have filed a memorandum of cross-objections with regard to the finding of the Subordinate Judge that they entered into the contracts in partnership.

When the appeal was called, learned Counsel for the respondents reported that they were no longer instructed. The reason for the withdrawal of their instructions is not far to seek. The question whether there was a completed agreement for a composition was raised and decided in another suit in the same Court (Original Suit No. 23 of 1929). That suit was filed by the second respondent in the present appeal. It was tried by a different Subordinate Judge who held that the proposed agreement for a composition was not completed and his decision has not been challenged on appeal. The parties to the present appeal were all parties to Original Suit No. 23 of 1929. In these circumstances the learned Advocate-General for the appellants contends that the decision in Original Suit No. 23 of 1929 brings into operation in this appeal the doctrine of *res judicata*. We consider that the contention is well founded.

In *Balkishan v. Kishan Lal*(1) a Full Bench of the Allahabad High Court held that the rule of *res judicata* applies equally to appeals and miscellaneous proceedings as it does to original suits and that where, after the commencement of the trial of an issue, a final judgment on the same issue is pronounced by a competent Court of jurisdiction in another case, it operates as *res judicata*. There are two single Judge decisions

(1) (1888) I.L.R. 11 All. 148 (F.B.).

HOCKALINGA
v.
SANKARAPPA.
LEACH C.J.

of this Court to the same effect, *Rangachariar v. Rangaswami Ayyangar*(1) and *Krishnan Nair v. Kambi*(2). In the former of these two cases VARADACHARIAR J. held that there was nothing in the observations of the Full Bench in *Panchanada Velan v. Vaithinatha Sastrial*(3) to exclude from the operation of the rule of *res judicata* judgments coming into existence during the pendency of proceedings by way of appeal or revision, if such judgments are allowed to become final. In the second of the two cases VENKATARAMANA RAO J. quoted with approval *Balkishan v. Kishan Lal*(4) and *Rangachariar v. Rangaswami Ayyangar*(1).

We agree that there is nothing in the judgment in *Panchanada Velan v. Vaithinatha Sastrial*(2) which prevents the Court holding that the doctrine of *res judicata* does apply in such a case as is now before the Court. In *Panchanada Velan v. Vaithinatha Sastrial*(3) there were cross suits between the same parties on the same facts. The suits were tried together and were dealt with in one judgment, although separate decrees were drawn up. An appeal was filed, but only against one of the decrees. The question was whether the fact that no appeal had been filed in the other suit brought into operation section 13 of the Code of Civil Procedure of 1882, which corresponds to section 11 of the present Code. The Full Bench held that the doctrine of *res judicata* had no application when the object of the appeal in substance, if not in form, was to get rid of the decision which was pleaded in bar.

In the present case the respondents have allowed the later decision to govern the position between

themselves and the appellants, and the later decision being final it must be applied here. The first explanation to section 11 of the Code states that the expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

The appellants are entitled to have the decree under appeal amended without any further investigation of the facts. They accept the finding that the balance outstanding is Rs. 21,685-3-7 and consequently there will be a decree for this amount with interest at six per cent from 14th November 1938 to this date and thereafter interest on the decretal amount at the Court rate. The appellants' claim in the lower Court was valued at Rs. 24,264-12-10, but as they did not succeed to the full extent they will receive and pay proportionate costs there. In this Court they are entitled to costs on the difference between Rs. 21,685-3-7 the amount now decreed and Rs. 16,248-14-8 the amount decreed in the trial Court.

The memorandum of objections will be dismissed with costs.

N.S.

(1) (1935) I.L.R. 59 Mad. 777. (2) 1937 M.W.N. 299.
(3) (1905) I.L.R. 29 Mad. 333 (F.B.). (4) (1888) I.L.R. 11 All. 148 (F.B.).

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Kuppuswami Ayyar.

CHINA. ANA. MUTHUVAYYANGAR (PLAINTIFF),
APPELLANT,

v.

THIRUVANGADAMMAL AND FOUR OTHERS
(DEFENDANTS), RESPONDENTS.*

Hindu law—Adoption—No formal ceremony necessary when giving and taking adopted boy—No utterance of any particular words prescribed—Giving and taking adopted boy before death of adoptive father—Performance of datta homam by his widow subsequent to his death, valid.

Under the Hindu law of adoption it is not necessary that there should be a formal ceremony involving the utterance of any particular words when the adopted boy is given and accepted. For a valid adoption all that the law requires is that the natural father shall be asked by the adoptive parent to give his son in adoption, that the boy shall be handed over and taken for this purpose and that the adoption ceremony shall be performed when the parties belong to the twice-born class. If there is a giving and taking of the adopted boy during the lifetime of a person, the *datta homam* ceremony could be lawfully performed by his widow after his death.

Seetharamamma v. Suryanarayana(1) followed.

APPEAL against the decree of the Court of the Subordinate Judge of Ramnad at Madura in Original Suit No. 25 of 1937.

K. V. Sesha Ayyangar and T. Thyagaraja Ayyar for appellant.

K. Rajah Ayyar for first and second respondents.

Other respondents were not represented.

* Appeal No. 246 of 1939.
(1) (1926) I.L.R. 49 Mad. 969.

The JUDGMENT of the Court was delivered by LEACH C.J.—In this appeal the Court is called upon to decide whether the second respondent is the adopted son of one G. Srinivasa Ayyangar, who died on 27th February 1937. The suit was brought by the appellant as the nearest reversioner to the deceased's estate for a declaration that the second respondent had no interest therein, in other words, that he had not been adopted to Srinivasa Ayyangar. The Subordinate Judge held that, during the lifetime of Srinivasa Ayyangar, the natural father of the second respondent had agreed to give his son to him in adoption and that Srinivasa Ayyangar took the boy with that intention. Therefore the condition imposed by Hindu law that there should be a giving and taking had been fulfilled during the lifetime of the adoptive father. It is common ground that the *datta homam* ceremony was performed by Srinivasa Ayyangar's widow, the first respondent, on 10th March 1937, that is, twelve days after the death of her husband. In these circumstances the Subordinate Judge considered that the second respondent had been lawfully adopted to Srinivasa Ayyangar. He also held that the deceased had given his widow oral authority to adopt and, further, that the authority could be implied from the surrounding circumstances. The widow claimed that she had received authority under a will executed by her husband, but the Subordinate Judge refused to accept the document as being a valid will.

On behalf of the appellant it has been conceded that, if there was a giving and taking of the boy during the lifetime of Srinivasa Ayyangar, his widow would have the right of completing the adoption by the performance of the *datta homam* ceremony after his death. That this is so is to be gathered from the

MUTHUVAYYAN
GAR
v.
THIRU-
VANGADAMMAL.
LEACH C.J.

MUTHUVAYYAN-
GAR
v.
THIRU-
VANGADAMMAL.
LEACH C.J.

decision of this Court in *Seetharamamma v. Suryanarayana*(1).

It is common ground that the boy left the house of his natural father six years before Srinivasa Ayyangar's death and that during the whole of this period he lived with Srinivasa Ayyangar and his wife who treated him as a son in every respect. Learned Counsel for the appellant accepts it as being true that Srinivasa Ayyangar throughout had the intention of adopting the second respondent and that the reason why the adoption ceremony was postponed was that he desired it to take place when the boy was of more mature age and, therefore, not so likely to fall into pollution. There is evidence that Srinivasa Ayyangar intended the adoption to take place after the expiry of the year Dhatu which came to an end in April 1937. All are agreed that the year Dhatu is looked upon as an unfortunate period, because in that year of the last cycle there was a terrible famine in this province. It may be taken that it was the intention of Srinivasa Ayyangar to perform the *datta homam* ceremony after the year Dhatu had expired. Death prevented him from carrying out his intention.

The evidence of what transpired when the second respondent was taken into Srinivasa Ayyangar's household consists of the testimony of the widow and of his natural father. In the course of her evidence the widow said :

"My husband and myself went and brought Raman to our house when he was five years old in order to adopt him so as to perpetuate our lineage. We asked Pichu Ayyangar that he should give Raman to us so that we might have him as our son. Then we got his tonsure ceremony performed at our cost in the Vettai Venkatesa Perumal Sannadhi and also gave him aksharabyasam."

(1) (1926) I.L.R. 49 Mad. 969.

The natural father stated that Srinivasa Ayyangar told him and the boy's mother that he was going to adopt the boy and he asked for their permission to do so. The witness was not actually asked whether he gave his consent but there can be no doubt that he did, because Srinivasa Ayyangar and his wife took the boy away with them there and then and thereafter brought him up. In these circumstances it cannot be doubted that Srinivasa Ayyangar asked the natural father to give the boy to him in adoption, that the father consented and that he handed over the boy to him to be taken in adoption.

Mr. Sesha Ayyangar, on behalf of the appellant, says that this is not sufficient. According to him there must be a formal ceremony and the words mentioned by Baudhayana uttered. The passage from Baudhayana relied on is reproduced in Mayne's Hindu Law, Tenth Edition, page 251, and reads as follows :—

"One should go to the giver of the child, and ask him, saying 'give me thy son'. The other answers 'I give him'. He receives him with these words, 'I take thee for the fulfilment of my religious duties. I take thee to continue the line of my ancestors'."

It is said that unless these words or words very similar are actually used there can be no giving and taking within the meaning of the Hindu law. In this connection Mr. Sesha Ayyangar has referred us to *Shoshinath Ghose v. Krishnasunderi Dasi*(1), *Kuppusamy Reddy v. Venkatalakshmi Ammal*(2), *Govindayyar v. Dorasami*(3) and *Krishna Rao v. Sundara Siva Rao*(4), but none of these cases goes to the length which he asks the Court to go.

(1) (1880) I.L.R. 6 Cal. 381 (P.C.). (2) (1915) 18 M.L.T. 434.
(3) (1884) I.L.R. 11 Mad. 5 (F.B.). (4) (1931) I.L.R. 54 Mad. 440 (P.C.).

MUTHUVAYYAN-
GAR
v.
THIRU-
VANGADAMMAL.
LEACH C.J.

MUTHUVAYYAN-
GAR
v.
THIRU-
VANGADAMMAL.
LEACH C.J.

In *Shoshinath Ghose v. Krishnasunderi Dasi*(1) the Privy Council had to consider whether there was a valid adoption when there had been no actual giving and taking of the boy but the mere exchange of deeds of gift and acceptance. Their Lordships held that this was not sufficient. The judgment concludes with this statement :

"It would seem, therefore, that according to Hindu usage, which the Courts should accept as governing the law, the giving and taking in adoption ought to take place by the father handing over the child to the adoptive mother, and the adoptive mother declaring that she accepts the child in adoption."

In making these observations the Board was considering whether the exchange of the deeds was sufficient and they were of the opinion that it was not. They were not laying down the proposition that the utterance of the words used by Baudhayana was necessary. They were indicating that the essentials for a valid adoption were the handing over of the boy by his father for this purpose and the acceptance by the adoptive parent. Whether there has been a giving and taking are questions of fact which can be proved by evidence of what is said and what happens on the occasion.

Kuppusamy Reddy v. Venkatalakshmi Ammal(2) emphasized the necessity of corporeal delivery and acceptance of the child. In *Govindayyar v. Dorasami*(3) the question was whether the ceremony of *datta homam* was essential to a valid adoption among Brahmans in Southern India when the adoptive father and the son belonged to the same gotra, and it was held that it was not. The decision in *Shoshinath Ghose v. Krishnasunderi Dasi*(1) was considered, but the

(1) (1880) I.L.R. 6 Cal. 381 (P.C.). (2) (1915) 18 M.L.T. 434.
(3) (1884) I.L.R. 11 Mad. 5 (F.B.).

judgment of the Full Bench does not indicate a different interpretation of the judgment of the Judicial Committee from that which we place upon it. In *Krishna Rao v. Sundara Siva Rao*(1) a mere declaration by the adoptive father to the effect that he had adopted a son was held not to be sufficient, because there had been no evidence of the giving and taking.

We hold that the Hindu law does not require that there shall be a formal ceremony when the boy is given and accepted. For a valid adoption, all that the law requires is that the natural father shall be asked by the adoptive parent to give his son in adoption, that the boy shall be handed over and taken for this purpose, and that the adoption ceremony shall be performed when the parties belong to the twice-born class. As we have already indicated, in our opinion, the evidence here proves beyond doubt that there was a giving and a taking of the second respondent in the lifetime of Srinivasa Ayyangar. This being so and it being accepted that the *datta homam* ceremony could be lawfully performed by the widow after her husband's death, we concur in the decision of the Subordinate Judge that the second respondent is the lawfully adopted son of Srinivasa Ayyangar. In these circumstances it is not necessary for us to consider whether the will is genuine or whether the widow had oral or implied authority to adopt.

The appeal fails and will be dismissed with costs, one set.

N.S.

(1) (1931) I.L.R. 54 Mad. 440 (P.C.).

MUTHUVAYYAN-
GAR
v.
THIRU-
VANGADAMMAL.
LEACH C.J.

APPELLATE CIVIL.

Before Mr. Justice King.

1942,
February 4.

POTTISWAMI (RESPONDENT), PETITIONER,

v.

SAIT SULAIMAN (MITTA) (PETITIONER), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 50 (2)—Petitioner, partner of a firm—Respondent's decree against firm in Small Cause Court at Khurai—Decree transferred for execution to another Court—No jurisdiction in that other Court to decide petitioner's liability under O. XXI, r. 50 (2).

The petitioner was a partner in a firm against whom the respondent had a decree granted by the Court of Small Causes at Khurai. The decree was transferred for execution to the Subordinate Judge's Court of Bezwada, which Court held that it had jurisdiction to decide the question of the petitioner's liability under Order XXI, rule 50 (2). Against that order the petitioner filed a revision petition to the High Court.

Held that the Subordinate Judge of Bezwada had no jurisdiction to hear the respondent's application under Order XXI, rule 50 (2), and that the respondent must apply to the Court at Khurai.

Kalu Ram v. Firm Sheonand Rai Jokhi Ram(1) followed.

Sital Prasad v. Messrs. Clement Robson and Company(2), *Bombay Company, Ltd., Karachi v. Kahan Singh*(3) and *Sanwal Das v. The Collector of Etah*(4) not followed.

PETITION under section 25 of Act IX of 1887, and under section 224 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Bezwada, dated 10th April 1940, and passed in Execution Application

* Civil Revision Petition No. 1240 of 1940.

(1) (1932) I.L.R. 11 Pat. 580.

(2) (1921) I.L.R. 43 All. 394.

(3) (1931) I.L.R. 13 Lah. 327.

(4) (1924) I.L.R. 46 All. 560.

No. 19 of 1940 in Civil Suit No. 148 of 1937, on the file of the Court of Small Causes, Khurai.

POTTISWAMI
v.
SULAIMAN.

P. Satyanarayana Rao for petitioner.

V. V. Ramadurai for respondent.

Cur. adv. vult.

JUDGMENT.

KING J.—The petitioner here is alleged by the respondent to be a partner in the firm of Pottiswami and Brothers, against whom the respondent has a decree granted by the Court of Small Causes at Khurai. The decree has been transferred for execution to the Subordinate Judge's Court of Bezwada, which Court has held that it has jurisdiction to decide the question of petitioner's liability under Order XXI, rule 50 (2). Petitioner questions the correctness of that decision.

KING J.

If rule 50 (2) alone be referred to, the decision appears to be obviously wrong. The sub-rule says that the decree-holder must apply to the Court which passed the decree. This must always be distinguishable in the nature of things from the Court to which the decree has been sent for execution and is so distinguished in fact in both section 42 and in Order XXI, rule 10.

The scope of Order XXI appears to be that where rule 10 applies the word "Court" alone is used. Where, as in rule 16, rule 26 or rule 50, it is intended that the application should be restricted to one Court, that one Court is specifically referred to. The learned Subordinate Judge relied, however, upon *Sital Prasad v. Messrs. Clement Robson and Company*(1). In that decision, which has been accepted without any independent discussion in *Sanwal Das v. The Collector of Etah*(2) and *Bombay Company, Ltd.*,

(1) (1921) I.L.R. 43 All. 394.

(2) (1924) I.L.R. 46 All. 560.

POTTISWAMI
v.
SULAIMAN.
KING J.

Karachi v. Kahan Singh(1), stress is laid upon the overriding provisions of section 42, which, it is said, was intended to remove all questions arising out of the decree from the cognizance of the Court which passed it and had transferred it.

This decision has, however, been dissented from in *Kalu Ram v. Firm Sheonand Rai Jokhi Ram*(2). There the learned Judges point out that Order XXI, rule 50 (2), contemplates what is in effect the trial of a suit in which the person against whom execution is sought may contest not only his own liability as a partner of the judgment-debtor's firm, but the plaintiff's claim upon its merits.

There being no authority in Madras I am free to choose either of these conflicting views. With great respect it seems to me that the Patna view is preferable. It not only gives the words "Court which passed the decree" their plain and literal meaning but it explains why a particular kind of adjudication is limited to the Court which passed the decree from a consideration not of some other part of the Code only, but of the words of the sub-rule itself. I accordingly allow this petition and direct that the respondent's application to the Subordinate Judge of Bezwada under Order XXI, rule 50 (2), be dismissed with costs throughout. His remedy must be to apply to the Court at Khurai.

V.V.C.

(1) (1931) I.L.R. 13 Lah. 327.

(2) (1932) I.L.R. 11 Pat. 580.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Happell.

BATCHU MALLIKARJUNA RAO (FIRST
RESPONDENT), APPELLANT,

v.

THE OFFICIAL RECEIVER, KISTNA, AT MASULIPATAM
AND ANOTHER (PETITIONER AND SECOND RESPONDENT),
RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sec. 4—Property of judgment-debtor sold in execution subsequent to his insolvency—Sale set aside on application by Official Receiver—Subsequent application by purchasers for refund of purchase price and poundage together with interest, ordered—Application by Official Receiver to review said order relating to interest, rejected—Further application to insolvency Court to set aside order of executing Court, not maintainable—Code of Civil Procedure (Act V of 1908), O. XXI, r. 93—Power of Court to grant interest under.

In execution of a decree, properties of a judgment-debtor who had become an insolvent were sold in spite of the protest of the Official Receiver. The purchase price and poundage were deposited in accordance with the rules by the purchaser. The Official Receiver subsequently applied to Court and got the sale set aside. The purchaser then applied for the refund of the poundage and of the purchase price and also for the award of interest upon the purchase money for the period during which it was in deposit. After notice of the application to the Official Receiver who remained *ex parte*, an order for refund of the poundage and for payment of interest was passed by the executing Court. The Official Receiver subsequently applied to the executing Court to review the said order, but the application was rejected. Thereupon the Official Receiver applied to the District Court under section 4 of the Provincial Insolvency Act for a declaration that the order of the executing Court was not binding on him in respect of the question of interest.

1941,
December 17.

MALLIKARJUNA
v.
OFFICIAL
RECEIVER,
KISTNA.

Held: (i) The District Court had no jurisdiction under section 4 of the Provincial Insolvency Act to interfere at the instance of the Official Receiver with the order passed by the executing Court.

Arunachalam v. Official Receiver(1) approved and followed.

Seshayya v. Rangiah(2) distinguished.

(ii) The executing Court had power under Order XXI, rule 93, Civil Procedure Code, to grant interest on the amount of purchase price deposited in Court.

APPEAL against the order of the District Court of Kistna, dated 8th August 1939 and made in Insolvency Application No. 46 of 1938 in Insolvency Petition No. 15 of 1935.

P. Satyanarayana Rao for appellant.

V. Govindarajachari for respondents.

KING J. The JUDGMENT of the Court was delivered by KING J.—The appellant was the purchaser in December 1935 of certain properties sold in execution of a decree in Original Suit No. 79 of 1932. At that time the judgment-debtor had been adjudicated an insolvent and the sale was held in spite of a protest by the Official Receiver against it. The purchase price and poundage were deposited in accordance with the rules by the appellant at the conclusion of the sale. In 1936, upon an application by the Official Receiver, the sale was set aside, and this order was confirmed on appeal by the High Court. Accordingly in 1938 the appellant, whose title to the property purchased had now gone, applied for the refund of the poundage and for the award of interest upon the purchase money for the period during which it was in deposit. Notice of this application was given to the Official Receiver in February 1938. But the Official Receiver, for reasons which it is not necessary now to investigate, remained

ex parte, and in July 1938 the executing Court passed an order in favour of the appellant that the poundage should be refunded and that interest on the purchase money deposited should be paid at the rate of six per cent. When this order was passed against him, the Official Receiver applied to the executing Court itself to have it reviewed or set aside. But the executing Court refused to accede to either of these requests. Thereupon the Official Receiver applied to the District Court under section 4 of the Provincial Insolvency Act for a declaration that the order of the executing Court was not binding upon him in respect of the question of interest. The District Judge passed an order upon this application in favour of the Official Receiver holding that the executing Court had no power to grant interest in the circumstances and that, even if it had the power, there were no circumstances which could justify imposing any liability to pay interest upon the Official Receiver or the insolvent's estate. Against this order of the learned District Judge the purchaser has filed the present appeal.

Two points have been taken in the appeal. The first is that the District Judge had no jurisdiction to pass any order under section 4, and the second is that the orders which he has passed are incorrect as he has overlooked the provisions of Order XXI, rule 93, Civil Procedure Code, which gave the executing Court full discretion to order interest or refrain from doing so as it pleases. We are inclined to agree with both these arguments. It seems to us contrary to all judicial principle that, when an Official Receiver has allowed an order to be passed against him *ex parte* and has applied unsuccessfully to have that order set aside or reviewed and fails to avail himself of his remedy by way of appeal or revision, he should be permitted to make use of the provision of section 4 of the Provincial Insolvency Act to reargue

MALLIKARJUNA
v.
OFFICIAL
RECEIVER,
KISTNA.
KING J.

(1) A.I.R. 1940 Mad. 733.

(2) (1939) 1 M.L.J. 203.

MALLIKARJUNA
v.
OFFICIAL
RECEIVER,
KISTNA.
KING J.

a question which has been finally decided against him. Of course, the language of section 4 is very wide and comprehensive. But we do not think that it is comprehensive enough to cover the case of a dispute between the Official Receiver as representing the insolvent's estate and a person who has no real connection whatever with the insolvency, like the present appellant, when the subject-matter of that dispute is an order passed by an ordinary civil Court under Order XXI, rule 93, where the jurisdiction of that Court cannot be questioned. We have been referred to a judgment reported as *Arunachalam v. Official Receiver*(1) by SOMAYYA J., in which the identical question now before us has been considered. The learned Judge has pointed out that in a matter of this kind the Official Receiver is in precisely the same position as an ordinary suitor and that he would be prevented in those circumstances from filing a fresh suit to reargue the question which had been decided in execution. If he is prohibited from filing a suit, he is equally prohibited from making any application under section 4 of the Provincial Insolvency Act. Learned Counsel who has appeared for the Official Receiver has not seriously attempted to challenge the reasoning of our learned brother in this case, and with respect we adopt that reasoning. We have indeed been referred by learned Counsel for the Official Receiver to another case reported as *Seshayya v. Rangiah*(2) in which an order in favour of certain appellants at a court-auction has been set aside at the instance of the Official Receiver under section 4 of the Provincial Insolvency Act. But to that order the Official Receiver was not himself a party, and therefore that case can easily be distinguished from the case now before us. Following the

(1) A.I.R. 1940 Mad. 733.

(2) (1939) 1 M.L.J. 203.

decision to which we have referred, viz., *Arunachalam v. Official Receiver*(1), we hold that in the circumstances of this case the learned Judge had no jurisdiction to interfere at the instance of the Official Receiver under section 4 with the order passed by the executing Court.

On the question of the discretion of the executing Court to order payment of interest, no argument is possible in favour of the respondent, unless it be argued that the appellate Court can interfere with the exercise of that discretion. The wording of rule 93 is perfectly explicit. The learned District Judge was wrong therefore in saying that the executing Court had no power to order payment of interest. On the question whether the executing Court made a wise use of its discretion or not, we of course need now say nothing, because we have already held that the learned District Judge had no jurisdiction to entertain the application under section 4 in the circumstances of the case. The result is that this appeal must be allowed and the order of the learned District Judge set aside and the application of the Official Receiver under section 4 dismissed with costs of this appeal payable out of the insolvent's estate.

N.S.

MALLIKARJUNA
v.
OFFICIAL
RECEIVER,
KISTNA.
KING J.

(1) A.I.R. 1940 Mad. 733.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahman and Mr. Justice
Somayya.

1942,
February 6.

MAHARANI GURUCHARAN KAUR OF NABHA AND
ANOTHER (PLAINTIFFS), APPELLANTS,

v.

THE PROVINCE OF MADRAS THROUGH THE COLLECTOR
OF MADURA, AND FOUR OTHERS (DEFENDANTS),
RESPONDENTS.*

Government of India Act, 1935, sec. 270 (1) and (2)—“Act done in execution of duty”—“Duty,” meaning of—Actual duty and not purported duty—Suit against police officials for damages for wrongful restraint or wrongful confinement—Acts done by officials bona fide though negligently in purported execution of duty—Suit not maintainable without requisite consent under section 270 (1)—Suit liable to be dismissed under sec. 270 (2)—Madras District Police Act (XXIV of 1859), ss. 21 and 53—Scope of—Acts of subordinate police officials justified under sec. 21—Suit against officials barred under sec. 53—Code of Criminal Procedure (Act V of 1898), ss. 54 (1) and 56—Sec. 54 (1) not controlled by sec. 56—Acts of superior police officer justified under sec. 54—“Requisition” in sec. 54 (1), cl. 9, meaning of—Includes telephone message—Superior officer entitled to order arrest through telephone message—Indian Limitation Act (IX of 1908), sec. 24 and art. 2—Sec. 24 not applicable to such suit—Art. 2 applicable—“Wrongful confinement”, meaning of—No wrongful confinement of person by mere denial to him of liberty of going in conveyance of his choice or of taking with him the article desired by him—Tort—Damages, suit for—Suit for damages against Province of Madras for wrong committed by its servants—Maintainability of—Master and servant—Government, if liable for wrongful acts of its servants.

Under the orders of the Government of India the ex-Maharaja of Nabha was restricted in his movements to

* Appeal No. 156 of 1939.

the municipal limits of Kodaikanal. A copy of the Government order was communicated to the District Superintendent of Police at Madura on 24th August 1928. Since then the ex-Maharaja has been living in Kodaikanal but without transgressing the municipal limits. On 13th January 1937, however, the station house officer of Kodaikanal police station communicated by telegram to the District Superintendent of Police, Madura, that the “ex-Maharaja was departing to Madras Spencer Hotel with family in car”. The District Superintendent of Police thereupon sent a message by telephone to the Sub-inspector of Police, Madura railway station, to go to Kodaikanal Road railway station and prevent the ex-Maharaja from leaving that station. The message was not correctly understood by the Sub-inspector who took it to be a direction to prevent the Maharani of Nabha, wife of the ex-Maharaja, who had come with her daughter by car to the Kodaikanal Road station to leave for Madras by train. Accordingly the Sub-inspector requested the Maharani not to board the Madras train which had arrived and, further, posted two constables near the fencing in the railway compound to prevent the car from being taken out of the compound. On 17th June 1937, after due notice, the Maharani and her daughter filed a suit for damages against the Province of Madras, the then District Superintendent of Police at Madura, the Sub-inspector of Police and the two police constables alleging *inter alia* that the acts were purported to be done by them in their official capacity and were quite irregular and without justification.

Held: (i) In the circumstances of the case no wrongful confinement of the plaintiffs could be said to have taken place. The offences of wrongful restraint or wrongful confinement are offences affecting the human body and cannot be said to have been committed if a person is not himself restrained or confined but the liberty of going in the conveyance in which he wishes to go or of taking the article which he wishes to carry and without which he is not willing to proceed is denied to him.

(ii) The act of the Sub-inspector could not be said to be *mala fide* though negligent.

(iii) The acts of the police officials were done *bona fide* and in execution of their duty as servants of the Crown within

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.

the meaning of section 270 (1) of the Government of India Act, 1935. The suit was consequently not maintainable since it was not instituted with the consent of the Governor of Madras as required by the section. As there was no proof that the acts of defendants 2 to 5 were not done in good faith the suit was liable to be dismissed under section 270 (2) of the Act.

(iv) The word "duty" in section 270 (1) of the Government of India Act, 1935, refers to actual duty and not to what a person merely thinks to be his duty.

(v) There is no warrant for the proposition that a police officer cannot order the arrest of a person by means of a telephonic message. The word "requisition" in section 54 (1), clause 9, of the Criminal Procedure Code is quite general and covers a message communicated by telephone.

(vi) Section 54 (1) of the Criminal Procedure Code is not limited by the provisions of section 56 of the Code and it is not incumbent in all cases upon a superior officer of the police, even when he is above the rank of an officer who is in charge of a police station or when he is not making an investigation under Chapter XIV of the Code, to comply with the formalities mentioned in section 56.

Mohamed Ismail v. King-Emperor (1) referred to.

(vii) The acts of the District Superintendent of Police could be justified under section 54 of the Criminal Procedure Code and those of the other police officials under section 21 of the Madras District Police Act.

(viii) The suit was governed by article 2 of the Indian Limitation Act and was barred by limitation.

(ix) Section 24 of the Indian Limitation Act was not applicable to the case, as the wrongful restraint complained of would be a tort and actionable *per se* and could have given rise to a cause of action immediately.

(x) Section 53 of the Madras District Police Act was also a bar to the suit.

(xi) The Government could not be made liable as the acts of the police officials were done or purported to be done by them in discharge of their duty imposed upon them by statute. Nor could any action be maintained against the Government for a tort committed by its servants if, in passing

(1) (1935) I.L.R. 13 Ran. 754.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.

the order in the performance of which the tort was committed, the Government was discharging its governmental functions as a sovereign.

Case law discussed.

APPEAL and MEMORANDUM OF CROSS-OBJECTIONS against the decree of the Court of the Subordinate Judge (Additional) of Madura, dated 21st November 1938 and passed in Original Suit No. 31 of 1937.

K. Bhashyam Ayyangar and *T. R. Srinivasan* for appellants.

Government Pleader (*K. Kuttikrishna Menon*) for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by ABDUR RAHMAN J.—This appeal arises out of a suit for damages brought by two ladies, the first plaintiff being a wife and the second plaintiff a minor daughter of the ex-Maharaja of Nabha, against the Province of Madras through the Collector of Madura and four police officials, one of whom was the then District Superintendent of Police at Madura, the other a Sub-inspector of the Government railway police at the Madura railway station and the remaining two, head constable and constable of the Government railway police stationed at Kodaikanal Road railway station in the Madura District. The facts that have led to the institution of this suit may be first stated.

Nabha is an important Sikh State in the Punjab which was being ruled since 1911 by the first plaintiff's husband. He was interned in 1928 at Kodaikanal—a hill station in the Madura District—by an order of the Government of India to which reference is made in a memorandum (Exhibit VII-b) issued by the Government of Madras to the District Magistrate, Madura, on 22nd February 1928 (the year 1922 typed

ABDUR
RAHMAN J.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

Mr. Cameron (the second defendant) was examined in this case as a witness (D.W. 5). He deposes to having communicated the following message on the telephone :—

“Ex-Maharaja of Nabha and family were reported to be leaving Kodaikanal, that it is probable that the party would be taking the Trivandrum Express at Kodaikanal Road station, that the Sub-inspector should prevent the ex-Maharaja from catching that train.”

The Sub-inspector however states in paragraph 9 of the cross-examination that he could not follow, to start with, whether the order of detention was in respect of the ex-Maharaja or the Maharani but with a reply to a question put by him on the telephone to the District Superintendent of Police, he was satisfied that the latter wanted the Maharani to be detained. According to Mr. Cameron, on the other hand, no question was put by the Sub-inspector that might have led him to detect the mistake as to the identity of the person to be detained and the only difficulty that the Sub-inspector had in understanding his message was with the word Nabha which he (the Sub-inspector) did not follow and which he was confusing with the word “Nadar”. Be that as it may, it was apparently for the District Superintendent of Police who must have been aware of his Sub-inspector's capacity to follow a message in English and whose attention was drawn to the difficulty exhibited by the latter in understanding the former's message to be circumspect and to take steps to ensure that his orders were properly understood.

On receipt of the telephonic message and understanding that the first plaintiff was to be detained, the Sub-inspector left Madura by the Trivandrum Express that was about to start when the message was received by him and arrived at Kodaikanal Road station at

about 8-15 p.m., eleven minutes after the usual time for its arrival.

The first plaintiff who had arrived at the Kodaikanal Road station at about 7-45 p.m. was awaiting the arrival of the train in her own car which was placed in the railway compound fenced on three sides by iron fencing and on the fourth side by the railway premises containing three or four rooms occupied by the Station Master, Spencer's refreshment room, a waiting room for the higher class passengers and a veranda. The iron fencing has a gate through which the cars come into the compound.

The Sub-inspector who had seen a first-class compartment reserved for the first plaintiff at an intermediate station between Madura and Kodaikanal Road ascertained from the fourth defendant on his arrival at Kodaikanal Road station if the first plaintiff had arrived. On being informed that she had and, in view of what he had understood at the time to have been the orders of the District Superintendent of Police, he prevented the first plaintiff's secretary from placing her luggage which he was trying to put in the compartment and communicated to the first plaintiff through her secretary the orders that he, i.e., the Sub-inspector had understood to have received from the District Superintendent of Police, Madura. The plaintiff complains that on the arrival of the train not only was she prevented by the Sub-inspector from boarding the train, but that the gate in the iron fencing was also closed under his instructions and the two constables (defendants 4 and 5) were placed near the gate which resulted in wrongful confinement or imprisonment of the plaintiffs. Since Mr. Bhashyam, learned Counsel for the appellants, referred to the confinement not only for the purpose of

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

enhancing the damages but as an additional ground for making the Sub-inspector and the two constables liable, we have to examine this contention in detail later. It is sufficient however to say for the time being that the contention advanced by the plaintiffs' learned Counsel, that the third defendant would in any case be liable for having exceeded his instructions and confining his clients within the railway compound, instead of permitting them or rather the first plaintiff from boarding the train, was not advanced in the lower Court and is being put forward for the first time in this Court.

Either in view of some altercation between the plaintiffs' secretary and the Sub-inspector or on account of the former's request in the vain hope of the plaintiffs being permitted to travel by the Trivandrum Express, the train was detained for about eight minutes longer than the scheduled time for its stay but it is unnecessary to go into these minor details, as they do not seem to bear on the questions that have to be determined in this appeal. We know it for a fact that the plaintiffs were not allowed to board the train and that the Sub-inspector sent a telegram (Exhibit C), after it had left, to the District Superintendent of Police, Madura North, at 8-42 p.m., which reads as follows :—

"Detained Maharani of Nabha from going by six (the number by which the Trivandrum Express is known) as per your orders advise as to what to do."

To this the following reply (Exhibit III) was despatched by Mr. Cameron at 9-20 p.m. :—

"Your orders were to detain Raja and not Maharani. Maharani may proceed anywhere and you should afford any assistance which the Maharani may require."

This was received at Kodaikanal Road telegraph office at 9-25 p.m. and delivered to the Sub-inspector

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

at 9-45 p.m. according to the time of its receipt as given at the corner of the telegram presumably by the Sub-inspector. Shortly after this the plaintiffs were allowed to go. It seems that the plaintiffs then went to the Spencer's refreshment room (*vide* Exhibit XIII) for a short time and in spite of a telegram (Exhibit K-1) that was sent by the plaintiffs' secretary to the Station Master, Trichinopoly, which reads as follows :—

"Maharani Nabha arriving by car to catch six, please detain reserve 4 first, 2 seconds, Madras", they could not catch the train as they arrived at that station only at about 1-30 a.m., while the train must have left it about two hours earlier. They left Trichinopoly eventually by the Dhanushkodi Passenger at about 4-30 a.m. on 14th January 1937 reaching Madras at about 2-30 p.m. on the same day.

Paragraphs 7, 17 and 18 of the plaint state the grounds on which the plaintiffs want to make the various defendants liable for damages for the suffering, both mental and physical, the humiliation caused to the plaintiffs and, last of all, the pecuniary loss suffered by them. As reliance was placed by the Government Pleader on the allegations in these paragraphs in support of his objection that the suit was not maintainable against defendants 2 to 5 under section 270 (1) of the Government of India Act, it would be useful to reproduce them *in extenso*. They read as follows :—

"7. The said acts of the defendants 2 to 5 were purported to be done by them in their official capacity and are quite irregular and there is no lawful justification for the said acts of the said defendants, and have all the appearance of official high-handedness. The said wrongful acts of the said defendants 2 to 5 restraining the liberty of the plaintiffs by show of authority have resulted in complete deprivation of liberty of the plaintiffs and amount to false imprisonment.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

17. Since the invasion of the plaintiffs' right to freedom has been committed in the course and as part of the official employment and alleged to be within the scope of his official authority, the first defendant is also liable in law to the plaintiffs.

18. As the defendants 3 to 5 have acted under the direction of the second defendant and as the defendants 2 to 5 have thereby joined in committing the said wrongful acts, they are also liable in the same way to the plaintiffs in damages."

Relying upon the information contained in the telegrams that were sent by the station house officer (Exhibits IV and VI), it was contended on behalf of the defendants that the ex-Maharaja of Nabha had also accompanied the persons who had left his house along with the plaintiffs on 13th January 1937 but that he had subsequently returned. The fact that the plaintiffs were detained at the Kodaikanal Road station was not denied but it was alleged on behalf of the defence that the telephonic message given by the District Superintendent of Police, Madura North, to prevent the ex-Maharaja of Nabha from proceeding by the Trivandrum Express was not correctly heard by the Sub-inspector of Police and, being under the *bona fide* impression that he was asked to prevent the first plaintiff from going by that train, he communicated the orders to her through her secretary and stopped her from boarding the train. It was denied however that the Sub-inspector of Police had ordered defendants 4 and 5 to close the gates or to post themselves near it or had wrongfully confined the plaintiffs. The "acts done by the defendants 2 and 3" were pleaded to have been "done by them in their official capacity in the lawful exercise of their duties" and "the third defendant" was said to have "acted *bona fide* in not allowing the plaintiffs to proceed by the Trivandrum Express train". It was asserted that "the plaintiffs were informed through the secretary

that they could go anywhere except the train". The allegations that the first plaintiff was not in good health or that there was loss of sleep or loss of appetite or bronchial affection on that score or that there was mental pain and physical discomfort, pecuniary loss and humiliation were denied.

Not being content with the denial of the injury caused to the plaintiffs, insult was added to it by not admitting the alleged position of the plaintiffs in life and their status, by which apparently it was meant that they were not the wife and daughter of the ex-Maharaja. We would have understood paragraph 15 of the first defendant's written statement to mean that the plaintiffs' designation as "Maharani" and "Princess" was being disputed, had it not been for the cross-examination of the first plaintiff on behalf of the defendants in paragraphs 28 and 29 which leads us to infer that the status of the first and second plaintiffs as the ex-Maharaja's wife and daughter was not being admitted. This was wholly opposed to the letters (Exhibits T, T-1 and T-2) written by the Private Secretary to His Excellency the Viceroy to or on behalf of the first plaintiff in August 1933 when she was even referred to as junior Maharani of Nabha, although the correct form of address in regard to her given by the Chief Secretary to the Government of Madras in an extract of a confidential demi-official letter written to the District Magistrate of Madura (Exhibit XIV) is stated to be different. Whether this new formula of address was evolved at that time or earlier, it is unnecessary to ascertain. But it appears to have evoked a serious protest on behalf of the first plaintiff (see Exhibits S and XI-a) and may have been to some extent responsible for this litigation, as it is quite possible that, if she had been

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

addressed by Mr. Cameron as Maharani in Exhibit VIII, the letter would not have remained unopened and this litigation would in all probability not have started. After all she was referred to as "Maharani" seven months later (Exhibit R) by no less an officer than the Deputy Inspector-General of Police when he was directed by the Government of Madras to see her with the object of apologising "on behalf of the police for the very discourteous treatment she received at the hands of the railway police at Kodaikanal Road station"; but by then the suit had been instituted and the case was stated to have "gone out of her hands" (Exhibit XII-a). We cannot help expressing our regret however that due advantage was not taken of the Government's gesture of goodwill. This is however only by the way and can have no effect on the determination of the various questions that arise in this appeal.

To revert to the pleas raised on behalf of the defendants. Since the first defendant had not authorised anything to be done to the plaintiffs and there was no ratification on its behalf of anything done by the other defendants, the first defendant's liability for the action of the other Government servants who had either acted or purported to act under the statutory powers conferred on them was denied. Reference was made in the end to the written apology sent by Mr. Cameron (Exhibit VIII) to the first plaintiff as soon as he had become aware of the unintentional mistake committed by the third defendant and the attempts that were subsequently made to have an interview with the first plaintiff for the same purpose, although they can have no bearing on the liability of the various defendants, if they or any one of them are or is found to be liable—whatever effect they may have on the quantum of damages in case the main

issues are decided against them. The validity of the notice served on the first defendant was disputed and the suit was alleged to have been barred by limitation. It was contended on behalf of defendants 2 to 5 that the plaintiffs were not entitled to maintain the suit without the consent of the Governor of Madras as required by section 270 (1) of the Government of India Act and that the suit was also barred under section 53 of the Madras District Police Act (Act XXIV of 1859).

In a judgment that is fairly well discussed, the learned Subordinate Judge of Madura came to the conclusion that the third defendant had ordered the closure of the eastern gate of the railway compound in order to prevent the first plaintiff from proceeding by car with the object of boarding the train at any other station like Dindigul or Trichinopoly and that under his orders defendants 4 and 5 "had totally and effectively restrained the freedom of the plaintiffs so as to cause false imprisonment". In answer to the issue whether defendants 2 and 3 (the District Superintendent of Police and the Sub-inspector) were acting *bona fide* in the lawful discharge of their duties, the learned Subordinate Judge was of opinion that they had acted *bona fide* and, although the second defendant had acted in the lawful discharge of his duties, the third defendant had not done so and was not protected by law. As to the first issue, which related to the bar under section 53 of the Madras District Police Act and under section 270 (1) of the Government of India Act, the learned Subordinate Judge found that under the latter section the sanction of the Governor of the Madras Province was a condition precedent for the maintainability of the suit but section 53 of the Madras District Police Act did not

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

apply to the facts of the present case. As for the liability of the Province of Madras, he held that, although section 179, sub-clause 1, of the Government of India Act was not a bar, the plaintiffs had no cause of action against it as defendants 2 to 5 were not acting as agents of the Government and the principles of implied authority to act on behalf of the latter or of the liability of a master for the wrongful acts done by his servant in the course of the latter's employment were not applicable. As to the question of limitation he held that, in so far as the act of the second defendant was in pursuance of section 54 of the Code of Criminal Procedure, the suit was barred by limitation against him but not against the other defendants. The issues in regard to the validity of the notice under section 80 of the Code of Civil Procedure and relating to misjoinder of defendants were not seriously pressed on behalf of the defendants. As for the quantum of damages the learned Subordinate Judge was of opinion that, if the case were to be decreed in favour of the plaintiffs, a sum of Rs. 5,000 would have been enough in the circumstances of the case; but, having regard to the conclusion in regard to the legal objections raised on behalf of the defendants, he was of the opinion that the suit was not maintainable. It was therefore dismissed. The plaintiffs appeal.

From the facts that have been stated and the pleadings of the parties that have been briefly summarised, it would be clear that there is no dispute in regard to the essential facts of this case.

Whether the ex-Maharaja of Nabha had actually left his house on 13th January 1937 and had returned as mentioned in the telegram (Exhibit VI), or had not left his house on that day at all, it is unnecessary

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

to decide although we are inclined to accept the ex-Maharaja's testimony and feel that the second telegram (Exhibit VI) was sent by the head constable (station house officer) after he had discovered that the first one (Exhibit IV) was sent under a mistake. It seems that Sebastian (D.W. 9), a police constable in the intelligence department, had received "information at 11 a.m. on 13th January 1937 that the ex-Maharaja of Nabha and the Rani (the first plaintiff) would go with their family to Spencer Hotel, Madras" and this information was communicated by him to Ghulam Dastagir (D.W. 8), head constable No. 988, on the same day. Either relying on the information that he had received during the day or as a result of the working of a heated imagination, Sebastian seems to have jumped to the conclusion that the ex-Maharaja had left Kodaikanal when he saw his cars pass by, and asked D.W. 8 to wire to the District Superintendent of Police, Madura, and to the other officers mentioned in the latter's statement, of the ex-Maharaja's departure. Even if the ex-Maharaja had left his house by car—a fact which we have already stated we are not prepared to believe—that should not have been sufficient for either Sebastian (D.W. 9) or Ghulam Dastagir (D.W. 8) to wire to the authorities, as the ex-Maharaja had been accompanying his wife and daughter even before up to the municipal limits when they wished to visit Madras and this must have been known to them.

As to the question whether Mr. Cameron (second defendant) had asked the Sub-inspector (third defendant) to detain any person other than the ex-Maharaja, it is true that the message, which Mr. Cameron deposes in his evidence as D.W. 5 to have sent, was not reduced to writing. It is not therefore possible to say whether the message given by the witness in his deposition

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

and reproduced in an earlier portion of this judgment was exactly what he has now stated it to be. But as the telegram (Exhibit IV) referred to the departure of the ex-Maharaja, the telegram (Exhibit V) which Mr. Cameron had given at or about the time when he telephoned his orders to the Sub-inspector also refers to the "Nabha ex-Raja" to be prevented from leaving Kodaikanal and the telegram (Exhibit III) which he sent in reply to Exhibit O reiterates that the orders were "to detain Raja and not Maharani", there cannot be much room for doubt that he must have asked the ex-Maharaja alone to be detained although it is possible to conceive that the word "party", if used by him, as both he and the Sub-inspector depose to its having been used on the telephone, might have led the Sub-inspector, D.W. 1 (who had read up to fourth form only), to think that the order of detention applied to all those as well who were or were to be with the ex-Maharaja. The Sub-inspector would not however admit this and states, as we have already noticed elsewhere, that his definite instructions were to detain the first plaintiff. Moreover the District Superintendent of Police knew that it was the ex-Maharaja alone who was debarred under Government orders from leaving the municipal limits of Kodaikanal. In the absence of any other indication or suggestion as to the motive for the first plaintiff's detention, we cannot but conclude that Mr. Cameron must have ordered the ex-Maharaja alone to be detained. There is no doubt however that the Sub-inspector (defendant 3) understood that the orders were in regard to the first plaintiff and it was on that basis that he acted until the telegram (Exhibit III) was received by him.

We will advert to the effect of this finding later but we cannot help deprecating at this stage that a

responsible officer like the District Superintendent of Police should have depended solely on the telephonic message and should not have followed it up by a confirmatory telegram or letter, particularly when he was dealing with the liberty of an ex-ruler of an important Indian State. Had Mr. Cameron taken the trouble to send a telegram to Kodaikanal Road station confirming his orders and sent a letter with a constable in a car, the mistake of detaining the plaintiffs would not have been committed and this unfortunate litigation would have been avoided.

Moreover, the use of the word "detain" which was in all probability used by Mr. Cameron on the telephone was also unfortunate. It is used both in the sense of keeping one in confinement as also for keeping him waiting or hindering him. It cannot be denied that to a policeman, particularly when he does not happen to be very well educated, the word detain would ordinarily suggest the first meaning rather than the second or the third. The use of this word by Mr. Cameron to the Sub-inspector and the use of it by the latter when communicating the former's orders to the first plaintiff's secretary could have been and was probably taken to mean that the first plaintiff was intended to be confined to the place where she happened to be at the time, i.e., in the car in the railway compound. And if the constables (defendants 4 and 5) were posted near the gate—and we are inclined to agree with the finding arrived at by the lower Court in this respect that they were placed there by the Sub-inspector—the conclusion would be irresistible that the first plaintiff must have thought that she was confined within the railway fencing where her car was standing and would not be permitted to leave it if she tried so to do. If that was the impression created in her mind, we can very well

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUS
RAHMAN J.

understand why the first plaintiff did not ask any person if she could go out of the compound and why she did not leave the car. That must have been her feeling from the subjective point of view; but that would not be enough for us to hold that she was actually confined or imprisoned and not merely restrained from proceeding by the Trivandrum Express. Had there been proof on the record that there was total restraint of the first plaintiff's movements or liberty during the period that she was in her car by the use or threat of force or by confinement, she could be said to have been imprisoned. Our attention was drawn in this respect by learned Counsel for the appellants to the evidence of P.W. 4, P.W. 5 and P.W. 6. There is no doubt that in answer to a request by the secretary (P.W. 6) "to ask the constables to open the gate on the east so that they could go" the Sub-inspector (D.W. 1) is reported to have said that "he could not allow them to go unless he received instructions from the District Superintendent of Police". But if this is taken along with what the witness (P.W. 4) stated in paragraph 11 of his cross-examination which reads as follows:—

"Through the upper class waiting room one can come to the platform and go out through the third class waiting room. There was no obstruction from anybody to go like that but no car can go that way",

it would appear that there was no total restraint on the plaintiffs' movements; but what the witness was trying to convey was that, by closing the gates the car could not have been taken out of the station compound and, as the plaintiffs could not have left the Kodaikanal Road railway station without the car, they must be taken to have been virtually confined. Similarly, P.W. 6, who is no other than the plaintiffs' own secretary, stated in his examination-in-chief that the Sub-inspector, D.W. 1, said that

"his orders were to detain the Maharani . . . He did not say she could be detained there and would not be allowed to go anywhere—I did not ask the Sub-inspector if there was any objection to the Maharani going back to Kodaikanal or to her going by car though not by train".

Having regard to these statements, we cannot attach any importance to the statement of P.W. 5 that the first plaintiff was not allowed to go and was told that she "*should stay there*".

Learned Counsel for the plaintiffs laid considerable stress on the advice sought by the Sub-inspector in his telegram (Exhibit O) after he had succeeded in preventing the first plaintiff from boarding the train. We are in agreement with Mr. Bhashyam that the explanation given by the Sub-inspector in his deposition that by those words he wanted to know what Mr. Cameron wanted the witness to do in regard to his own movements, i.e., whether he might return to Madura, is wholly unconvincing and that the Sub-inspector was apparently enquiring as to how he should act, as the first plaintiff had been detained from going by the Trivandrum Express and was then at the Kodaikanal Road station. But this does not show that the first plaintiff was there because she was confined to the Kodaikanal Road station but because she happened to be left behind after the train had left the station without her. We are however prepared to admit that, by placing the policemen at the gates and by closing the same (although not locking), it would be a legitimate inference to draw that the plaintiffs' car was stopped by defendants 3 to 5 and would not have been allowed to be taken out. This does not however mean that the plaintiffs were confined and would have been prevented from proceeding in any direction other than possibly to Dindigul or Trichinopoly if they had attempted

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUS
RAHMAN J.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

to do so. On the analogy of the decisions in *Emperor v. Lahanu Manaji*(1) and *In re Peria Ponnuswami Goundan*(2) and of *In re Muhammad Yusuf Sahib*(3), it was contended by Mr. Bhashyam that, if the first plaintiff was not allowed to go in her car in which she had a right to proceed and it was impossible for her to go anywhere without her car, the persons who prevented her from using the car should be held to have confined or imprisoned her wrongfully. It was argued by the learned Government Pleader, on the other hand, that, even if the defendants are found to have prevented the car from being taken out of the railway compound by the first plaintiff or at her instance, they could not be said to have confined or imprisoned the first plaintiff. He cited *Emperor v. Rama Lala*(4), *In re Venkataramiah*(5) and *Durgapada Chatterji v. Nilmani Ghosh*(6) in support of his contention. It is admitted in this case that the first plaintiff may be, in so far as she was prevented from boarding the Trivandrum Express, taken to have been wrongfully restrained by the Sub-inspector. But the contention that a person would be said to have been confined merely because he is not allowed to proceed either in his car or conveyance, even if no restriction is placed on his person, does not seem to us correct. The offences of wrongful restraint or wrongful confinement are offences affecting the human body and cannot be said to have been committed if a person is not restrained or confined himself but the liberty of going in the conveyance in which he wishes to go or taking the article which he wishes to carry and without which he is not willing to proceed is denied to him.

(1) (1925) 27 Bom. L.R. 1419.

(3) (1938) 2 M.L.J. 583.

(5) (1908) 11 Cr. L.J. 192.

(2) A.I.R. 1927 Mad. 506.

(4) (1912) 15 Bom. L.R. 103.

(6) (1934) 60 C.L.J. 472.

If the decisions cited by Mr. Bhashyam lay down any different rule, we would be, with great deference, unable to concur with them.

We are not, for the above reasons, satisfied both on facts and as to law that the plaintiffs were or can be said to have been actually confined either in the railway compound or even within the limits of Kodai-kanal Road station. Had the first plaintiff or her secretary made a request to the Sub-inspector or to the constables for the former to go out of the railway compound and had any obstruction been created, it would have been a different matter. The onus of proving confinement lay on the plaintiffs and, in the absence of satisfactory evidence on this point, it is not possible for us to agree with the lower Court—although it has to be admitted, as we have already observed, that the conduct of the third defendant was undoubtedly dubious and the user of the word “detention” makes the statement of the defence witnesses on this point doubtful.

In view of our finding that Mr. Cameron had ordered the ex-Maharaja to be detained, the question of his *bona fides* for ordering the first plaintiff to be prevented from boarding the Trivandrum Express does not arise for consideration. We are equally clear in our minds that the Sub-inspector was not actuated by any bad or malicious motives either. He was under an honest impression, although a mistaken one, that he was ordered to prevent the first plaintiff from going by the Trivandrum Express. At one stage of the case, Mr. Bhashyam advanced the contention that the Sub-inspector's conduct was at all events extremely negligent and that he should not be held to have acted in good faith, if we were not satisfied that he had proceeded in the matter with due

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

care and caution. But, when it was pointed out to him that the definition of the words "good faith" in the General Clauses Act is materially different from that given in the Indian Penal Code and that it would not be correct in this case to use them in the limited sense in which they were used in the Indian Penal Code, the contention was not pressed. The action of the Sub-inspector could not be, even if negligent to some extent, held to be malicious or even *mala fide*. We must therefore hold that in preventing the first plaintiff from proceeding by the Trivandrum Express he was acting *bona fide* though erroneously.

Having come to these findings of fact, we are now free to discuss the various questions of law which have been raised on behalf of the various defendants. The first contention advanced by the learned Government Pleader was that, inasmuch as the plaintiffs were expressly suing the defendants for acts which were admitted by them to have been done in their official capacity, the suit would not be maintainable without the consent of the Governor under section 270 (1) of the Government of India Act. It runs as follows:—

"No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent, in the case of a person who was employed in connexion with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connexion with the affairs of a province, of the Governor of that province in his discretion."

Inasmuch as the act of wrongful confinement or of wrongful restraint which was committed in January 1937, i.e., some months before "the relevant date" by persons employed in connection with the

affairs of a province, it would fall within the ambit of the section if it was done or purported to be done by them in the execution of their duty as servants of the Crown in India. As the question of the applicability of section 270 (1) depends primarily on the nature of the allegations made against the public servants in the plaint—for which see *Hori Ram Singh v. The Crown* (1)—we will have to examine the allegations contained in paragraph 7 of the plaint which we have reproduced earlier in this judgment. The plaintiffs' complaint is that the "acts of defendants 2 to 5 were purported to be done by them in their official capacity" or, in other words, in the execution of their duty as servants of the Crown. Since this suit was not instituted with the consent of the Governor, section 270 (1) clearly constitutes a bar so far as defendants 2 to 5 are concerned. Mr. Bhashyam however contended that section 270 (1) would have no application unless the acts were done or purported to be done by these defendants in the execution of their duty. He contended in the first instance that, as it was not possible for Mr. Cameron to order any subordinate of his to apprehend or to detain any person by telephone, he could not be stated to have done anything in the discharge of his duty. Secondly it was contended that, as, in the absence of any allegation or information that the plaintiffs had committed any offence, it was not possible for the Sub-inspector of Police to have restrained or confined them, equally he could not be said to have done anything in the execution of his duty. The same argument was advanced with reference to the other two constables who are defendants in the case. Reference was made in this connection by Mr. Bhashyam to section 54 of the Criminal Procedure Code under which it is

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

(1) [1939] F.C.R. 159, 179, 184.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

possible for a police officer to arrest a person without a warrant.

There is no warrant for the proposition that a police officer cannot order the arrest of a person by means of a telephonic message. The word "requisition" in section 54 (1), clause 9, is quite general and clearly covers a message communicated by telephone, although it will be necessary for him, when he is asking another police officer to do what he could have done himself, to disclose not only the identity of the person whom he wishes to be arrested but also the offence or the reason for which the arrest is to be made. This has to be done for the reason stated in the last clause of section 54 (1). This information will enable a person who is called upon to arrest to know that the person required to be arrested by him could have been lawfully arrested without a warrant by the officer who had issued the requisition. The proposed action being thus within the competence of one who may be described, although not quite accurately, as a principal, the person requisitioned would be doing nothing wrong if he complies with his so-called principal's orders and carried them out as his agent.

Our attention was drawn to a decision by a single Judge of the Rangoon High Court in *Mohamed Ismail v. King-Emperor*(1) where it was held that the provisions of section 54 of the Criminal Procedure Code were limited by section 56 of the Code and that, although it is possible for a police officer to arrest, on his own initiative or when acting independently, any person concerned in a cognizable offence without a warrant, yet, where a subordinate police officer was not acting independently but was merely

1) (1935) I.L.R. 13 Ran. 754.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

deputed by a superior officer to arrest a person concerned in a cognizable offence, the order specifying the person to be arrested and the offence or other cause for which the arrest was to be made must be in writing and the subordinate police officer must notify to the person to be arrested the substance of the order and, if so required by such person, show him the order.

Inasmuch as the police officer in that case was making an investigation under Chapter XIV of a case under section 380, Indian Penal Code, which is a cognizable offence, the decision was, if we may say so with respect, fully justified. But if the learned Judge wished to lay down generally that the provisions of section 54 were to be limited by those of section 56, Criminal Procedure Code, and in all cases it is incumbent upon a superior officer of the police, even when he is above the rank of an officer who is in charge of a police station or when he is not making an investigation under Chapter XIV, Criminal Procedure Code, to comply with the formalities mentioned in section 56 of the Code, we must with deference express our dissent. Section 54 applies to all police officers whether superior or subordinate. Section 56 only applies to such police officers as are in charge of a police station or as are making investigations under Chapter XIV. The Officer in charge of a police station is defined in section 4 (p), Criminal Procedure Code. Let us suppose that an Inspector-General of Police orders his Deputy Inspector-General of Police or a District Superintendent of Police (all of whom are superior police officers and who would not ordinarily be in charge of a police station or making an investigation themselves under Chapter XIV) to arrest a person, would it be essential for the Inspector-General of Police to comply with the requirements

MAHARAJA OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

of section 56 of the Criminal Procedure Code? In our opinion, it would not be so necessary. Nor would it be necessary for a subordinate police officer, say an Inspector of Police, to do so if he gives an order for a person's arrest to another police officer as long as the person giving the order is not the officer in charge of a police station and is not making an investigation under Chapter XIV, Criminal Procedure Code. In other words, section 56 of the Code only applies to cases of police officers who are either in charge of a police station or who are making investigation under Chapter XIV. If in their capacities as such officers they depute their subordinates to arrest without a warrant (otherwise than in their presence) they have to give that order in writing. But if they are not acting in that capacity, a compliance with the general provisions contained in section 54 (1), clause 9, would be enough.

Had the ex-Maharaja of Nabha left the Kodaikanal municipal limits and arrived at Kodaikanal Road station against the orders of the Government of India, he would have been guilty of an offence defined in section 225-B, Indian Penal Code, and liable to arrest by Mr. Cameron without a warrant, the offence being of a cognizable nature. The Sub-inspector also knew that the ex-Maharaja could not leave the Kodaikanal municipal limits and he could have also done the same. If Mr. Cameron could have arrested the ex-Maharaja himself under section 54 (1), clause 1, it is clear that he could have made a requisition to the Sub-inspector, either in writing or verbally or even by telephone, to arrest the ex-Maharaja at Kodaikanal Road station under clause 9 of the same section. In making a requisition to arrest the ex-Maharaja at Kodaikanal Road, both the person to be arrested and the cause for which the arrest was

MAHARAJA OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

to be made must be taken to have been specified and it would have appeared to the Sub-inspector therefrom that the ex-Maharaja could have been on leaving the municipal limits of Kodaikanal arrested without a warrant by Mr. Cameron. It would follow therefore that, in asking the Sub-inspector to detain the ex-Maharaja, Mr. Cameron was not only doing what he was fully entitled to do but was executing a duty that he was bound to discharge in view of the orders of the Government of India conveyed to the Inspector-General of Police in Exhibit VII-d and by the latter to the District Superintendent of Police in Exhibit VII.

As regards the Sub-inspector and the two constables, Mr. Bhashyam contended that the act done or purported to be done by them must have been in the execution of a duty and, in so far as they could not be said to have been under any duty or entitled to arrest the first plaintiff under section 54, Criminal Procedure Code, they clearly exceeded their powers and could not be brought within the ambit of section 270 (1) of the Government of India Act. In other words, his contention is that, in order to attract section 270 (1), the power and duty to arrest must be clearly found to be existing under section 54, Criminal Procedure Code, and it should not be merely a purported duty or a duty that a person wrongly thought he was bound to discharge. We agree with the learned Counsel's contention that the word "duty", as used in the section of the Constitution Act, refers to the actual duty and not what a person merely thinks to be his duty. We also agree that section 54, Criminal Procedure Code, cannot help these defendants. None of its provisions can be held to empower them to restrain or confine the first

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

plaintiff. There was no requisition by Mr. Cameron to arrest the first plaintiff and, even if the request to arrest the ex-Maharaja may be taken to have been wrongly understood as a request to arrest her, there was no disclosure of the offence or other cause for which she could have been arrested. In the absence of any disclosure of an offence or any other cause, it is contended on behalf of the appellants that it was not possible for the Sub-inspector to detain or arrest the first plaintiff under the provisions of section 54, Criminal Procedure Code. If section 54 were the only section under which it would have been possible for the Sub-inspector to act, there would have been undoubtedly a great deal of force in the learned Counsel's contention. But under section 21 of the Police Act, it is the duty of every subordinate police officer, as the third defendant was, to obey the orders of the senior police officer, as Mr. Cameron, the District Superintendent of Police, happened to be at the time. It therefore Mr. Cameron ordered the Sub-inspector to arrest or detain the ex-Maharaja, the Sub-inspector was bound to comply with the order. If, in pursuance of such an order, the Sub-inspector had arrested or detained the ex-Maharaja, he would have been acting in execution of his duty. But if, by a mistake in reading or hearing the order, the Sub-inspector detained some one else, as it happened in the present case, he could not be said to have been acting in execution of his duty in carrying out the orders of his superior officer, but none the less he can be said to be purporting to carry out an order which he understood to have been passed by Mr. Cameron and which it was his duty to execute. It was in the end urged that, under section 21 of the District Police Act, a police officer is bound to execute merely lawful orders and the order to arrest or detain the

first plaintiff could not be regarded to be lawful. It was also contended that this section only dealt with disciplinary jurisdiction of the police officers and had no application when they were dealing with the public generally. This section provides that it shall be the duty of every police officer "to obey and execute all orders and warrants lawfully issued to him". It may be argued, and not without some force, that it would not be open to a subordinate police officer to question the legality of the orders of his superiors and that, if an order or warrant was lawfully issued to him, it would be his duty to obey and execute the same. In other words, the argument is that the word "lawfully" does not qualify the words "orders or warrants" and merely refers to the method of their issue. *Prima facie* this seems to be correct; but, even if it is not so and the word lawfully is found to qualify the words "orders or warrants", there is no difficulty in overruling this contention. The order to arrest or detain the ex-Maharaja issued by Mr. Cameron was, as has been already held, a perfectly lawful order. It does not become unlawful merely because it was misunderstood by the person who was to execute the same. The only difference would be, as pointed out before, that the Sub-inspector instead of acting in execution of his duty could only be said to have purported to act in execution of his duty. But both of them are covered by section 270 (1) of the Constitution Act and cannot legally give rise to a cause of action except with the consent of the Governor. There is also no force in the contention that section 21 is applicable between police officers *inter se* and has no application when they are dealing with private individuals. The orders which they as police officers are to give and the warrants which they are to issue

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

will relate largely, if not solely, to private individuals or to individuals even if they happen to be police officials in their private capacity. The Police Act does not deal with administrative matters of the police as a department but with matters and duties which they in their official capacity are called upon to undertake and discharge.

It is not easy to understand why the lower Court considered that the third defendant's action was not protected by law. He was purporting to perform a duty which he was bound to discharge. It follows therefore that the plaintiffs must be, both according to their allegation in the plaint and on the merits irrespective of any such allegation, held not to be entitled under section 270 (1) of the Government of India Act to institute this suit against defendants 2 to 5 without the consent of the Governor.

We have already held that the actions of defendants 2 and 3 were *bona fide*. The police constables (defendants 4 and 5) were similarly bound to obey the orders lawfully issued by the Sub-inspector and there can be no manner of doubt that what they were ordered to do and what they did in pursuance of such orders as were given to them was done by them in the execution of their duties as servants of the Crown in India and was done by them in good faith. Under section 270 (2) of the Constitution Act all civil and criminal proceedings against such persons have to be dismissed unless the Court is satisfied that the acts complained of were not done in good faith. In other words, the onus of proving want of good faith in the case of such persons and such acts as are referred to in this sub-clause is placed upon the plaintiff or the complainant as the case may be. There is no proof on the record that any of the four

defendants (defendants 2 to 5) did not act in good faith. Indeed we have found that all of them acted in good faith. For that reason also the case against these defendants must fail.

The incident which led to the institution of this suit occurred as stated before on 13th January 1937. The plaint was presented on behalf of the plaintiffs on 17th June 1937 after a notice of two months had been given on behalf of the plaintiffs as required by section 80, Civil Procedure Code. The period of such notice has to be excluded in computing the period of limitation under section 15, sub-clause 2, of the Limitation Act. The civil Courts in Madura were closed on account of summer recess and reopened on 14th June 1937. If the period of limitation for a suit of this nature were found to be three months under article 2 of the Limitation Act, as it has been contended on behalf of the defendants to be, the suit would be barred by time, the last date of its institution in that case being 14th June 1937. Learned Counsel for the plaintiffs however relies on articles 19, 36 and 120 and contends that article 2 of the Limitation Act would not be, in any case, applicable to the facts of the case. It is urged by him in the alternative that, even if article 2 of the Limitation Act is found to be applicable, the period of limitation under section 24 of the Limitation Act should be computed from the time when the injury (i.e., the illness in Madras) to the plaintiff resulted in consequence of the happenings of the 13th January.

Article 19 of the Limitation Act would have been undoubtedly more appropriate if we had been of opinion that the first plaintiff was wrongfully confined or falsely imprisoned. In view of our finding however that she had been only wrongfully restrained, article 19

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

Maharant of Nabha
v.
Province of Madras
—
Abdur Rahman J.

of the Limitation Act would have no application. Article 36 makes a general provision for suits founded on torts. Provisions for particular cases are to be found in articles 19 to 27 and 37 to 49. If a case falls under any of the special articles, article 36 will have no application. It clearly provides that it would have no application if the limitation for acts complained of had been specially provided for. It cannot apply if the malfeasance, misfeasance or non-feasance referred to therein were committed or purported to be committed in pursuance of any enactment in force in British India. Much less can article 120 which is a residuary article have any application. It can only be invoked as a last resort and in case no other article is found to be applicable. If the suit happens to be for compensation for doing an act alleged to have been done in pursuance of any enactment in force for the time being in British India, as this happens to be, article 2 will have to be applied in preference to either article 36 or any other article referred to above and this is because it has been proved now that the various defendants acted on 13th January 1937 or purported to act in pursuance of some enactment. It is true that the use of the word "alleged" by the Legislature in this article is not happy. It cannot be taken to mean that a mere allegation by a party invoking its assistance or pleading that he had acted or omitted to act in pursuance of an enactment would attract its provisions. But when the act is found to have been done or purported to have been done in pursuance of an enactment, as the acts of defendants 2 to 5 have been found to be, this article must be held to apply. Relying on the word "alleged" in this article, learned Counsel for the appellants argued that, before it could be found to

govern the present suit, the allegation by the defendants that they were acting in pursuance of an enactment must have been made by them when they were acting. This is obviously incorrect. First of all, a contention like this assumes that every person who is acting in pursuance of an enactment must not only know, at the time when he is acting, the correct title and provision of the Act under which he was authorised to act (as, if it happens to be wrong, it may be argued that the correct enactment was not alleged by the person doing the act) but also the provisions of the Limitation Act (which is after all an adjectival law) which make it essential for him to mention his authority for the act done by him. Secondly, this article applies both to the doing of an act or omitting to do an act; it might be physically possible for a person to speak and to refer to the enactment at the time when he is acting in pursuance of the enactment but what about the omission to act? If a man does not act and is not even present for the simple reason that he did not wish to act, is he even then required to speak and name the provision of law under which he thinks he is not required to act or on account of which he omitted to act? The enactment under which he acted or omitted to act can surely be referred to by him or on his behalf when he is called upon to explain his conduct later. As we have found that the defendants were acting under the provisions of section 54, Criminal Procedure Code, and section 21 of the Police Act, both of which were and are in force, the suit must be held to be governed by article 2 of the Limitation Act.

The contention advanced on behalf of the plaintiffs that column 3 of the article should be governed by section 24 of the Act and limitation should not be held

MAHARANT OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

to start under article 2 from the time when the acts took place but from the time when the injury to the plaintiff (i.e., the illness in consequence of her detention) occurred in Madras a few days later has also no force in our opinion. If the act complained of had not given rise to a cause of action until some special damage had resulted therefrom, section 24 of the Limitation Act might have been of help to the plaintiffs. In so far as their learned Counsel vehemently contended—and we are not inclined, as at present advised, to disagree with him—that the wrongful restraint complained of and found to have been committed would be a tort and actionable *per se*, it could have given rise to a cause of action immediately. Section 24 of the Act cannot thus help the plaintiffs and the period of limitation cannot be computed from the time when the injury is alleged by the plaintiffs to have resulted to them.

It was moreover contended by the learned Government Pleader that section 53 of the District Police Act was also a bar. The relevant provisions of that section read as follows :—

“All actions and prosecutions against any person, which may be lawfully brought for anything done or intended to be done, either under the provisions of this Act or under the provisions of any other law for the time being in force, conferring powers on the police shall be commenced within three months after the act complained of shall have been committed and not otherwise.”

The learned Subordinate Judge overruled this contention as he held that

“the act could not be said to be one done or intended to be done under the provisions of the Police Act or the Criminal Procedure Code, though the third defendant honestly believed that in doing that act he was carrying out the orders of the District Superintendent of Police and though that was

an act done by him in execution of his duty as a servant of the Crown in India ”.

No reason has been given by him why section 54, Criminal Procedure Code, or section 21 of the Police Act, to which reference was made by him in the preceding sentence, had no application to the defendants. We have in an earlier part of this judgment discussed the question and taken pains to show that the acts of these officers were covered by the provisions of the Criminal Procedure Code and those of the Police Act. The very fact that the Sub-inspector was carrying out or purported to carry out the order of the District Superintendent of Police would bring him within the protection afforded by the Government of India Act read with the provisions contained in the Police Act. We must therefore hold that the finding of the learned Subordinate Judge in paragraph 29 of his judgment is erroneous and section 53 of the District Police Act applies to the case so far as defendants 2 to 5 are concerned and the suit is therefore barred by limitation against them on this ground as well.

The last question to decide is whether the Province of Madras could be held liable for the acts of the other defendants. Relying on the cases such as those of *Limpus v. London General Omnibus Company*(1), *Poland v. John Parr & Sons*(2) and *Bayley v. Manchester, Sheffield, and Lincolnshire Railway Co.*(3), it was contended by learned Counsel for the appellants that the Government would be, like any other master, responsible for the acts of its servants when they are done by them within the scope of their authority, even if they happen to be against the express orders or instructions of the Government.

(1) (1862) 1 H. & C. 526 ; 158 E.R. 993.

(2) [1927] 1 K.B. 236.

(3) (1872) L.R. 7 C.P. 415.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

In the present case, however, it was argued by Mr. Bhashyam, that there was no question of the defendants' and of, at any rate, Mr. Cameron's acting in contravention of the Government's orders. The duty of keeping the ex-Maharaja within the municipal limits of Kodaikanal was imposed on Mr. Cameron as the District Superintendent of Police and on the third defendant, either directly or through Mr. Cameron, and anything done or purported to be done by both of them within the scope of their authority would, if it amounts to a civil wrong, make the Government liable. It was further argued that the Government would be responsible for the negligence of its servants committed by them in complying with its express orders.

Had we been dealing with a private individual or his servants who were shown to have committed a civil injury in the course of their employment and for their master's benefit, even if the act would have been against his specific instructions, he, i.e., the master, would have been liable. But the question now to decide is whether the Government could be made liable when the acts were done or purported to be done by certain police officers in the discharge of their duties. The fact that the ex-Maharaja must be regarded to have been taken into or kept in custody under the orders of the Government of India is immaterial. He was interned by an order of the Government which was nothing but an act of state and which could not be questioned by the municipal Courts of the country. Nor would his being in the custody of defendants 2 and 3, even if that be assumed to be correct, make any difference if they were under a statutory duty to keep him in custody and entitled to arrest him if he, in spite of being a detenu, happened

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

to transgress the municipal limits of Kodaikanal. That they were both empowered and bound to arrest him admits of no doubt in our opinion. Had the ex-Maharaja left the municipal limits of Kodaikanal, he would have fallen within the mischief of section 225-B, Indian Penal Code, and would have been liable to be arrested by any police officer without a warrant. This was not because of any special request made either by the Government of India or the Government of Madras but because, in his capacity as a police officer, it is his duty to arrest an offender without a warrant if he can in law do so and with a warrant when he has been ordered to do so by the authorities entitled to issue the same. The decision in *Tobin v. The Queen*(1) is a clear authority for the proposition that a petition of right could not have been on the facts of the present case maintained against the Queen although, in that case, a naval officer had, purporting to act in pursuance of a statutory authority, wrongly seized a ship in the supposed performance of a duty imposed upon him by an Act of Parliament. It was held in that case that, on those facts, the maxim *respondeat superior* would not apply and make the Crown liable. The question how far the Government is liable for the acts of its servants when they are performed, not in the carrying on of an ordinary business transaction which as successor of the East India Company it has at times to undertake, but in pursuance of the exercise of governmental or sovereign power, has been the subject of several decisions by the various High Courts in India. It was held by JENKINS C.J. (Chief Justice of the Bombay High Court as he then was) and another

(1) (1864) 16 C.B. (N.S.) 310; 143 E.R. 1148.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

learned Judge in *Shivabhajan v. Secretary of State for India*(1) that the Government was not liable on account of the act of a chief constable who had seized certain bundles of hay not in obedience to an order of the executive Government but in the performance of a statutory power vested in him by the Legislature. To the same effect there are decisions of other Courts including our own where this question has been fully discussed; see *M. A. Kader Zailany v. The Secretary of State for India in Council*(2), *Ross v. Secretary of State for India*(3), *The Secretary of State for India v. Somayya*(4) and *Secretary of State for India in Council v. Shreegobinda Chaudhuri*(5). It will be supererogatory on our part to tread the same ground once again. These authorities clearly establish that the Government could not be made liable if the act was done or purported to be done by the defendants in the discharge of their duty imposed upon them by statute.

In determining the application of section 270 (1) of the Government of India Act to defendants 2 to 5, we have already held that the acts done or purported to be done by these police officers were in execution of their duty. Mr. Cameron who telephoned to the Sub-inspector for the ex-Maharaja to be detained at the Kodaikanal Road station was performing a statutory function and did not act because he was expressly authorized by the Government to detain the ex-Maharaja on that day. In the same way the third defendant was bound to carry out the orders which were given or which he erroneously understood to have been given by his superior officer. The orders passed by the third defendant had to be obeyed by

(1) (1904) I.L.R. 28 Bom. 314.

(2) (1931) I.L.R. 9 Ran. 375.

(3) (1915) I.L.R. 39 Mad. 781.

(4) (1926) 51 M.L.J. 440.

(5) (1932) I.L.R. 59 Cal. 1289.

defendants 4 and 5. Had the third defendant been found to have detained the first plaintiff not *bona fide*, but on account of malice, the situation would have been different. Had these defendants been carrying out an order passed by the Government not in the exercise of its governmental functions but in carrying on the ordinary business transactions, the position might have been also different. But in this case these considerations are out of place. The contention advanced by Mr. Bhashyam that these police officers were acting as agents to keep the ex-Maharaja in custody and not as police officers has absolutely no force. The direction of the Government of India contained in Exhibit VII-c that it wanted a "watch to be maintained by the police at any railway station where the detenu was likely to entrain and steps to be taken to ensure his re-arrest in the event of his absconding" do not enable a police officer to do anything more than he was bound to do under the provisions of the Criminal Procedure Code or under the Police Act, irrespective of this direction having been given by the Government of India. The Government expects all officers to discharge the duties imposed upon them by statute and in this case the Government was not asking or expecting anything else or in addition to be done. In fact, the Government in passing this order was trying to minimize the rigour with which the movements of the ex-Maharaja could have been closely supervised. Paragraph 1 of this very letter indicates that the Government did not favour the employment of any special police guard and clearly stated that it did not wish a close supervision over the ex-Maharaja of Nabha. That is why the special police staff employed apparently by the Local Government was ordered by the Government of India to be

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

disbanded. We might also state in passing that, if any act had been found to have been committed maliciously, it could not be held to have been done on behalf of the Government. Similarly, the detention of the first plaintiff being wholly wrongful and illegal and in excess of the Sub-inspector's duty could not render the Government liable unless it was found to have been subsequently ratified or adopted by it. It was so held by their Lordships of the Judicial Committee in *The Collector of Masulipatam v. Cavalry Vencata Narrainapah*(1) where they observed at page 554 :

"Again, the acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceeds that authority, when the Government in fact, or in law, directly or by implication, ratifies the excess."

The position is therefore reduced to this: that the Government could not be held liable either when an officer takes an action in pursuance of a statutory duty or when the act committed by him happens to be in excess of his authority unless in the latter case the act is either done by the Government's express orders or is subsequently ratified and adopted by it. Nor could any action be maintained against the Government for a tort committed by its servants if, in passing the order in the performance of which the tort was committed, the Government was discharging its governmental functions as a sovereign.

In view of our conclusion as regards all the defendants, it is unnecessary to go very minutely into the question of damages. Having regard to the status of the plaintiffs and to the inconvenience to which they were put, the lower Court would have been

(1) (1860) 8 M.I.A. 500.

inclined to pass a decree for a sum of Rs. 5,000 if it had held that any of the defendants could be made liable in this suit. We are, on the whole, satisfied that the view taken by the lower Court in regard to the quantum of damages was not, in the circumstances, erroneous or unreasonable.

For the above reasons the appeal fails against all the defendants and is dismissed. Having regard to the peculiar circumstances of the case, we consider that the lower Court's order in directing the parties to bear their own costs was fully justified and we would follow the same course ourselves.

The memorandum of cross-objections must therefore be dismissed, but without costs.

A portion of the argument in this case centred on the interpretation of the word "duty" used in section 270, sub-clause 1, of the Government of India Act. It was contended on behalf of the appellant that the word "duty" could not include what was characterized by Mr. Bhashyam as "purported duty", i.e., a duty which an officer may erroneously consider that he was required to perform. The learned Government Pleader however contended that the word "duty" used in the section would also include a duty that an officer might think he was entitled or liable to discharge. We accepted the interpretation placed upon that word by Mr. Bhashyam but decided the point (in connexion with which this interpretation was put) against him as we held the acts done by the defendants to be in the discharge of duty and not of what was described as a "purported" duty. Since this case involves a substantial question of law as to the interpretation of the Act within the meaning of section 205 a certificate will issue to this effect.

N.S.

MAHARANI OF
NABHA
v.
PROVINCE OF
MADRAS.
—
ABDUR
RAHMAN J.

APPELLATE CIVIL—FULL BENCH.

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

POTHURU SREERAMULU CHETTI (PLAINTIFF),
APPELLANT,

v.

DUVVURU SUBBARAMI REDDY AND TEN OTHERS
(DEFENDANTS AND NIL), RESPONDENTS.*

Hindu law—Alienation—Debt due on promissory note, binding on joint family—Decree against makers personally and their respective sons limited to latter's interests in joint family assets—Makers subsequently adjudicated insolvents—Decree-holder's application to make Official Receiver party to execution proceedings, rejected—Sons' interests alone in certain items of property belonging to joint family, thereafter sold in execution—Sale proceeds paid rateably to creditors holding debts binding on joint family—Auction purchaser entitled not merely to right in equity but to sons' interests absolutely in properties sold—Auction purchaser not bound to pay other debts binding on joint family.

R and his brother, who were members of a Hindu joint family, executed a promissory note for moneys borrowed in order to meet a family necessity. The payee filed a suit on the promissory note impleading the makers and their respective sons as defendants and obtained an interim order of attachment of the family properties. The interim order was subsequently made absolute. A decree was thereafter passed in the suit against the makers of the promissory note personally and against their sons, limited so far as the sons were concerned to their interests in the family properties. The makers of the promissory note subsequently applied for their own adjudication in insolvency and an order of adjudication was passed. The decree-holder thereupon sought to implead in the execution proceedings the Official Receiver

* Second Appeals Nos. 57 and 58 of 1939.

as the representative of the makers of the instrument, but this was refused. The decree-holder was consequently compelled to limit his application for execution to the interests of the sons in the properties attached. The sons' interests in some of the items of the properties were sold by the Court and were purchased by a stranger and their interests in the rest of the properties were purchased by the decree-holder himself. When the proceeds of the sales were paid into Court they were paid out rateably to the decree-holder and five other creditors who had obtained decrees against the family and had applied for rateable distribution. It was conceded that the debts due to these creditors were also debts binding on the family. The purchasers obtained symbolical possession of the properties purchased by them and subsequently filed suits for partition thereof. The Subordinate Judge granted to the plaintiffs decrees for partition but held that they were only entitled to take the shares of the sons in the properties in suit subject to the payment of other family debts. On appeal to the District Judge this decision was confirmed. On second appeal to the High Court,

held: the plaintiffs-purchasers were entitled to decrees for partition free from the condition imposed by the Courts below.

The sales, in the above circumstances, for the satisfaction of family debts were capable of conveying to the purchasers a good title, notwithstanding that other debts equally binding on the family were left unsatisfied.

APPEALS against the decrees of the District Court of Nellore in Appeal Suits Nos. 184 and 183 of 1937 preferred against the decrees of the Court of the Subordinate Judge of Nellore in Original Suits Nos. 52 and 70 of 1936 respectively.

These second appeals came on for hearing in the first instance before LEACH C.J. and KRISHNASWAMI AYYANGAR J. who referred them to a Full Bench. The appeal then came on for hearing before the Full Bench constituted as above.

ON THE REFERENCE:

V. Govindarajachari and N. Vasudevarao for appellants.—the decrees of the Courts below are erroneous in so far as they

SREERAMULU
v.
SUBBARAMI.

1942,
March 4.

SREERAMULU
v.
SUBBARAM.

direct that the plaintiffs' right to partition is subject to the payment of the remaining debts binding on the family. The plaintiffs are entitled to partition without any such condition being imposed on them. The plaintiffs purchased the sons' interests in the family properties in court-auction in respect of a debt binding on the family and the sale proceeds were further utilized for the discharge of debts binding on the family. The principle that an alienee from a co-parcener acquires only a right in equity does not apply to such a case. The sale held in execution of a decree binding on the members of a joint family gives the purchaser not merely a right in equity but a right in the property itself. It is conceded on behalf of the respondents that, if the entire item including the fathers' interests had been sold, the purchaser would get a good title to the property; but it is contended on their behalf that the position is different when the sons' interests alone excluding the fathers' interests are sold. Such a distinction is not well founded. The governing test is not the extent of the interest that is sold but the nature of the debt for the discharge of which the alienation is made, that is to say, whether the concerned debt is binding on the family or not so binding. Where the Court sells the sons' interests in the family properties in regard to debts binding on the family, it purports to do so in the exercise of the powers which the manager has under Hindu law to make alienations for family necessity. It is the manager's power that is exercised by the Court in such a case and, where a manager sells property for a family purpose, he conveys not merely a right in equity but an interest in the property sold. The decision in *Venkureddi v. Venku Reddi*(1) is distinguishable on the facts and is not applicable to the present case. There is no direct authority on the point under discussion. It is however submitted that there is no equity in requiring the plaintiffs-purchasers to pay the other family debts, when the entire sale-proceeds furnished by them have been utilized for discharging debts binding on the family.

K. Rajah Ayyar for *K. Kuppuswami* for ninth respondent.—The plaintiffs are entitled only to a right in equity, namely, a right to partition subject to the payment of binding family debts. They are in no better position than the purchasers of family property from junior members of a Hindu joint

(1) (1926) I.L.R. 50 Mad. 535 (F.B.).

SREERAMULU
v.
SUBBARAM.

family. It is not only the nature of the debt for which an alienation of co-parcenary property is made but also the status of the person who makes the alienation that determine the nature of the right acquired by the alienee. If the sale by a member who is not the manager gives the purchaser only a right in equity, a court-sale cannot confer a higher right. There is no distinction in principle between private sales and court-sales; see *Aiyyagari Venkataramayya v. Aiyyagari Ramayya*(1). The Court in selling the sons' interests in the present case could not have purported to exercise the powers of the fathers who had been adjudicated insolvents. Neither the concurrence of the Official Receiver nor of the insolvency Court appears to have been obtained for the sale. The executing Court has purported to sell only the right, title and interest of the judgment-debtors, the sons. The right that is acquired under such a sale is consequently a mere right in equity. The nature and scope of the right acquired in such circumstances are defined in *Manjaya v. Shanmuga*(2) and *Venkureddi v. Venku Reddi*(3).

Other respondents were not represented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by LEACH C.J.—These second appeals have been placed before a Full Bench for decision because they raise a question of Hindu law of some importance and there is no textual or other authority which has bearing.

LEACH C.J.

On 7th September 1931, Seshayya Chetti, the appellant in Second Appeal No. 58 of 1939, filed a suit in the Court of the District Judge of Nellore to recover an amount claimed by him to be due on a promissory note. The promissory note had been executed by the first respondent and his brother Rami Reddi, who is now dead and is represented by his sons, the second, third and fourth respondents. The defendants to the suit were the makers of the instrument and their respective sons, the family being joint.

(1) (1902) I.L.R. 25 Mad. 690, 714 (F.B.).

(2) (1913) I.L.R. 38 Mad. 684.

(3) (1926) I.L.R. 50 Mad. 535 (F.B.).

SREERAMULU
v.
SUBBARAMI.
LEACH C.J.

On 26th September 1931 the plaintiff obtained an interim order for attachment before judgment of the properties in suit and the interim order was made absolute on 11th January 1932. On 7th October 1932 the Court passed a decree for Rs. 3,118 with interest and costs against the makers of the promissory note personally and against their sons, limited so far as the sons were concerned to their interests in the family properties. On 16th November 1932 the two principal defendants applied for their own adjudication in insolvency, and on 8th March 1933 an order of adjudication was passed. On 2nd May 1933 the decree-holder asked to be allowed to implead in the execution proceedings the Official Receiver as the representative of the makers of the instrument. The District Judge refused the application on the ground that execution could not be allowed against the Official Receiver. It is regrettable that an arrangement was not made that the interests of all the members in the properties should be sold in the execution proceedings. This could have been done by consent with full safeguard to the creditors of the insolvents and, if such an arrangement had in fact been made, the present suits would have been avoided. The result of non-co-operation was that the decree-holder was compelled to limit his application for execution to the interests of the sons in the properties attached. On 19th October 1933 the sons' interests in some of the items of the properties were sold by the Court and purchased for Rs. 10,455 by the appellant in Appeal No. 57 of 1939. Their interests in the rest of the properties were sold on 27th October 1933 and were purchased by the decree-holder for Rs. 830.

It is common ground that the promissory note sued upon represented moneys borrowed in order to

SREERAMULU
v.
SUBBARAMI.
LEACH C.J.

meet a family necessity. After the order of attachment had been passed, five other creditors who had obtained decrees against the family applied for rateable distribution of the proceeds of sale. Again, it is common ground that the debts due to them were debts which were binding on the family. When the proceeds of the sales were paid into Court, they were paid out to the decree-holder and the five other creditors rateably. On 19th March 1934 the purchasers of the properties obtained symbolical possession and on 16th April 1935 each of them filed a suit for partition of the shares of the sons in these properties. These suits were numbered as Original Suit No. 52 of 1936 and Original Suit No. 70 of 1936 respectively. Second Appeal No. 57 of 1939 arises out of the first of these suits and Second Appeal No. 58 of 1939 out of the second. The Subordinate Judge of Nellore, in whose Court the suits were tried, granted to the plaintiffs decrees for partition but at the same time held that they were only entitled to take the shares of the sons in the properties in suit subject to the payment of other family debts. The total value of the properties held by the family was Rs. 25,000 and the family owed altogether Rs. 40,000. The plaintiffs appealed to the District Judge against the decision of the Subordinate Judge that they were only entitled to the shares of the sons subject to the liability for payment of the remaining debts of the family, but the District Judge concurred in the decision of the Subordinate Judge. The question which this Court is called upon to decide is whether the condition imposed by the Courts below is sound in law.

Under the Mitakshara law a member of a joint family cannot claim to be given his share in a particular asset of the family. The co-parceners are

SREERAMULU
v.
SUBBARAMI.
LEACH C.J.

entitled to joint possession and there is community of interest. If a member of the family wishes to take his share, there must be a partition of the whole estate. In the same way, a person who has acquired the interest of a member of a joint family in the family properties must, when he wishes to enforce his rights, institute a suit for partition of all the assets and the value of the share acquired is, of course, only arrived at after making provision for the payment of the debts of the family. When the plaintiff has obtained a decree for partition and it appears that the value of a particular property does not exceed the net value of the member's share, the Court may direct that the particular property shall be allocated to the plaintiff, but in ordinary circumstances the Court will not go beyond this.

The appellants limited their claim for partition to the sons' interests in the attached properties and, in holding that they were only entitled to take the sons' interests in the properties subject to the sons' liability in respect of other family debts, the Courts below had regard merely to the principles to which reference has just been made. The appellants say, however, that the Subordinate Judge and the District Judge lost sight of an important factor which must be taken into consideration under the peculiar circumstances which we have here. They admit that, if the moneys paid into Court had not been utilized for the payment of debts due by the family, they would be compelled to take the sons' interests in the properties in suit subject to the liability for payment of the debts due by the family, but they say that, inasmuch as the sons' interests had already been sold for the payment of family debts, the condition imposed below amounts to a direction that the

same properties shall be sold twice over for this purpose, a position which no Court with the power to apply principles of equity could ever contemplate.

SREERAMULU
v.
SUBBARAMI.
LEACH C.J.

We agree and, in doing so, we have regard also to the terms of the decree under which the appellants bought the interests of the sons in the properties in suit. By the decree all the sons were directed to pay from their interests in the properties the decretal amount and, therefore, under it the decree-holder had the right of bringing to sale the interests of the sons as they then stood. By reason of the sales which took place on 19th and 27th October 1933 the value of the sons' interests in the properties was realized and applied in full in the discharge of family debts, a burden which the Courts below would subject them to again. The situation is undoubtedly unique and consequently the Court is called upon to formulate a rule which is in keeping with natural justice and the spirit of Hindu law. We consider that it is in consonance with both to hold that a sale for the satisfaction of family debts is capable of conveying to the purchaser a good title in such circumstances as we have here, notwithstanding that other debts equally binding on the family were left unsatisfied. The creditors who had been diligent got their shares of the proceeds when the sons' interests in the properties were sold in order to meet family liabilities and we can see no warrant for the condition which has been attached to the decrees obtained by the appellants. The interests of the fathers remain and as these have devolved on the Official Receiver he can realize them for the benefit of the creditors who are still unpaid.

For these reasons we hold that the decisions of the Courts below are erroneous and the appeals will be allowed. This means that the appellants will be

SREERAMULU
v.
SUBBARAMI.

entitled to a decree for partition free from any condition. It follows that the appellants are entitled to their costs throughout.

N.S.

APPELLATE CIVIL.

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

1942,
February 11.

YENDAMURI SUBBA RAO (APPELLANT), PETITIONER,

v.

KOVVURI TATA REDDI (RESPONDENT), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XLIV, r. 1, proviso
—Scope of—Practice of Courts in Madras Presidency
regarding hearing applicants.

Though it is not obligatory in law for Courts to hear an applicant before disposing of his application under Order XLIV, rule 1, of the Code of Civil Procedure, yet the practice of the Courts in the Madras Presidency to hear the applicant should be followed, the Court taking care not to allow the applicant to travel beyond the documents referred to in the proviso to rule 1 of Order XLIV.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) praying the High Court to revise the order of the Court of the Subordinate Judge of Cocanada, dated 18th November 1940, and made in unregistered appeal, Stamp Register No. 9860 of 1940.

G. Balaparameswari Rao for appellant.

Respondent appeared in person.

JUDGMENT.

LEACH C.J.

LEACH C.J.—This petition raises the question whether a person who files an application for an order permitting him to file an appeal in *forma pauperis* is entitled to be heard in support of the application.

* Civil Revision Petition No. 1180 of 1941.

Two Judges of this Court (SADASIVA AIYAR J. and WADSWORTH J.) have held that he is not entitled to be heard. On the other hand PATANJALI SASTRI J. has held that he is.

SUBBA RAO
v.
TATA REDDI.
—
LEACH C.J.

Order XLIV, rule 1, Civil Procedure Code, states that a person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may apply to be allowed to appeal as a pauper, subject in all matters, including the presentation of the application, to the provisions relating to suits by paupers in so far as those provisions are applicable. Then follows this proviso:—

“ Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.”

There is here a mandatory provision requiring the Court to reject the application unless, upon reading it and the judgment and decree appealed from, it considers that it is contrary to law or usage having the force of law, or is otherwise erroneous or unjust. In *In re Paramasivam Pillai** SADASIVA AIYAR J. refused to hear Counsel and dismissed the application after perusing it and the judgment and decree complained of. The learned Judge quoted with approval the observations of JENKINS C.J. in *Sakubai v. Ganpat*(1) where the learned Chief Justice observed that the proviso was a very necessary safeguard introduced by the Legislature for the benefit of litigants who found themselves opposed by paupers and the Court should be careful to see that the proviso is satisfied.

The opinion of WADSWORTH J. was expressed in *Kanthimathi Ammal v. Ganesa Iyer*(2) where he

* Civil Miscellaneous Petition No. 3601 of 1914.
(1) (1904) I.L.R. 28 Bom. 451. (2) (1935) I.L.R. 59 Mad. 805.

SUBBA RAO pointed out that the proviso contains no indication
 TATA REDDI. that it is either necessary or desirable for the Judge
 LEACH C.J. to hear the party before passing orders of rejection.
 The contrary opinion expressed by PATANJALI
 SASTRI J. is to be found in the order passed by him in
Subbayya v. Anjaneyalu(1). There the Judge con-
 sidered it

"difficult to see how such a proceeding can be disposed
 of except in conformity with the fundamental principle in all
 judicial procedure that no order should be made without
 notice to the parties who will be prejudicially affected by the
 order and without affording them a reasonable opportunity
 of being heard."

I consider that the opinions expressed by SADASIWA
 AIYAR J. and WADSWORTH J. correctly state the law.
 At the same time I share the satisfaction of PATANJALI
 SASTRI J. that the practice of the Courts in this
 Presidency in dealing with applications of this kind
 has been to hear the applicant. While there is no
 necessity in law to do so, it will tend to maintain
 confidence if Judges do give applicants an opportunity
 of being heard, being careful, of course, not to allow
 them to travel beyond the documents referred to in the
 proviso to rule 1 of Order XLIV.

The petition will be dismissed but, as the respon-
 dent has not appeared, there will be no order as to
 costs.

BYERS J.—I agree.

G.R.

(1) I.L.R. [1941] Mad. 389.

APPELLATE CIVIL.

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

SRI RAJA RAO NILADRI RAO GARU (APPLICANT-
 PURCHASER), APPELLANT,

1942,
 February 11.

v.

R. VENKATARAMA IYER AND TWO OTHERS
 (RESPONDENTS 1 to 3), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXI, r. 97—
 Application under—Requirements—Sale by Court in exe-
 cution proceedings and conditions contemplated by r. 95
 necessary—Original Side Rules, Madras High Court,
 O. XIX, r. 17.*

An application under rule 97 of Order XXI of the Code of
 Civil Procedure lies only when property has been sold by a
 Court in execution proceedings and the requirements of rule 95
 have been fulfilled. It does not apply in a case where there is
 no sale certificate and no order of Court for delivery of posses-
 sion. The provisions of rule 17 of Order XIX of the Rules of
 the Original Side of the Madras High Court lend support
 to this conclusion.

APPEAL against the Order of GENTLE J., dated 10th
 September 1941, and passed in the exercise of the
 Ordinary Original Civil Jurisdiction of the High
 Court in Application No. 1024 of 1941 in Civil Suit
 No. 451 of 1927.

T. R. Venkatarama Sastriar for *Y. Govindarajulu*
 for appellant.

N. Panchapagesa Ayyar for first respondent.

V. R. Nataraja Ayyar for second respondent.

L. S. Veeraraghava Ayyar for third respondent.

* Original Side Appeal No. 49 of 1941.

NILADRI
v.
VENKATARAMA.
LEACH C.J.

JUDGMENT.

LEACH C.J.—It is not necessary to enter upon a discussion of the merits of this appeal because a preliminary objection taken by the first respondent must prevail.

On 30th July 1930 the third respondent obtained a final decree for sale in a mortgage suit instituted on the Original Side of this Court against the second respondent and others. The preliminary decree was for the payment of Rs. 4,64,059-6-9 with interest. The security comprised a number of immovable properties, some in Madras and some in Salem. As the result of an arrangement between the third respondent (the decree-holder) and the second respondent (the judgment-debtor) all the properties except two lots were released on payment by the second respondent to the third respondent of their values. On 20th June 1934 the unrealized security included twenty-two acres of land in Mambalam, a suburb of Madras. The decree-holder had applied for the sale of these lands and a proclamation had been settled, but by consent of the parties the sale was on that date postponed for a period of three months. It was a condition of the postponement that if the value of the lands was not paid to the decree-holder within three months they should be sold by him or on his behalf "by private treaty or otherwise", without the necessity of a fresh proclamation of sale. It is the appellant's case that one hundred and twenty grounds of the Mambalam property were covered by paimash No. 611. Eighteen grounds equal one acre. The second respondent did not pay to the decree-holder the value of the lands within the required period, but the decree-holder eventually found in the appellant a purchaser for thirty-three grounds at an acceptable price. It is the

appellant's case that at this stage the second respondent conceived the idea of getting the benefit of this area for himself by pretending that the lands did not fall within paimash No. 611, but within paimash Nos. 606 to 609. All the lands comprised within paimash Nos. 606 to 609 had been released from the mortgage. Apparently there are no records in existence from which accurate information can be obtained with regard to the boundaries of lots included in these paimash numbers.

On 24th April 1939 GENTLE J. ordered the second respondent to execute a conveyance to the appellant in respect of the thirty-three grounds of land said to be within paimash No. 611. A conveyance was drawn up and approved by the Court. The boundaries of the thirty-three grounds were taken from an original sale deed executed in favour of the second respondent in 1920. In obedience to the order of the Court the second respondent on 19th March 1941 executed the conveyance, but made the following unauthorised addition at the end of the document:—

"As the lands are not properly identified and as there are no correct survey numbers, I am not selling any lands already released by the Rajah Sahib and sold by me to others. These sales have been made according to the Corporation identification. I have excluded these plots."

This addition to the document was eventually struck out under an order of the Court. On 24th March 1941 the second respondent, according to the appellant, conveyed to the first respondent the lands which the appellant had purchased under the conveyance of 19th March 1941. According to the first respondent the two lots of properties are quite distinct, the lands bought by him being within paimash Nos. 606 to 609. When the appellant went to take possession of the property which he understood he had

NILADRI
v.
VENKATARAMA.
LEACH C.J.

NILADEI
v.
VENKATARAMA.
LEACH C.J.

purchased he discovered that the first respondent was already there and he alleges that the first respondent obstructed him. In these circumstances he filed an application under Order XXI, rules 95 and 97, of the Code of Civil Procedure, asking for an order of the Court directing the removal of the obstruction. This application was also heard by GENTLE J. who came to the conclusion that the evidence did not establish that the lands purchased by the appellant were the same as those purchased by the first respondent. He considered that there might have been a mistake. The learned Judge further held that there was no evidence of obstruction. On these findings he dismissed the application. The appeal is from his order of dismissal. The first respondent says that the appeal does not lie because the application did not lie. He contends that Order XXI, rule 97, only applies to sales held by the Court in execution of decrees and maintains that the sale to the appellant was a private one.

The provisions of the Code with regard to the sale of immovable property in execution of a decree are contained in rules 82 to 103 of Order XXI. Rule 83 which gives power to the Court to postpone a sale to enable a judgment-debtor to raise the amount of the decree does not apply to a decree for sale granted in a mortgage suit. Rule 94 states that where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. The rule further provides that the certificate shall bear the date on which the sale became absolute. Therefore, in a sale held in execution the Code requires the Court to grant a certificate of sale containing specified particulars.

NILADEI
v.
VENKATARAMA.
LEACH C.J.

Rule 95 says that where the immovable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting the purchaser or any person whom he may appoint to receive delivery in possession of the property. Rule 97 reads as follows :—

“(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.”

In this case there was no sale certificate and no order for delivery of possession and the question which the Court is called upon to decide is whether in these circumstances an application under rule 97 would lie at the instance of the appellant.

The conveyance to the appellant was made in pursuance of an arrangement which was entered into between him and the second and third respondents outside the Court. It is said by Mr. Venkatarama Sastriar, on behalf of the appellant, that parties may choose to adopt their own procedure for the realization of the decretal amount and that this does not preclude the operation of rule 97. In this connection he relies on a passage from the judgment of the Privy Council in *Pisani v. Attorney-General for Gibraltar*(1).

(1) (1874) L.R. 5 P.C. 516, 522.

NILADRI
v.
VENKATARAMA. said :

LEACH C.J.

"It is true that there was a deviation from the *cursus curiae*, but the Court had jurisdiction over the subject, and the assumption of the duty of another tribunal is not involved in the question. Departures from ordinary practice by consent are of every day occurrence; but unless there is an attempt to give the Court a jurisdiction which it does not possess, or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of Appeal cannot properly review the decision, such departures have never been held to deprive either of the parties of the right of appeal."

Mr. Venkatarama Sastriar has also drawn our attention to the fact that the principle stated in *Pisani v. Attorney-General for Gibraltar*(1) was affirmed by their Lordships in *Sadasiva Pillai v. Ramalinga Pillai*(2).

The facts in *Pisani v. Attorney-General for Gibraltar*(1) are in no way analogous to the facts here. The Court is here concerned with the effect of certain provisions of an Indian statute. The statement of Sir MONTAGUE E. SMITH in *Pisani v. Attorney-General for Gibraltar*(1) on which Mr. Venkatarama Sastriar so much relies cannot legitimately be taken out of its setting and used for the purpose of interpreting rule 97 of Order XXI of the Code of Civil Procedure. In my judgment the rule only applies when property has been sold by the Court in execution proceedings and the requirements of rule 95 have been fulfilled. The provisions of rule 17 of Order XIX of the Rules of the Original Side of this Court lend strong support for this opinion. The rule states that every application under Order XXI, rule 95, of the Code for possession of immovable property sold in execution of a

(1) (1874) L.R. 5 P.C. 516, 522.

(2) (1875) L.R. 2 I.A. 219.

decree *shall* be accompanied by a certificate of the Registrar that a sale certificate under Order XXI, rule 94, of the Code has been granted to and in the name of the person who at the time of the sale was declared to be the purchaser.

The objection now taken by the first respondent was taken by him when the application for the removal of the obstruction was before GENTLE J. The learned Judge overruled the objection and in doing so accepted the opinion expressed by SULAIMAN J. in *Sobha Ram v. Tursi Ram*(1). It was there stated that the provisions of rule 97 come into operation only when either the delivery of possession has been ordered by the Court or, at any rate, an attempt to obtain possession has been made by the decree-holder out of Court. The decision of the Allahabad High Court was criticized by RANKIN C.J. in *Kiranshashi Dasee v. The Official Assignee of Calcutta*(2) and the learned Chief Justice refused to follow it. In the course of his judgment RANKIN C.J. said that the correct way of working rules 95, 96 and 97 was this :

"First of all, to find out whether the applicant claims to be within rule 95 or rule 96. If he does not, dismiss his application then and there and leave him to bring a separate suit. If, on any reasonable right he claims to be under rule 95 or rule 96, let him have a general warrant mentioning nothing about any particular person who is likely to give trouble; wait and see what particular person does give trouble when the officer of the Court comes to put the applicant into possession; and according to the claim of the person who thus gives trouble, an application may successfully be made under rule 97."

The effect of the decision in *Kiranshashi Dasee v. The Official Assignee of Calcutta*(2) is that the obstruction must be to an officer of the Court before an

(1) (1924) I.L.R. 46 All. 693 (F.B.). (2) (1932) I.L.R. 60 Cal. 8.

NILADEI
v.
VENKATARAMA.
LEACH C.J.

application can be made under rule 97. I see no reason to doubt the correctness of this interpretation of the rule, but even if obstruction to the purchaser himself is sufficient to found an application, it does not, as I have already indicated, lie until the requirements of rule 95 have been met. Rules 95 and 97 must be read in conjunction. The conditions requisite for the application of rule 97 were not fulfilled here and therefore the application did not lie.. The appellant's remedy, assuming that there was unlawful obstruction, was by way of suit, not by way of an application under rule 97.

For these reasons I would dismiss the appeal with costs, Rs. 150.

BYERS J.—I respectfully agree.

G.B.

APPELLATE CIVIL.

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

THE OFFICIAL RECEIVER, WEST TANJORE, TANJORE
(RESPONDENT), APPELLANT,

1942,
February 18.

v.

K. SAMBASIVA AYYAR (APPELLANT), RESPONDENT.*

Provincial Insolvency Act (V of 1920), sec. 51 (1)—Insolvency petition filed on certain date—Order of Judge on the same day to check and file—Checked and filed on the same day—Order of Judge directing petitioner to pay costs of publication on a later date—Costs paid on the later date—Order of adjudication thereafter—Petition to be deemed to have been admitted within sec. 51 (1) on the first date and not on the day when costs of publication were paid—Sale of properties in three lots on one date under one proclamation—Sale of all lots on that date—Whole of purchase price of two lots and twenty-five per cent of the price on third lot paid into Court on that day—The balance of twenty-five per cent of the purchase price of third lot paid into Court on a later date—Intervention of insolvency between the two payments—The whole of the purchase price of the lots distributed rateably among certain creditors under sec. 73 of the Code of Civil Procedure—Application by Official Receiver against creditors for refund of whole amount—Creditors entitled to retain the purchase price of the first two lots—Creditors liable to refund the whole of purchase price of third lot with interest—Inherent jurisdiction of Court—Creditors entitled to costs of execution and not to costs of suit.

S obtained a money decree against K. In execution of the decree he attached three lots of immovable properties belonging to the latter. The Court directed all the three lots to be sold on 30th June 1933 but in separate lots. The sales took place on that date. Two lots were sold for Rs. 7,500 in aggregate, which amount the purchasers paid into Court on the day of sale. The third lot was sold for Rs. 4,520 of which twenty-five per cent was paid into Court immediately and the balance was paid

* Letters Patent Appeals Nos. 37 and 38 of 1940.

OFFICIAL
RECEIVER,
WEST TANJORE
v.
SAMBASIVA.

into Court on 4th July 1933. On 3rd July 1933 a petition was filed for the adjudication of K and on that date the Court wrote on the petition these words: "check and file emergently". The petition was checked and taken on the file on the same day; whereupon the Court ordered that the charges for publishing the notice should be deposited by the petitioner by 7th July 1933. The costs were paid on that date and accordingly publication was ordered and in the due course K was adjudicated on the petition. The proceeds of the sale of the insolvent's properties in the execution proceedings were rateably distributed between S and five other creditors who had all obtained decrees against K. On 7th October 1936 the Official Receiver filed an application asking the Court to direct the six creditors who had participated in the sale proceeds to refund the sums which they had received.

Held.—(i) The insolvency petition must be deemed to have been admitted on 3rd July 1933, within the meaning of section 51 (1) of the Provincial Insolvency Act, when it was checked and taken on file and not on 7th July when the costs of publication were paid.

Narasimha Pattamahadevi v. Annan Naidu(1) and *Chidambaram Pandaram v. Lakshminarayana Cheltiar*(2) distinguished.

(ii) According to the proper interpretation of section 51 (1) of the Act, when several properties are sold separately (though under one proclamation) and the moneys are paid into Court separately, the moneys represent assets "realized" in the course of execution on the various dates when they are paid into Court. Rs. 7,500 must be deemed to be realized in the course of the execution on 30th June 1933 and Rs. 4,520 on 4th July 1933. Under section 51 (1) the Official Receiver was not entitled to the refund of Rs. 7,500 but only to Rs. 4,520. The Court has inherent power to award interest thereon from 7th October 1936 when he demanded refund of the amount. In refunding the amounts the creditors would be entitled to deduct the costs incurred in the execution proceedings but not the costs of the suit out of which these proceedings arose.

Balarama Reddi v. Official Receiver, Nellore(3) overruled.

(1) (1940) 1 M.L.J. 350.

(2) (1941) 2 M.L.J. 109.

(3) (1939) 1 M.L.J. 205.

APPEALS under Clause 15 of the Letters Patent against the orders of KING J., dated 24th September 1940, and passed in Appeal Against Appellate Orders Nos. 127 and 136 of 1939 preferred to the High Court against the order of the District Court of West Tanjore at Tanjore, dated 27th July 1939, and made in Civil Miscellaneous Appeal No. 53 of 1938 preferred against the order of the Court of the Subordinate Judge of Tanjore, dated 3rd September 1938, and passed in Interlocutory Application No. 276 of 1936 in Insolvency Petition No. 15 of 1933.

B. Sitarama Rao with *T. K. Subramania Pillai* for appellant.

R. Sundaralingam and *A. V. Viswanatha Sastri* for respondent.

The JUDGMENT of the Court was delivered by LEACH C.J.—In these appeals the Court is concerned largely with the effect of section 51 (1) of the Provincial Insolvency Act and several interesting questions of law are involved.

In Original Suit No. 4 of 1933 on the file of the Court of the Subordinate Judge of West Tanjore, the fourth respondent in Letters Patent Appeal No. 38 of 1940 obtained a money decree against one Kasinatha Ayyar, who in that year was adjudicated insolvent. In execution of the decree he attached immoveable properties belonging to the judgment-debtor. There were three lots of properties, two of them being situate in the village of Anakkudi and the third in the village of Manikandi. The Court ordered all the properties to be sold on the same date, but in separate lots. The sales took place on 30th June 1933. The two lots in Anakkudi village were sold for an aggregate sum of Rs. 7,500 which was paid into Court by the purchasers on the day of the sale. The lot in Manikandi village

OFFICIAL
RECEIVER,
WEST TANJORE
v.
SAMBASIVA.

LEACH C.J.

OFFICIAL
RECEIVER,
WEST TANJORE
v.
SAMBASIVA.
LEACH C.J.

was sold for Rs. 4,520 of which 25 per cent was paid into Court immediately and the balance on 4th July 1933. On 3rd July 1933 a petition was filed in the Subordinate Judge's Court asking for the adjudication of Kasinatha Ayyar and in due course he was adjudicated on this petition. The proceeds of the sale of the insolvent's properties in the execution proceedings were rateably distributed between the decree-holder and five other creditors, who had also obtained decrees against Kasinatha Ayyar. On 7th October 1936 the Official Receiver of West Tanjore filed an application asking the Court to direct the six creditors who had participated in the sale proceeds to refund the sums which they had received, but the Subordinate Judge dismissed it on the ground that the properties had been sold before the admission of the insolvency petition. The Official Receiver appealed to the District Judge of West Tanjore, who reversed the decision of the Subordinate Judge. The District Judge considered that the properties had been sold after the admission of the petition.

Against the order of the District Judge allowing the Official Receiver's application two appeals were filed, one by respondents 1, 2, 4 and 6 in Letters Patent Appeal No. 38 of 1940 and the other by the third respondent in that appeal. The appeals were heard by KING J., who held that the insolvency petition had been admitted on 3rd July 1933, that is, three days after the Rs. 7,500 had been paid into Court and one day before the balance of the Rs. 4,250 realized for the Manikandi property was paid into Court and that by reason of section 51 of the Provincial Insolvency Act the creditors were entitled to keep the Rs. 7,500 but they were bound to refund the Rs. 4,520, although the decree-holder was entitled to deduct from what he

had received out of the Rs. 4,250 the costs incurred by him in the execution proceedings. The learned Judge also held that the Official Receiver was entitled to interest on the moneys which the creditors had wrongly withdrawn from the Court. These Letters Patent Appeals have been filed by the Official Receiver. The respondents have filed memoranda of cross-objections. So far as the Official Receiver is concerned, he only challenges the finding of KING J. that the creditors were entitled to retain the Rs. 7,500. Read together, the memoranda of cross-objections raise all the questions decided against the creditors by the learned Judge.

Section 51 (1) of the Provincial Insolvency Act reads as follows :—

“ Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution by sale or otherwise before the date of the admission of the petition.”

Whether the creditors are to be allowed to retain the Rs. 7,500 depends on whether KING J. was right in holding that the petition had been admitted on 3rd July 1933 and that the money had been “ realized ” within the meaning of the section before that date. The claim to the refund of the Rs. 4,520 stands on a different footing because three-fourths of this sum was not paid into Court until 4th July 1933, and by reason of the decision of this Court in *Ramanathan Chettiar v. Subramania Chettiar*(1) the sum of Rs. 4,250 could not be deemed to have been realized until the balance had been paid.

Admittedly the insolvency petition was presented to the Subordinate Judge on 3rd July 1933 and on that date the Subordinate Judge wrote on the petition

OFFICIAL
RECEIVER,
WEST TANJORE
v.
SAMBASIVA.
LEACH C.J.

(1) (1924) I.L.R. 48 Mad. 656.

OFFICIAL
RECEIVER,
WEST TANJORE
v.
SAMBASIVA.
LEACH C.J.

these words : " Check and file emergently." The petition was checked and taken on the file on the same day, whereupon the Court ordered that the charges for publishing the notice of the petition should be deposited by the petitioner by the 7th July. The costs were deposited on that date and accordingly publication was ordered.

It is contended for the respondents that the petition must be deemed to have been admitted when the costs of the publication were paid on the 7th July; but this contention ignores the fact that the petition was taken on the file on the day on which it was presented, and that means that this was done after it had been checked and found to be in order. The fact that the Court ordered the costs to be paid by the 7th July in itself showed that the Court had already admitted the petition. It has been said that the decisions of this Court in *Narasimha Pattamahadevi v. Annan Naidu*(1) and *Chidambaram Pandaram v. Lakshminarayana Chettiar*(2) indicate that the petition could not be regarded as being admitted until the notice requiring payment of the costs of publication was issued. Both those cases were, however, concerned with the first proviso to rule 90 of Order XXI of the Code of Civil Procedure, in which it is provided that, where an application is made for an order setting aside a sale on the ground of irregularity or fraud, the Court may call upon the applicant *before admitting the application* either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realized by the sale, whichever is less, or to deposit the amount into Court. There is here provision for what the Court may do before admitting the application in the particular

(1) (1940) 1 M.L.J. 350.

(2) (1941) 2 M.L.J. 109.

circumstances. In admitting an insolvency petition all that the Court is concerned with is seeing whether the petition itself complies with the requirements of the law. If it does, then it admits it; and this is what happened on the date on which the petition against Kasinatha Ayyar was presented.

In support of the plea of the Official Receiver that the creditors were not entitled to retain the Rs. 7,500, Mr. Sitarama Rao relies on the judgment of WHITE C.J. in *Ramanathan Chettiar v. Subramania Sastrial*(1) which was accepted as embodying a correct statement of the law by BEASLEY C.J. in the unreported case of *V. E. R. M. K. Krishnan Chettiar v. Perianna Chettiar**. In *Ramanathan Chettiar v. Subramania Sastrial*(1) the properties of the judgment-debtor were attached and brought to sale. They consisted of two lots of immovable properties. The proceeds of the sale of the first lot were paid into Court but, before the proceeds of the sale of the second lot had been paid in, another execution creditor applied under section 295 of the Code of Civil Procedure, 1882, for rateable distribution. It was held by WHITE C.J., who was sitting alone, that the other execution-creditor was entitled to participate in a rateable distribution in the sale proceeds of the two parcels as the assets had not been realized within the meaning of the section until the whole of the proceeds of the properties sold in execution had been paid into Court, and the other execution-creditor had applied before the price of the second parcel had been realized. Mr. Sitarama Rao says that the same principle must be applied here and inasmuch as the Rs. 4,520, which represented the sale proceeds

OFFICIAL
RECEIVER,
WEST TANJORE
v.
SAMBASIVA.
LEACH C.J.

* Civil Revision Petition No. 1030 of 1930.
(1) (1902) I.L.R. 28 Mad. 179.

OFFICIAL
RECEIVER,
WEST TANJORE
v.
SAMBASIVA.
LEACH C.J.

of the Manikandi lot, was not paid in until after the insolvency petition had been admitted, there was no realization of any of the assets in the course of execution before the date of admission of the petition. The judgment in *Ramanathan Chettiar v. Subramania Sastrial*(1) was quoted in the judgment of the Bench which decided *Ramanathan Chettiar v. Subramania Chettiar*(2), although it is conceded that the question raised in that appeal was not the same as that raised in *Ramanathan Chettiar v. Subramania Sastrial*(1). The judgment in *Ramanathan Chettiar v. Subramania Sastrial*(1) was also accepted by the Calcutta High Court in *Barendra v. Martin & Co.*(3), but there is a later decision in *Girindra Nath Ray v. Keder Nath Bidyanta*(4). In that case different lots of properties were sold in execution under the same proclamation, but, as here, each lot was offered separately. Although the decisions in *Ramanathan Chettiar v. Subramania Sastrial*(1) and *Barendra v. Martin & Co.*(3) were not quoted, it was contended that the assets could not be deemed to be received by the Court until the purchase consideration for all the lots had actually been deposited into Court. In rejecting this contention the Court pointed out that the properties were sold separately, the sale proceeds were realized separately and the sale of each lot was completed when the whole of the balance of the purchase money was deposited in Court.

In discussing the judgment in *Ramanathan Chettiar v. Subramania Sastrial*(1) KING J. clearly indicated that he considered that the case had been wrongly decided and there is much to be said in support of this opinion. In this case, however, we are not considering

(1) (1902) I.L.R. 28 Mad. 179.

(3) (1920) 33 C.L.J. 7.

(2) (1924) I.L.R. 48 Mad. 656.

(4) (1924) 29 C.W.N. 575.

section 295 of the Code of 1882 or section 73 of the present Code. The Court is concerned with interpretation of section 51 (1) of the Provincial Insolvency Act and, if the words used here are to be given their ordinary meaning, the argument advanced on behalf of the Official Receiver is unsustainable. The section says that no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution before the date of the admission of the insolvency petition. Where property is sold in execution and the money is paid into Court, that money represents assets realized in the course of the execution. When there are several properties sold separately and the moneys are paid into Court separately the position is exactly the same. When the Rs. 7,500 was paid into Court by the purchasers of the Anakkudi properties, the money represented assets realized in the course of the execution.

In *Ramachandra Aiyar v. Primathi Ammal*(1) ABDUR RAHIM J. expressly held that where property is sold in lots there are separate sales, notwithstanding that all of them had taken place under one proclamation, and this principle was recognized and applied by a Bench of this Court in *Narasimhamurthy v. Official Receiver, West Godavari*(2). In that case some vacant land and a house were sold separately in execution proceedings. There was material irregularity in the publication of the sale notice. The Court set aside the sale of the vacant land, but refused to set aside the sale of the house because no substantial loss had been suffered. The judgments in these cases run counter to the judgment in *Ramanathan Chettiar v. Subramania*

OFFICIAL
RECEIVER,
WEST TANJORE
v.
SAMBASIVA.
LEACH C.J.

(1) 1910 M.W.N. 834.

(2) (1935) I.L.R. 59 Mad. 438.

OFFICIAL
RECEIVER,
WEST TANJORE
v.
SAMBASIVA.
LEACH C.J.

Sastrial(1) and lend strong support for the interpretation given by KING J. of section 51 of the Provincial Insolvency Act, which we accept.

In the memoranda of cross-objections filed by the respondents objection is taken to the judgment of the learned Judge in that it directed the respondents to refund the Rs. 4,520, but in view of the decision of this Court in *Ramanathan Chettiar v. Subramania Chettiar*(2) this objection very properly was not pressed.

The two questions which remain for decision are (i) whether in refunding the Rs. 4,520 the sixth respondent is entitled to an allowance in respect of the costs of the suit instituted by him as well as the costs of the execution proceedings and (ii) whether the learned Judge was right in directing the respondents to pay interest on the Rs. 4,520 which they withdrew from Court unlawfully. With regard to the right to deduct the costs incurred in the suit and execution proceedings three decisions of this Court have been quoted to us, namely, that of PAKENHAM WALSH J. in *Swamintha Ayyar v. Official Receiver, South Malabar*(3), that of ABDUR RAHMAN J. in *Balarama Reddi v. Official Receiver, Nellore*(4) and that of WADSWORTH J. in the unreported case of *Nune Krishnamurthy v. Mothey Narayana Rao**. In *Swaminatha Ayyar v. Official Receiver, South Malabar*(3) PAKENHAM WALSH J. held that a creditor was entitled under section 51 of the Provincial Insolvency Act to a charge on the sale proceeds for the expenses incurred by him in bringing the property attached to sale and he considered that the word "benefit" in section 51 meant the net realization in execution after payment of the costs. It is not clear from the judgment whether the

* Civil Miscellaneous Appeal No. 175 of 1937.

(1) (1902) I.L.R. 28 Mad. 179.

(3) (1933) I.L.R. 57 Mad. 330.

(2) (1924) I.L.R. 48 Mad. 656.

(4) (1939) 1 M.L.J. 205.

learned Judge intended to include the costs of the suit, but as he made reference to the provisions of section 52 this might have been his intention. The decision of ABDUR RAHMAN J. in *Balarama Reddi v. Official Receiver, Nellore*(1) is to the effect that a decree-holder who has been required to make a refund as the result of the adjudication of the judgment-debtor is not entitled to retain anything for costs out of the money realized by him in execution. The opinion expressed by WADSWORTH J. in *Nune Krishnamurthy v. Mothey Narayana Rao** is in agreement with that of PAKENHAM WALSH J. In arriving at his decision WADSWORTH J. considered both the judgments of PAKENHAM WALSH J. and of ABDUR RAHMAN J. KING J. preferred the opinion expressed by PAKENHAM WALSH J. and WADSWORTH J., but he only allowed the creditors to deduct the costs of the execution proceedings, not the costs of the suit.

As we have seen, section 51 precludes a person from retaining any benefit of the execution against the Official Receiver except assets realized before the date of the admission of the petition. Section 52 states that, where execution of a decree has issued against the property of a debtor which is saleable in execution and before the sale takes place notice is given to the Court executing the decree that an insolvency petition by or against the debtor has been admitted, the Court shall direct the property, if in the possession of the Court, to be delivered to the Receiver; but the section proceeds to direct that the costs of the suit in which the decree was made and of the execution shall be a first charge on the property so delivered. The receiver is then empowered to sell the property for the

OFFICIAL
RECEIVER,
WEST TANJORE
v.
SAMBASIVA.
LEACH C.J.

* Civil Miscellaneous Appeal No. 175 of 1936.
(1) (1939) 1 M.L.J. 205.

OFFICIAL
RECEIVER,
WEST TANJORE
v.
SAMBASIVA.
LEACH C.J.

purpose of satisfying the charge. The argument advanced on behalf of the creditors is this. Section 52 clearly recognizes a right to a charge on the property attached in respect of the costs of the suit, if before the sale takes place notice of the insolvency is given to the Court which ordered the attachment. Therefore a decree-holder should not be in any worse position because the sale has in fact taken place.

This argument would be sound if sections 51 and 52 could be read together, but in our opinion the wording of section 51 precludes this. The sale here has taken place and the creditors are by section 51 required to refund any benefit received by them from the assets realized in the course of the execution. We accept the argument of the creditors that they are entitled to take into account the costs incurred in the execution proceedings, as the benefit of the execution is what remains after such costs have been paid; but whether they are entitled to the costs of the suit seems to us to be quite another matter. The property was sold in execution for the purpose of realizing the decretal amount and the costs awarded. Therefore, if the decree-holder is given the costs of the suit out of the assets realized he is getting a benefit out of the execution, and section 51 says he is not entitled to this. It may very well be that the effect of section 51 was not fully realized when it was incorporated in the statute. It is certainly remarkable that the decree-holder is in far better position if notice of insolvency is given to the Court before the sale than afterwards, but the Court can only construe section 51 according to its wording. We consider, having regard, as we must, to its wording, that KING J. took the correct course in allowing the creditors to deduct merely the costs of the execution proceedings and not the costs

of the suit out of which those proceedings arose. It follows that in our opinion the decision of ABDUR RAHMAN J. in *Balarama Reddi v. Official Receiver, Nellore*(1), so far as the costs of the execution proceedings are concerned, should not be followed.

Coming now to the question of interest, there is no provision in the Insolvency Act conferring upon the Official Receiver the right to recover from the respondents the Rs. 4,520 with interest, but the learned Judge allowed interest as he agreed with the District Judge that the situation was analogous to one in which restitution is ordered under section 144 of the Code of Civil Procedure. Admittedly the provisions of that section do not apply here and interest can only be ordered on the ground that it is just and equitable to do so. Order XXI, rule 93, of the Code of Civil Procedure, states that, where a sale of immoveable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase money, with or without interest, as the Court may direct. We have no doubt that under its inherent powers the Court can in a case of this nature direct a refund to be made with interest, if it considers that it is just to do so. Mr. Viswanatha Sastri for the respondent says, however, that the Official Receiver should not be allowed interest from any date anterior to 7th October 1936 when he demanded refund of the money. The sale of the property was confirmed on 15th January 1934, but the judgment-debtor applied for an order directing the sale to be set aside under Order XXI, rule 90. The Court refused the application and an appeal was filed. This appeal was supported by the Official Receiver and he continued to support the

OFFICIAL
RECEIVER,
WEST TANJORE
v.
SAMBASIVA.
LEACH C.J.

(1) (1939) 1 M.L.J. 205.

OFFICIAL
RECEIVER,
WEST TANJORE
SAMBASIVA.
LEACH C.J.

application until 16th October 1935. In these circumstances, there is substance in the contention of the respondents that interest should not be allowed from any date anterior to the date of demand and we alter the decree passed by the learned Judge to this extent.

The result is that both the appeals fail and will be dismissed with costs. The memoranda of cross-objections also fail, except in so far as interest has been disallowed to the Receiver for the period between the date of the withdrawal of the money from the Court and the date of demand by him for payment. The parties will pay and receive proportionate costs in respect of the memoranda of cross-objections.

G.R.

APPELLATE CIVIL.

Before Mr. Justice King.

1942,
February 26.

GOPAL NAICKER (FIRST RESPONDENT), APPELLANT,

v.

ALAGIRISAMI NAICKER (PETITIONER), RESPONDENT.*

The Indian Limitation Act (IX of 1908), art. 181—Preliminary decree in mortgage suit—Provision to pay money in periodical instalments—Defaults in payment—Period of limitation not to be computed only when the first default occurs—Cause of action arises on every fresh default.

In a mortgage suit a preliminary decree was passed in June 1933, which provided for the payment of the mortgage money in seven annual instalments in June of each year, and also that, if there were default in the payment of any instalment, the decree-holder might then proceed to sell the mortgaged property for the whole of the amount of the instalments still

* Second Appeal No. 629 of 1940.

GOPAL
v.
ALAGIRISAMI.

remaining unpaid, and also for a sum which he had provisionally relinquished. No instalment was in fact paid in either 1934, 1935, 1936 or 1937. Before the instalment of 1938 had become due the decree-holder applied for a final decree, conceding that though the first instalment had not been paid he could not claim it as still due. It was contended for the judgment-debtor that the application was barred by limitation.

Held: that every fresh default gave rise to a new cause of action and that a final decree could be granted in the suit.

The decree in the present case provided that the enforcement of the penalty might follow upon any default and the decree-holder at no time was bound to enforce the penalty.

The first occasion when the right to apply accrues cannot be taken as the date from which the period of limitation runs. The Limitation Act does not specifically use the word "first" in article 181 as it does in article 130 or article 131.

Muhammad Islam v. Muhammad Ahsan(1), *Har Gopal v. Ram Rachhpal*(2) and *Maung Sin v. Ma Tok*(3) followed.

Raichand Motichand v. Dhondo Lazuman(4) and *Ram Prasad Ram v. Jadunandan Upadhia*(5) not followed.

APPEAL against the decree of the Court of the Subordinate Judge of Tuticorin in Appeal Suit No. 136 of 1938 preferred against Order of the Court of the District Munsif of Koilpatti in Interlocutory Application No. 505 of 1938 in Original Suit No. 249 of 1942.

T. L. Venkatarama Ayyar for appellant.

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

Cur. adv. vult.

JUDGMENT.

KING J.—This appeal arises out of a mortgage suit in which a preliminary decree was passed in June 1933. It provided for the payment of the mortgage

KING J.

- (1) (1894) I.L.R. 16 All. 237. (2) (1921) I.L.R. 2 Lah. 155.
(3) (1927) I.L.R. 5 Ran. 422 (P.C.). (4) (1918) I.L.R. 42 Bom. 728.
(5) (1934) I.L.R. 56 All. 921.

GOPAL
v.
ALAGIRISAMI.
KING J.

money in seven annual instalments of Rs. 115 each in June of each year; and also that if there were default in the payment of any instalment the decree-holder might then proceed to sell the mortgaged property for the whole of the amount of the instalments still remaining unpaid, and also for the sum of Rs. 262 which he had provisionally relinquished. No instalment was in fact paid in either 1934, 1935, 1936 or 1937. On 22nd June 1938, before the 1938 instalment had become due, the decree-holder applied for a final decree, conceding however that though the first instalment had not been paid he could not claim it as still due. The judgment-debtor contended that the application was barred by limitation. This view was accepted by the learned District Munsif of Koilpatti, but on appeal a final decree was granted by the learned Sub-Judge of Tuticorin. This is a second appeal by the first judgment-debtor.

It is common ground that the article in the Limitation Act which applies to this case is 181, and that time begins to run when "the right to apply accrues." The essential point at issue is whether that right accrues only once, on the occurrence of the first default, or as often as any default occurs.

The appellant's learned Advocate relies in the first place upon the language of the compromise decree itself. No doubt the language of the translation runs that in default of payment . . . such and such amounts "shall be collected by the plaintiff" but I am satisfied that there is nothing at all in the original Tamil to connote the idea of compulsion, and it is clear from the judgment of the learned Subordinate Judge that it must have been practically the agreed background of the discussion before him that the respondent was given by the decree an

GOPAL
v.
ALAGIRISAMI.
KING J.

option to enforce its penalties or to refrain from doing so. It would certainly require the most explicit language before one could accept the interpretation that a creditor who has agreed to make a concession should bind himself to withdraw it the moment any default should occur.

The authorities which have been brought to my notice in this matter of the interpretation of article 181 where periodical payments have to be made are almost equally divided. There is none in Madras which is binding upon me. *Muhammad Islam v. Muhammad Ahsan*(1) and *Har Gopal v. Ram Rachhpal*(2) lay it down that every fresh default gives rise to a new cause of action, and in my opinion the antepenultimate paragraph in the judgment of the Privy Council reported as *Maung Sin v. Ma Tok*(3) is to the same effect. On the other hand *Raichand Motichand v. Dhondo Laxuman*(4) and *Ram Prasad Ram v. Jadunandan Upadhia*(5) are very definitely to the contrary.

It is the former of these two views which very emphatically commends itself to me. *Raichand Motichand v. Dhondo Laxuman*(4) is mainly based upon the principle that provisions for payment in instalments are intended to benefit not the creditor but the debtor; but I am unable, with respect, to see why such a principle should continue to be applied when the debtor refuses to carry out those provisions, going even so far as in the Bombay case—refusing to make any payment for six years. In *Ram Prasad Ram v. Jadunandan Upadhia*(5) it is pointed out with undoubted force that the right to apply has certainly

(1) (1894) I.L.R. 16 All. 237.

(2) (1921) I.L.R. 2 Lah. 155.

(3) (1927) I.L.R. 5 Ran. 422, 426 (P.C.). (4) (1918) I.L.R. 42 Bom. 728.

(5) (1934) I.L.R. 56 All. 921.

GOPAL
v.
ALAGIRISAMI.
KING J.

accrued whenever a first default occurs but the learned Chief Justice does not say why this fact should prevent a second right to apply from accruing when a second default occurs, and with respect I cannot understand what MUKERJI J. means when he says :

"A right to apply may accrue on several occasions but for the purposes of limitation the first occasion when the right to apply accrues must be taken as the crucial date."

The Limitation Act does not specifically use the word "first" in article 181 as it does, e.g., in article 130 or article 131. And it seems to me that to read the word "first" into article 181 in a case like the present is to nullify the real significance of the decree which provides that the enforcement of the penalty may follow upon *any* default, and, as I read it, that the decree-holder is at no time *bound* to enforce the penalty.

It seems to me further that, if the view contended for by appellant's learned Advocate be accepted, limitation must begin to run as soon as the first default occurs and nothing can stop it running. Let me take a hypothetical case and suppose that the 1934 instalment, instead of not having been paid at all, had been paid a month late, then the instalments for 1935 and 1936 had been paid punctually, and finally there had been a fresh default in 1937. It is argued for the appellant that the tardy payment in 1934 would serve as an acknowledgment under section 19, but I am quite unable to see how such a payment could in any sense amount to a recognition of the right of the decree-holder to apply for a final decree. It is merely a payment under the preliminary decree and is no more an acknowledgment of anything than a prompt payment would have been. It seems therefore that the intervening payments could not prevent the period of limitation which had commenced in 1934

GOPAL
v.
ALAGIRISAMI
KING J.

from continuing to run, so that, in the circumstances which I have supposed to exist, the decree-holder, because of his clemency in accepting the first instalment one month late, would be prevented from taking advantage of the subsequent default. Such a result would certainly seem to me to frustrate the clear intentions of the parties to the agreement.

I am accordingly of opinion that the view of the learned Subordinate Judge is right and must be upheld. The appeal is dismissed with costs. Appellant must pay the court-fee to Government.

V.V.C.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahman and Mr. Justice Somayya.

GOVERDANDOSS TAKERSEY (PLAINTIFF), APPELLANT,

1942,
March 3.

v.

M. ABDUL RAHIMAN AND ANOTHER (DEFENDANTS 1 AND 2),
RESPONDENTS.*

Indian Partnership Act (IX of 1932), s. 69 (2)—Applicable to suit filed on behalf of firm only—Inapplicable to suit filed in name of individual partner—Contract by agent on behalf of individual partner—Suit thereon by individual partner, maintainable—Principal and agent—Contract by agent to sell sandalwood—Power of attorney, construction of—Agent authorized to sell goods—Implied authority to receive advance—Power to sell implying power to receive price of goods sold—Agent purporting to receive portion of advance by adjusting his own debts to vendee—Contract not rendered totally invalid thereby—Suit for refund of advance paid—Principal liable to refund only moneys actually paid.

As the agent under a power of attorney of B, A entered into a contract with C as the agent of D for the supply of certain

* Appeal No. 5 of 1940.

GOVERDANDOS
TAKERSEY
v.
ABDUL
RAHMAN.

quantities of sandalwood out of two estates belonging to *B*. A sum of Rs. 8,700 was stated to have been paid to *A* as advance in respect of the contract. Out of this sum Rs. 4,600 was paid in cash, Rs. 3,700 was adjusted as moneys due by *A* to *D* and for the balance of Rs. 400 a promissory-note was executed by *C* to *A*. *D* repudiated the contract stating that *C* had exceeded his authority in entering into it and filed a suit against *A*, *B* and *C* claiming a refund of the advance of Rs. 8,700. It was contended *inter alia* by *B* that (i) *D* was incompetent to maintain the suit in his individual capacity as the money advanced under the contract belonged to a firm of which *D* was a partner, (ii) the suit being for the benefit of an unregistered firm of which *D* was a partner, section 69 (2) of the Indian Partnership Act (IX of 1932) was a bar to it, (iii) *A* had no authority either to enter into the contract or to receive any advance thereunder, and (iv) the contract was not valid and binding as regards *B* as the personal interest of *A* in entering into it by reason of the adjustment thereunder of the sum of Rs. 3,700 owed by *A* to *D* was in conflict with the duty of *A* as agent towards *B*, his principal. Both *A* and *B* claimed certain sums by way of damages in respect of the repudiation of the contract by *D*.

Held: (i) *D* was entitled to maintain the suit in his own name. The contract was entered into on his behalf in his individual capacity and not on behalf of the firm.

Agacio v. Forbes(1) applied and followed.

(ii) Section 69 (2) of the Indian Partnership Act was not a bar to the suit. The stringent provisions of the section should be strictly construed and could only be attracted to a suit if it was instituted either by or on behalf of the firm, that is to say, *ex facie* it was purported to be filed by or on behalf of the firm or in its interests.

(iii) *A* had authority under the power of attorney executed in his favour to enter into the contract.

(iv) *A* had authority to receive the advance. The power to sell sandalwood, conferred under the power of attorney, included the power to receive advances.

An authority to sell goods is assumed to carry with it an authority to receive the price of goods sold.

(1) (1861) 14 Moo. 160; 15 E.R. 267.

Observations in *Narasimhulu Chetti v. Sundara Chariar*(1) doubted.

(v) The contract is not rendered totally invalid as against *B* by reason of the adjustments of his own debts made by *A*.

In the absence of ratification by *B* of the contract made by *A*, *B* could only be made liable to refund the amount actually paid to *A* as advance.

Reckitt v. Barnett, Pembroke and Slater, Ltd.(2) and *Midland Bank v. Reckitt*(3) explained and followed.

(vi) *C* had authority to enter into the contract on behalf of *D* and the repudiation of the contract by *D* was wrongful. *D* was liable to pay damages.

APPEAL against the decree of the Court of the Subordinate Judge of the Nilgiris at Ootacamund in Original Suit No. 52 of 1938.

R. Swaminatha Ayyar for appellant.

B. Sitarama Rao, K. Srinivasa Rao and T. Krishna Rao for second respondent.

First respondent was not represented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by ABDUR RAHMAN J.—This appeal arises out of a suit for refund of Rs. 8,700 stated to have been advanced by the third defendant as an agent of the plaintiff to the first defendant at the time of the execution of the agreement (Exhibit J) on 9th November 1936. Under the terms of this agreement the first defendant, who held a general power of attorney dated 24th March 1936 from the second defendant, agreed to sell to the third defendant as an agent of the plaintiff thirty tons of sandalwood that may be got ready by the former out of the two estates (Benhope and Killiard) belonging to his principal in a period of one year at Rs. 800 per ton and any further quantity of wood that

ABDUR
RAHMAN J.

(1) (1910) 20 M.L.J. 479.

(2) [1929] A.C. 176.

(3) [1933] A.C. 1.

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHIMAN.
—
ABDUR
RAHMAN J.

may be available out of the aforesaid estates at Rs. 780 per ton. The sum of Rs. 7,800 was acknowledged to have been received by way of an advance in Exhibit J and was agreed to be adjusted at the time when the goods were delivered to the third defendant on behalf of the plaintiff at the rate of Rs. 100 per ton. The agreement also provided for a liquidated damage at Rs. 150 per ton if either of the parties failed to deliver or take the goods mentioned in the agreement. On the same date another *varthamanam* letter (Exhibit J-2) was executed by the third defendant as an agent of the plaintiff in favour of the first defendant as the power of attorney agent of the second defendant under which six tons of sandalwood (not covered by the agreement Exhibit J) were sold at the rate of Rs. 810 per ton and were agreed to be delivered before 30th November 1936. The third defendant communicated the terms of the agreement (Exhibit J) to his principal in Bombay the very next day (Exhibit F-14) in which he referred to a sum of Rs. 8,700 having been paid by way of an advance to the first defendant towards this contract. A sum of Rs. 5,000 was stated to have been paid in cash and the balance of Rs. 3,700 that was due by the first defendant to the plaintiff in respect of certain previous dealings was said to have been taken into account towards the advance. The plaintiff sent a telegram (Exhibit F-15) in reply on 13th November 1936 in which he expressed his surprise at the third defendant's failure to act in accordance with the instructions contained in the former's letter (obviously referring to the letter dated 3rd November 1936, Exhibit F-11), refused to accept the terms communicated to him in Exhibit F-14 and asked the third defendant to cancel the agreement. The third defendant was also forbidden by the plaintiff to pay Rs. 5,000 to the first defendant. But the sum of Rs. 5,000 or

as it really transpired later, the sum of Rs. 4,600 had already been paid to the first defendant on the date on which Exhibit J was executed. On the receipt of the telegram (Exhibit F-15), the third defendant wrote to the first defendant on 15th November 1936 (Exhibit H) in which the plaintiff's refusal to abide by the agreement was duly communicated and the sum of Rs. 5,000 alleged to have been paid to the first defendant was asked to be adjusted towards the price of the six tons of sandalwood covered by the agreement (Exhibit J-2). This letter was not acknowledged by the first defendant. The third defendant was thus constrained to write another letter on 30th November 1936 (Exhibit V) in more or less the same terms. This was taken by the first defendant to Mr. Ramamurti, an advocate at Ootacamund, who sent a reply to the third defendant (Exhibit K). In this letter the sum of Rs. 5,000 was acknowledged to have been received in cash and the third defendant's contention that the agreement (Exhibit J) had been entered into subject to the condition of its being ratified by the plaintiff was repudiated. The first defendant expressed his readiness and willingness to abide by the terms of the agreement and threatened to make the third defendant and his principal (the plaintiff) liable if they persisted in committing a breach of the agreement. On the same date a copy of the reply sent to the third defendant was sent to the plaintiff's lawyer at Bombay (Exhibit K-1) in which a copy of Exhibit K was enclosed. This was taken or sent by the plaintiff to Messrs. Payne & Company, solicitors of Bombay, for reply. They wrote Exhibit L and Exhibit L-1 on 23rd December 1936 to the first and second defendants respectively. In these letters, the third defendant's authority to enter into "any contract with any person" without the plaintiff's express

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHIMAN.
—
ABDUR
RAHMAN J.

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

authority and sanction was denied and the agreement was said to have been brought about under some kind of pressure and coercion to which the third defendant was alleged to have been subjected. In the end it was asserted that the agreements were conditional on the plaintiff's approval and, as he had repudiated them on 15th November 1936, they were no longer binding. The allegations contained in these letters were denied by the defendants in the letters written by their lawyer on 23rd January 1937 (Exhibit L-2 and Exhibit L-3).

The present suit was instituted by the plaintiff on 16th February 1938 with the allegations that the third defendant was not entitled to enter into any agreement on behalf of the plaintiff and that, in doing so, he had not only acted beyond the scope of his authority but in direct contravention of the plaintiff's instructions. The second defendant was attempted to be made liable for the refund of the amount of Rs. 8,700 which formed the consideration of Exhibit J as the first defendant held a power of attorney from the second defendant and had acted within the scope of his authority.

The first defendant in his reply contended that the third defendant had been for a long time acting on behalf of the plaintiff in such matters and that the agreement was fully within the scope of his authority. And since the breach of the contract by the plaintiff and the third defendant was alleged to be unjustified and the first defendant's readiness and willingness to abide by the terms of the contract reaffirmed, the whole of the advance of Rs. 8,700 was claimed to have been forfeited. A sum of Rs. 1,715-8-0 was claimed on behalf of the first defendant in the alternative as damages having been suffered by him in consequence of the breach by the plaintiff and the third defendant.

The second defendant in his written statement contended that the first defendant had no authority to enter into the contract contained in Exhibit J. It was said to be in excess of his powers and the power of attorney referred to by the plaintiff in the plaint was alleged to have been cancelled by the second defendant long before Exhibit J came into existence. In the alternative he asked for damages from the plaintiff to the extent of Rs. 5,700.

The plaintiff in his replication dated 26th July 1939 also pleaded a ratification by the second defendant of the agreement entered into by the first defendant on his behalf.

Two additional written statements were filed on behalf of the first two defendants on 23rd August 1939 in which it was contended that the amount for which the suit was brought was not due to the plaintiff personally and the claim for the same could not therefore be enforced by him. In other words, as specified in paragraph 3 of the written statement, the suit was not brought by the proper person and was therefore liable to be dismissed. The plea raised on behalf of the second defendant in his written statement was, if anything, clearer. It was alleged that the suit was instituted by Goverdandoss, the plaintiff, in his individual capacity and, as he had no right to the suit amount, he was incompetent to file it. It was also alleged in paragraph 3 of the additional written statement that the firm "Goverdandoss Takersey" had not been registered as required under the Partnership Act at or before the presentation of the suit and that registration was effected only on 31st July 1939.

One of these written statements, i.e., the one filed on behalf of the first defendant, appears to have been

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

admitted on a condition which appears to be meaningless. The writing of the learned Subordinate Judge is extremely illegible but the order admitting the statement on behalf of the first defendant is read by the office as follows :—

“Counter filed; not opposed subject to plaintiff being allowed to raise the contention that it is not open to the defendant to revise the memo (written statement) filed.”

The other order was unconditional and it gave permission to the second defendant to raise this new defence. Why these two orders passed on the same day should have been different in terms cannot be easily understood, unless it be that the Subordinate Judge desired to admit the written statement of the second defendant on the same condition as was imposed by him when he was admitting the additional pleas on behalf of the first defendant. Why pleas of this nature were allowed to be raised at all, unless the Subordinate Judge had applied his mind and come to the decision that these ought to be admitted, is equally incomprehensible. The issues framed by the Subordinate Judge on 6th August 1939 raised points other than those mentioned in the written statements. It is not easy to follow how these issues were framed and why the objections on behalf of the defendants were misunderstood. We take it however that the issues raised by the lower Court merely covered the objections contained in the additional written statements filed on 23rd August 1939 and their scope could not be enlarged only because they happen to be vague and indefinite. Objections of this kind should, if raised, be faced by the trial Courts and disposed of finally. The pleas should have been either admitted or rejected.

The Subordinate Judge in a judgment which is unnecessarily prolix held that, although the power of attorney in favour of the first defendant was not

proved to have been cancelled until April 1937, he had no authority to enter into a contract on behalf of the second defendant and that the latter had not ratified the agreement contained in Exhibit J. He also found that the third defendant had authority on behalf of the plaintiff to enter into the contract. The contention that the whole of the advance was liable to be forfeited was repelled but the plaintiff was held liable to pay damages suffered by the first defendant to the extent of Rs. 1,715-8-0. He also found that out of Rs. 5,000 a sum of Rs. 400 was not paid in cash by the third defendant and that a promissory note for the amount was executed by him in favour of the first defendant. In view of his findings the Subordinate Judge ordered the promissory note to be returned by the first defendant to the plaintiff and passed a decree for the sum of Rs. 8,300 against the first defendant less Rs. 1,715-8-0 found to have been suffered by him as damages. The suit against the second defendant was dismissed. The plaintiff appeals.

Before we go into the various questions raised on behalf of the parties, we would like to examine the contentions advanced on behalf of defendants 1 and 2 in their additional written statements filed on 23rd August 1939. If the plaintiff's suit is liable to be dismissed on the ground that he had no *locus standi* to maintain the action, it would be unnecessary to examine the other questions.

The objection that the plaintiff was incompetent to maintain the suit in his individual capacity was based on the assertion that the money advanced under the agreement Exhibit J belonged to the firm working under the name and style of Goverdandoss Takersey—which also happened to be the name of the plaintiff

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

who was a partner thereof. The plaintiff's capacity to institute the suit in his individual name was for that reason questioned.

But, taking advantage of the issues framed by the lower Court, Mr. Sitarama Rao, learned Counsel for the second respondent, contended that, in so far as the suit was instituted "on behalf of" or, in other words, for the benefit of the firm of Goverdandoss Takersey, it falls within the mischief of section 69 (2) of the Indian Partnership Act (Act IX of 1932) and is liable to be dismissed on that ground. We have already referred to the fact that the plea advanced on behalf of the defendants was only to the effect that Goverdandoss Takersey, who had filed the suit in his individual name, was incompetent to do so and not that the suit was by or on behalf of the firm of Goverdandoss Takersey and was not maintainable in the absence of the firm having been registered. In fact the plea that is now being advanced is directly opposed to what had been raised in the written statements. The contention then was that the suit had been instituted by Goverdandoss Takersey in his individual capacity and it could not therefore be maintained. The argument that is now urged assumes that the suit had been brought by the plaintiff on behalf of the firm and would be maintainable if the firm had been duly registered before its institution, as required by the Indian Partnership Act. The reasons for this change of front are not far to seek. It was not denied on behalf of the plaintiff that the firm of Goverdandoss Takersey was not registered at the time when the suit was instituted but was registered shortly before this plea was raised on behalf of the defendants. The defendants were fully aware of this fact and had in their written statements even given the date when the

registration was effected. In all probability the plea that the suit was on behalf of the firm and was liable to be defeated on that ground was not raised, as one of the learned Judges of this Court had taken the view that the registration of the firm subsequent to the institution of the suit was sufficient and the suit could not be dismissed on that ground; *Varadarajulu Naidu and Kuppuswami Naidu & Co. v. Rajamanika Mudaliar*(1). That is why the plea that the present suit was on behalf of the firm was not raised and the objection, even if the issue was to be taken literally and as extending the scope of the pleas raised in the written statements, not pressed, as stated by the lower Court, at the time of the arguments. But, after the decision of this suit by the lower Court, the view in *Varadarajulu Naidu and Kuppuswami Naidu & Co. v. Rajamanika Mudaliar*(1) was dissented from in *Ponnuchami v. Muthusami*(2) and an attempt was made to press the objection—although not raised in the written statements—which happened to be covered by the words of the issue as framed by the trial Court. The contention was attempted to be supported by a statement of one of the partners of the firm of Goverdandoss Takersey who was examined as a witness on behalf of the plaintiff (P.W. 1). There is no admission, however, in this statement that the contract (Exhibit J) was entered into on behalf of the firm.

When it was pointed out to Mr. Sitarama Rao that the contention now advanced by him was materially different from what was urged by his clients in the lower Court in their additional written statements, he said that it was open to him to raise a point of law for the first time in appeal and that it would be our

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

(1) (1937) 2 M.L.J. 273.

(2) I.L.R. [1942] Mad. 355.

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

duty to give effect to it, if found to be correct, in the same way as it would be our duty to give effect to a plea of limitation even when it has not been raised by a party. He cited a decision of the Sindh Court in *Lokramdas v. Tharumal*(1) in support of his contention. There is a distinct provision in the Indian Limitation Act that a Court is bound to dismiss a suit on the ground of limitation if it finds the suit to be barred, whether a plea of this kind had been raised on behalf of the defendants or not. No such provision however exists in the Indian Partnership Act. It is not therefore quite easy to accept the view that the Court is bound to dismiss *suo motu* a suit on the ground of non-registration of the firm even if no plea had been raised by any of the defendants to the suit. We agree however that a point of law of this nature can be raised for the first time in appeal if all the facts necessary for its determination are on the record. Had we therefore been of the view that there was substance in this contention, we would have had to give effect to it. But on a reading of the plaint we find that the suit was not instituted by or on behalf of the firm but by Goverdandoss Takersey in his individual capacity and this fact was actually admitted by the defendants in their written statement. Learned Counsel for the second respondent however contended that this would not be material if the suit was actually filed in the interests of the firm. He urged that such a suit would fall within the ambit of section 69 (2) of the Indian Partnership Act and would be covered by the words "on behalf of the firm" used in that section. We are not impressed by that argument. A stringent provision of this nature has, first of all, to be strictly construed. It is moreover immaterial, in our opinion,

(1) A.I.R. 1939 Sind. 206.

whether the benefit of a suit is to go to any person other than the plaintiff ultimately. The provisions of section 69 (2) of the Indian Partnership Act could only be attracted to a suit if it was instituted either by or on behalf of the firm, that is to say, *ex facie* it was purported to be brought either by or on behalf of the firm or even, as urged by Mr. Sitarama Rao, in the interests of the firm. But this must be clear from the plaint itself and must not in any case depend on the liability of a plaintiff to restore the benefit that he has received out of that suit to the firm of which he is a partner eventually. The law has been thus stated in *Lindley on Partnership*, at page 350 (Tenth Edition):

"One partner may sue alone on a written contract made with himself if it does not appear from the contract itself that he was acting as agent of the firm; and one partner ought to sue alone on a contract entered into with himself, if such contract is in fact made with him as principal and not on behalf of himself and others."

The Supreme Court of Hongkong had non-suited the plaintiff in *Agacio v. Forbes*(1) on the ground that the suit should have been filed by the firm which was beneficially interested and not by the plaintiff who had entered into the contract. This decision was reversed by their Lordships of the Privy Council who held that the contract, having been entered into by the plaintiff personally, constituted a personal agreement and that he was entitled to bring the suit in his own name without joining his partners as plaintiffs in the action. The suit could therefore be and was properly instituted by the plaintiff and the defendants' objection that the present suit falls within the mischief of section 69 (2) of the Indian Partnership Act is therefore overruled.

We must now see whether the plaintiff was entitled to bring the suit in his own name. It is true that the

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

(1) (1861) 14 Moo. 160; 15 E.R. 267.

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

agreement (Exhibit J) does not clearly state that the third defendant was acting on behalf of the individual Goverdandoss Takersey and not on behalf of the firm carrying on business in that name; but on going through the various letters that were exchanged between the various parties to the suit (Exhibits F-14, V, K, L and L-1) there is no doubt left in our minds that the third defendant entered into the contract (Exhibit J) as an agent and on behalf of the individual Goverdandoss Takersey and not of the firm of that name.

The first important question of fact to decide is whether the first defendant was empowered by the second defendant to enter into a contract such as is contained in the agreement (Exhibit J). The lower Court found—and that finding is not challenged before us—that the power of attorney (Exhibit M) had not been cancelled until April 1937, i.e., for at least five months after this agreement was entered into. The first defendant would therefore be entitled to enter into a contract on behalf of the second defendant if he was authorized to do so under that document. The material portion of Exhibit M is as follows:—

"You shall cut the sandalwood trees in the under-mentioned two estates by employing coolies, sell them according to your like, pay the wages, etc., to the coolies, maintain ledger and day-book accounts in respect of sale, deliver them to me with particulars. You shall yourself sign on my behalf in the forest Government order, permit, etc., in the under-mentioned two estates from this date."

These two estates are then described in the schedule.

We have already referred to the fact that the sandalwood trees on the two estates known as Benhope and Killiard belonged to the second defendant. They were purchased by him in October and December 1935 under Exhibit XVIII-a and Exhibit XV respectively. It was in regard to these sandalwood trees that the

power of attorney was executed by the second defendant in favour of the first defendant. It was in regard to these sandalwood trees that he had entered into an agreement with the third defendant under Exhibit J.

Learned Counsel for the appellant argued the case in this Court against the second defendant both on the basis and independently of this power of attorney. But as, in our opinion, the power of attorney is clear and binding on the second defendant in respect of this transaction, it is unnecessary for us to refer to a large body of other documents to which our attention was drawn by learned Counsel for the appellant in this connection. The second defendant was not held liable by the lower Court

(a) as the first defendant was found to have entered into a contract in regard to eighty-seven tons of sandalwood which it was not possible to supply to the plaintiff out of the two estates,

(b) as the terms in the power of attorney were so construed as not to conform any authority on the first defendant to enter into a forward contract, and

(c) as the first defendant was found not to have been authorized under the power of attorney to receive a large sum of Rs. 8,700 as an advance (*vide* paragraphs 20, 21, 22 and 23 of the judgment).

The same grounds have been reiterated by learned Counsel for the second respondent before us in support of his contention that the first defendant could not have been authorized by the second defendant to enter into a contract of the nature contained in Exhibit J. He also attacked the contract on the ground that, inasmuch as the first defendant had been induced to enter into the contract contained in Exhibit J by agreeing to make his own principal, the second defendant, liable for the sum of Rs. 3,700 in substitution for his own

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHMAN.
—
[ABDUR
RAHMAN J.]

GOVERDANDOS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

liability, he must be held to have acted in such a way as came in conflict with his own duty as an agent, and the transactions must, for that reason, be held to have been vitiated. We will consider this objection separately and later.

The contention that the first defendant had entered into a contract for the supply of eighty-seven tons of sandalwood that was far in excess of the supplying capacity of the two estates is based upon the terms found in Exhibit J that the parties to that document had agreed to deduct Rs. 100 per ton out of the advance received or acknowledged to have been received by the first defendant. We are not however prepared to agree with the construction that is being placed on that agreement. It specifically provides for the sale of thirty tons of sandalwood. This was approximately the quantity of wood that was to be found in the two estates. Had the parties been contemplating the supply of wood not out of the two estates but from other sources, we have no doubt that it would have been clearly mentioned in the agreement. A reference to the supply of further wood was obviously made to cover such additional wood as may be available from out of these two estates in addition to the thirty tons which formed the subject of the agreement. It is difficult to infer that the contract was to supply eighty-seven tons of sandalwood simply because Rs. 100 had to be deducted out of every ton of wood delivered by the first defendant to the third defendant. The obvious meaning of a provision of that nature was that Rs. 100 would be deducted on the delivery of each ton up to thirty tons and the balance would be deducted from out of the price due in respect of such other wood as may be supplied in addition to thirty tons. It is unreasonable to assume that a contract for the supply

of fifty-seven tons would have been left so vague and indefinite if the idea were that the first defendant could get that quantity from elsewhere and supply it to the third defendant. Had the price of sandalwood risen higher than that for which it was agreed to be sold, could it have been contended on the basis of a contract such as is to be found in Exhibit J that the third defendant would have been entitled to recover damages from the first defendant on the latter's failure to supply fifty-seven tons of wood? We do not think so.

The next contention which appears to have been accepted by the lower Court and was advanced again before us was to the effect that the first defendant was not empowered by the power of attorney to enter into an agreement for the sale of forward goods or rather of wood which had not been cut, dried, cleaned and rendered fit for sale. Learned Counsel for the second respondent contends that the power of sale mentioned in the power of attorney after the power to have the sandalwood trees cut, leads to the inference that the power to sell could only be exercised after the trees had been cut. If the order in which the various powers have been conferred is read in the manner suggested by learned Counsel for the second respondent it would mean that the power to pay wages, etc., to the coolies (apparently for cutting the trees) could not be exercised by the first defendant unless the sandalwood had been sold. But the sandalwood could not be sold, as contended, unless the trees were cut. And the trees could not be cut unless the coolies were paid either daily or weekly. The suggested construction would make it impossible for the first defendant to do any work and would defeat the very object for which the power of attorney was given to him. It is proved

GOVERDANDOS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

GOVERDANDOS
TAKERSHY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

on the record that the usual procedure in this business is that the monies are advanced by the intending purchasers after they have entered into an agreement to buy the wood with the object of enabling the owner of the trees to pay for the cost of getting the trees cut and the wood dried and cleaned. The advances made by the persons who had entered into agreements of purchase are subsequently deducted from out of the price when the wood is delivered to them. This was exactly what had happened in this case as well. The power to sell the wood in the circumstances contained in the power of attorney would include the authority to agree to sell the wood that was not ready for delivery and had to be cut, dried and cleaned later on.

There is no force in the contention that the first defendant was not entitled to receive a large sum of Rs. 8,700 by way of an advance. There is nothing in the power of attorney which may even suggest that the first defendant's powers were in any way limited as long as he was exercising the authority given to him under Exhibit M. But learned Counsel for the second respondent contended that the mere authority to sell the trees would not entitle the first defendant to receive their price, large or small. In support of this contention reliance was placed on an observation of a Division Bench of this Court in *Narasimhulu Chetti v. Sundara Chariar*(1) which was to the effect that the authority to sell immovable property did not carry with it the authority to receive the price of the same. This was, however, in the nature of an *obiter* as the learned Judges were not satisfied in that case that Mr. Devarajulu Nayudu had been authorized to sell the house at the price at which he had purported to sell it without any further reference to the owners. But there is no

(1) (1910) 20 M.L.J. 479.

doubt that the learned Chief Justice was of that opinion and referred to two cases, *Mynn v. Joliffe*(1) and *Viney v. Chaplin*(2), on the authority of which he was prepared to hold that a mere general authority to sell land did not carry with it an implied authority to receive the purchase money on behalf of the principal. These decisions first of all would have no application to the present case as we are dealing with wood cut and dried and not with immovable property. But even with regard to immovable property it is not quite easy to lay down unconditionally, and we say so with very great respect to the learned Chief Justice, that a person authorized to sell the property would not ordinarily be entitled to receive the price for which he sells the property. It would be different if an agent is authorized to execute a conveyance merely. But, when a person is authorized to sell, he is naturally authorized to do something more than to execute conveyances. For instance he can settle the price if he has not already been asked to sell for a price fixed by the owner. He can select the purchaser and, in the absence of any specific directions, sell the property to anyone that he likes if the same price is offered by more than one. He can enter into an agreement to sell or of sale and can convey the property. An agent having an authority to sell must not only be taken to have authority to do every lawful thing which is necessary to effect a sale but also what is usually done in the course of conducting a sale. And the receipt of the value or the price of the property sold by the agent must be regarded to be what is usually done in the course of conducting a sale. The power to receive the price must be ordinarily and, in the absence of any stipulation or direction to the contrary,

(1) (1834) 1 Moo. & Rob. 326; 42 R.R. 802. (2) (1858) 27 L.J. Ch. 434.

GOVERDANDOS
TAKERSHY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

GOVERDANDOSS
TAKERSBY
v.
ABDUL
RAHMAN.
—
[ABDUR
RAHMAN J.]

considered to be implicit in the power of sale. It would otherwise mean that an agent who is authorized to sell the property to a vendee may sell and convey the property but, when it comes to actually receiving the price for which it has been sold, he must withhold his hand and refer the vendee to go and pay it to the owner for the simple reason that there is no specific authority in his favour to receive it on behalf of the owner. What would happen if the vendee becomes an insolvent after the property has been conveyed to him? Is the owner to lose his money? Let us now examine the decisions on which the observation of the learned Chief Justice was based.

The facts in *Mynn v. Joliffe*(1) were that an agent was employed to find a purchaser and to enter into a contract to sell an estate. He possessed no authority express or implied to receive the purchase money and was therefore held not entitled to receive the purchase money on behalf of the owner of the estate. It must not be overlooked that the agent in that case was merely a commission agent. This decision can only be understood on the basis that the agent in that case was an agent to find a purchaser and to enter into a contract to sell the estate but had no power to convey the same. Since the agent did not have the power to pass the title in the property, he was found to possess no authority to receive its price. This decision is no authority for the proposition that an agent who is authorized to sell the property and to convey the same to the purchaser would not be entitled to receive the price of the property sold and conveyed by him. The case in *Viney v. Chaplin*(2), from which the observations of Lord Chancellor CRANWORTH were cited by the learned Chief Justice, should present no

(1) (1834) 1 Moo. & Rob. 326; 42 R.R. 802. (2) (1858) 27 L.J. Ch. 434.

difficulty if it is remembered that the vendor's solicitor, although he happened to be in possession of the executed conveyance along "with the signed receipt for the consideration money indorsed", was held not entitled to receive the purchase money for the property, as he was found to possess no authority to receive the price and the possession of the conveyance and the receipt executed by the vendor were not found by the Court of Appeal to confer any authority on him to receive the money. There is nothing in that case to suggest that the solicitor was authorized to sell and convey the property himself. We have discussed these cases not because the decision in *Narasimhulu Chetti v. Sundara Chariar*(1) is binding upon us (the observation being in the nature of an *obiter*) but out of respect to the learned Chief Justice. "Sale" has been defined in the Transfer of Property Act as being a transfer of ownership in exchange for a price. The authority to sell would therefore carry with it the power to receive the price. At all events, cases of movable property must be decided on entirely different considerations. An auctioneer—who is merely an agent on behalf of an owner of goods—was found entitled in *Woolf v. Horne*(2) to recover the price from the purchaser himself and was held personally liable when he failed to deliver the goods sold by him to the purchaser. It may be that this decision was arrived at as the auctioneer was held to be in possession of the goods (coupled with interest) as distinct from having merely their custody as a servant or an agent; but we have referred to this case to bring out the distinction between the sale of movable and the sale of immovable property. Section 27 of the Indian Sale of Goods Act (1930) and section 178 of the Indian Contract Act

GOVERDANDOSS
TAKERSBY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

(1) (1910) 20 M.L.J. 479.

(2) (1877) 36 L.T. 705.

GOVERDANDOS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

confer special powers on mercantile agents in regard to sales and pledges of goods. But it is worthy of note that section 27 of the Sale of Goods Act only provides that a person cannot validly sell the goods belonging to another unless he had authority to do so (or the authority could not be disputed by the owner on account of his conduct) and does not separate the power of sale from the power or authority to receive the price. The authority to sell goods is assumed to carry with it the authority to receive the price.

We then come to the contention advanced by Mr. Sitarama Rao, learned Counsel for the second respondent, that the first defendant could not enter into a transaction in which his personal interest was in conflict with his duty towards the second defendant, his principal, and the transaction contained in Exhibit J could not therefore be binding on him. This contention is based on the fact that the sum of Rs. 3,700 (which formed part of the advance stated to have been made by the third defendant at the time when the agreement, Exhibit J, was entered into) had been due to the plaintiff by the first defendant in respect of certain prior transactions and it was not possible for the latter, as an agent of the second defendant, to have accepted the money, which he owed to the plaintiff, by way of an advance towards the transaction in suit without actually receiving it from the third defendant, unless the first defendant was not only in a position to pay the amount due by him to the plaintiff in cash in the second defendant's account but had in fact done so. In order to substantiate the contention that the first defendant was induced to act in contravention of his duties towards his principal both by the third defendant and by the plaintiff, reference was made to the letters, Exhibits F-11 and F-13, exchanged

between the plaintiff and the third defendant, and it was urged that, if the principle that no agent could be permitted to enter into a transaction in which he had a personal interest in conflict with his duty was to be upheld, the agreement, Exhibit J, must be held to be void as against the second defendant.

Reliance was placed by Mr. Sitarama Rao in this connection on two decisions by the House of Lords in *Reckitt v. Barnett, Pembroke and Slater, Ltd.*(1) and *Midland Bank v. Reckitt*(2). It was held in the first of these decisions that, as the agent had not been authorized under the power of attorney given to him to use his principal's money for the purpose of paying his (the agent's) private debts and the authority was limited to drawing cheques in connection with the management of the principal's affairs, an issue of a cheque by the agent for the payment of his private debts could not fall within the authority. And as the bankers had notice that the principal's money was being applied for the agent's private purposes, they were held not entitled to keep the proceeds of the cheque. Similarly in the second case a solicitor, who was authorized by a power of attorney to draw cheques on the client's banking account with the object of applying it for the purposes of his client, was held to have no authority to draw cheques for the payment of his private debts to the Midland Bank. The bank was found to have had notice, from the form of the cheques issued, that the money did not belong to the solicitor and was consequently not allowed to retain it as against the debts due to it by the solicitor on a suit for refund brought by his principal.

The only conclusion that could be drawn from these decisions is that the first defendant could not

GOVERDANDOS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

(1) [1929] A.C. 176.

(2) [1933] A.C. 1.

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

exceed his authority given under the power of attorney, Exhibit M, and acknowledge the receipt of money due by him on behalf of his principal without an actual payment made by him in his principal's account. Nor could the second defendant be liable to refund the amount that was not paid to the first defendant on his behalf, unless he (the second defendant) had chosen to ratify the first defendant's act with a full knowledge of all the facts so that the second defendant may be found to have accepted the responsibility for his agent's act.

These decisions, or the principles underlying these decisions, whatever their effect may be in regard to the sum of Rs. 3,700 and to a sum of Rs. 400 (out of Rs. 5,000) which was not admitted to have been received in cash, can have no effect on the sum of Rs. 4,600 which was actually paid to the first defendant within the authority conferred on him by the power of attorney, Exhibit M. Moreover it must be remembered that the plaintiff is not suing for the performance of the contract contained in Exhibit J but merely for the refund of money paid by his agent, the third defendant, to the first defendant. The plaintiff asks for the refund as the third defendant was not, according to his contention, authorized to enter into this transaction without his specific authority and, even if found to have been acting within the scope of his authority, as the contract remained unfulfilled. The question of the authority of the third defendant to enter into a contract of this kind may, and would in fact, bear on the question of the plaintiff's liability to pay damages for the breach of the contract but has, in our opinion, no relevancy to the question of refund for which this suit has been instituted. Had the second defendant or the first defendant suffered no damages

whatever in respect of the breach of the contract entered into by the third defendant within the scope of his authority, would it have been possible for the first defendant or even for the second defendant, if the contract by the first defendant were found to be within the scope of his authority, as this one has been already held to be, to urge that the suit should be dismissed even to the extent of Rs. 4,600, simply because in taking the advance on behalf of the second defendant the first defendant had agreed to accept the sum of Rs. 3,700 due by him to the plaintiff. To the extent of Rs. 4,600 at least, there was no conflict between the first defendant's interest and duty. It is not possible therefore for the second defendant to get rid of his liability to refund what had been actually received by his agent, the first defendant, subject of course to the deduction of any damages that the plaintiff may be found liable to pay on account of the breach of the contract committed by the third defendant and subject to our finding on the question of ratification by the second defendant of the contract, Exhibit J, and thus of the advance of the entire sum of Rs. 8,700 pleaded by the plaintiff.

There is no evidence on the record that the second defendant had ever ratified his agent's act in acknowledging the sum of Rs. 3,700 as an advance after the former had come to know that this sum of money was due by the latter and was not actually paid by the third defendant. In the absence of any such evidence it is not possible to make the second defendant liable for payment of that sum or of any other sum that is not found to have been paid to the first defendant at the time when the agreement, Exhibit J, was entered into.

After considering the evidence, both documentary and oral, in the case, the lower Court took the view

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

that the contract, Exhibit J, entered into by the third defendant must be taken to have been entered into within the scope of his authority and the plaintiff was therefore liable to pay damages to the first defendant for the breach of contract committed by him with the consent and at the instance of the plaintiff. Having been taken through the various documents and the oral evidence on the record, we are of the same opinion and would therefore hold that the plaintiff is liable for the breach of contract.

Although there is a reference in the notice, Exhibit K, that a sum of Rs. 5,000 was paid by the third defendant to the first defendant, yet we find for a fact that Rs. 4,600 was paid in cash to the first defendant and that the third defendant had executed a promissory note for Rs. 400 in favour of the first defendant on that date. This promissory note has not been paid for and was in fact produced in this Court by the first defendant as Exhibit II. This shows that the second defendant could not be held liable to pay the sum of Rs. 400 which was not received by the first defendant.

Now that the contract, Exhibit J, has been held to have been entered into by the third defendant within the scope of the authority given by the plaintiff, the last question to decide is what damages he (the plaintiff) is liable to pay on account of the breach of contract committed by him or at his instance (see Exhibit F-15 and Exhibit H). An attempt was made by Mr. Sitarama Rao to show that his client would be entitled to recover damages at the rate of Rs. 50 per ton for the eighty-seven tons that had been agreed to be supplied under the terms of Exhibit J. We have already held that the contract was for the supply of thirty tons of sandalwood

definitely and for such other wood that may be got out of the two estates and that it was not for eighty-seven tons. The lower Court was, in the circumstances, of opinion that the damages claimed by the first defendant in his written statement amounting to Rs. 1,715-8-0 were not unreasonable and have been established. Having regard to the market conditions and to the rate prevailing for these goods at or about the time when they would have been delivered by the first defendant, if the contract had not been cancelled in November 1936, we are of opinion that the damages awarded by the lower Court were fully justified, and we need not reduce them by Rs. 215-8-0 if we cannot see our way to enhance them in the manner asked for by learned Counsel for the respondents.

For the above reasons the plaintiff is entitled to recover the sum of Rs. 4,600 from the second defendant less the sum of Rs. 1,715-8-0, the amount of damages which he has been found liable to pay for his breach. The plaintiff would be entitled to recover this sum from the second defendant. A decree for the amount is accordingly passed in his favour against the second defendant with interest at six per cent from the date of the suit up to the date of realisation. The first defendant was liable to pay Rs. 3,700 to the plaintiff and a decree to that extent against him is maintained. The sum of Rs. 400 is found not to have been paid by the third defendant to the first defendant. The promissory note executed by the third defendant is, as stated before, on the record. No decree can be passed in regard to that sum. It will be delivered to the third defendant as cancelled and he would no longer be liable to pay the amount due thereunder. As for costs, the most

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHMAN.
—
ABDUR
RAHMAN J.

GOVERDANDOSS
TAKERSEY
v.
ABDUL
RAHMAN.

appropriate order in the circumstances of the case seems to be that, as between the plaintiff and the second defendant, the parties will bear their costs both here and in the Court below. But the first defendant will be liable to pay proportionate costs to the extent of the sum decreed against him in both the Courts.

N.S.

APPELLATE CRIMINAL.

Before Mr. Justice Horwill.

1941.
December 19,

PUBLIC PROSECUTOR, APPELLANT,

v.

K. V. KALKURA (ACCUSED), RESPONDENT.*

Indian Penal Code (Act XLV of 1860), sec. 294-A—Accused conducting lottery—No drawing of ticket or number—Not guilty under either part of the section—Meaning of the word “drawing” in the section.

The respondent and another were running a lottery in which the only substantial prize fell necessarily to the agent who sold the largest number of tickets. The ticket bearing the highest number among those sold by that agent was a number upon which all the other lucky numbers were based. The holders of those lucky numbers received a small prize of one rupee. The accused were tried by the Joint Magistrate who found that the respondent was conducting a lottery and was guilty of offences punishable under both parts of section 294-A, Indian Penal Code. On appeal the Sessions Judge acquitted the accused. On appeal to the High Court by the Crown,

held, that although the respondent was conducting a lottery he was not guilty under either part of section 294-A; because he had not been keeping an office or place for the

* Criminal Appeal No. 413 of 1941.

purpose of *drawing* a lottery and had not been publishing any proposal to pay any sum on any contingency relative to the *drawing* of any ticket, lot, number, or figure in any such lottery.

The word “drawing” in the section cannot be ignored and must be given its natural meaning. It does not mean “conducting” and the Legislature did not intend to give it any such comprehensive and unusual meaning.

Case law, on the interpretation of the word “drawing” in the section, reviewed.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the afore-said respondent (accused) by the Sessions Judge of South Kanara Division in Criminal Appeal No. 43 of 1940 on his file (Calendar Case No. 32 of 1939 on the file of the Court of the Joint Magistrate of Coondapoor Division).

Public Prosecutor (V. L. Ethiraj) for appellant.

Pais for Pais, Lobo & Alvares for respondent.

JUDGMENT.

HORWILL J.—The accused and another were running a lottery which was a gigantic swindle, in that the only substantial prize fell necessarily to the agent who sold the largest number of tickets. The ticket bearing the highest number among those sold by that agent was a number upon which all the other lucky numbers were based. The holders of those lucky numbers received a small prize of one rupee. The accused were tried by the Joint Magistrate of Coondapoor, who found that the appellant was conducting a lottery and was guilty of offences punishable under both parts of section 294-A, Indian Penal Code. In appeal, the Sessions Judge of South Kanara held that although it was true that the appellant was conducting a lottery and had cheated the public on a

PUBLIC
PROSECUTOR
v.
KALKURA.

HORWILL J.

PUBLIC
PROSECUTOR
v.
KALKURA.
HORWILL J.

large scale, he was not guilty under either part of section 294-A, Indian Penal Code, because he had not been keeping an office or place for the purpose of *drawing* a lottery and had not been publishing any proposal to pay any sum on any contingency relative to the *drawing* of any ticket, lot, number, or figure in any such lottery. He therefore allowed the appeal and acquitted the appellant. The Crown has preferred the present appeal, contending that the Joint Magistrate was right and the Sessions Judge wrong.

The learned Joint Magistrate argued that one must not interpret the word "drawing" in section 294-A, Indian Penal Code, too strictly. He was of opinion that the question

"as to how exactly the winning ticket number was drawn or determined is immaterial so long as this was done or determined by the accused in a regular office kept by him for that particular purpose."
He thought

"the section really means that once the fact of the scheme being a lottery is accepted, the word 'draw' signifies the manner in which the element of chance in it is determined by the act of the promoters of that lottery."

If the learned Magistrate was right, this word "drawing" would have no significance at all and would be equivalent to "conducting". Both the learned Sessions Judge and the learned Magistrate, in analysing the cases bearing upon the subject, have discussed whether the section refers to a physical drawing or not; but it seems immaterial to me what sort of drawing it was, whether physical or otherwise, provided that there was a drawing. In the present case there admittedly was no drawing of any sort at all, whether physical or otherwise.

PUBLIC
PROSECUTOR
v.
KALKURA.
HORWILL J.

There has been no decision of this High Court on the interpretation of the word "drawing" in section 294-A; but the matter has received considerable attention at the hands of Judges of other High Courts. The leading case on the subject is a judgment of SHADI LAL and LE-ROSSIGNOL JJ. in *Emperor v. Mukandi Lal*(1). The same question arose there because in one of the lotteries under discussion there was no drawing, the lucky numbers being calculated arithmetically. The learned Judges remarked:

"The word 'drawing,' we think, is used in the section in its physical sense, and when the section was enacted in 1870, it seems probable that the only form of lottery envisaged by the Legislature was a lottery run on the usual lines, in which the winning numbers are actually drawn out of an urn, box, or other receptacle."

When something is made an offence which was not formerly an offence, men will naturally exercise their ingenuity in circumventing the law, and that is no doubt a reason why so many ingenious methods of ascertaining lucky numbers have since the enactment of this section been devised. This case was followed in *Emperor v. Gurbaksh Singh*(2) by a single Judge of the Lahore High Court and considered and approved in *Emperor v. Vazirally*(3) which was a decision of a Bench. There, a firm of cigarette vendors were anxious to advertise a new brand of cigarettes and published the fact that certain packets of cigarettes would each contain a five-rupee note. They sent ten five-rupee notes to the manufacturers to put in certain packets at random. The learned Judges approved of *Emperor v. Mukandi Lal*(1) and agreed that the section contemplated a physical drawing. That decision was also followed in an earlier

(1) A.I.R. 1917 Lah. 93.

(2) A.I.R. 1934 Lah. 840.

(3) (1928) I.L.R. 53 Bom. 57.

PUBLIC
PROSECUTOR
v.
KALKURA.
—
HONWILL J.

Bombay case, *King Emperor v. Rachappa*(1). The matter was also carefully considered in *O. D. Harder v. Emperor*(2). There is thus a substantial consensus of opinion in two High Courts and a Chief Court that the word "drawing" in section 294-A cannot be ignored and must be given its natural meaning.

The learned Public Prosecutor has sought to draw some distinction between the first part of section 294-A and the second part; and points out that most of the decisions turned on the construction of the second part of section 294-A, in which it is rather more clear than in the first part that the Legislature contemplated an actual drawing from some receptacle; for it speaks of the drawing of any ticket, lot, number, or figure, while the first part refers to "drawing any lottery". "Drawing any lottery" is not a common expression; but there is no reason to suppose that the Legislature was having regard in the second part of that section to an actual drawing from a receptacle and not in the first part. If "drawing" had a different meaning in the first part to what it had in the second, then it would mean, as I have pointed out, merely "conducting", and there is no reason to think that the Legislature intended to give the word "drawing" any such comprehensive and unusual meaning.

I hold therefore that the learned Sessions Judge was right in acquitting the accused, even though he was conducting a lottery. The appeal is dismissed.

V.V.C.

(1) A.I.R. 1925 Bom. 26.

(2) A.I.R. 1934 Sind. 149.

APPELLATE CIVIL—FULL BENCH.

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

AMIRTHAMMAL AND TWO OTHERS (APPELLANTS 1 TO 3,
DEFENDANTS 3 TO 5), APPELLANTS,

1942,
April 2.

v.

VALLIMAYIL AMMAL (RESPONDENT-PLAINTIFF),
RESPONDENT.*

Hindu law—Succession—Congenital idiot—Status of co-parcener in joint family—Share-taker though not share-enjoyer, while disqualification lasts—Can lawfully marry.

A congenital idiot has the status of a co-parcener under the Hindu law notwithstanding that he is excluded from the enjoyment of his share.

Texts of Hindu law reviewed.

Krishna v. Sami(1) followed.

Muthusami Gurukkal v. Meenammal(2) approved.

Commissioner of Income-tax, Punjab v. Krishna Kishore(3) referred to.

Pudiava Nadar v. Pavanasa Nadar(4) not followed.

Venkateswara Pattar v. Mankayammal(5) distinguished.

Under the Hindu law a congenital idiot can be lawfully married.

The view of Mayne in his book on Hindu Law, Sixth Edition, at page 106, approved.

The observations to the contrary by the editor of the tenth edition of Mayne's Hindu Law, at pages 150 to 153, not approved.

Mouji Lal v. Chandrabati Kumari(6) explained.

Venkatacharyulu v. Rangacharyulu(7) and *Muthusami Gurukkal v. Meenammal*(2) approved.

* Second Appeal No. 844 of 1938.

(1) (1885) I.L.R. 9 Mad. 64 (F.B.). (2) (1918) I.L.R. 43 Mad. 464.
(3) I.L.R. [1942] Lah. 1 (P.C.). (4) (1922) I.L.R. 45 Mad. 949 (F.B.).
(5) (1934) 69 M.L.J. 410. (6) (1911) I.L.R. 38 Cal. 700 (P.C.).
(7) (1890) I.L.R. 14 Mad. 316.

AMIRTHAMMAL
v.
VALLIMAYIL
AMMAL.

V had a son C who was a congenital idiot but his father married him to A and by her C had two sons and a daughter. Both the sons were born after the death of V in 1912 but neither of them was similarly afflicted, and they had died by 1917. By a will, dated 13th February 1912, V bequeathed all his property, which was ancestral, to his widow, to whom he gave full powers to alienate. V had also two daughters K and M. His widow died in 1917, M in 1924 and K in 1926. The elder daughter K was survived by a son and two daughters who were respectively the fifth, first and second defendants in the suit. The younger daughter M had a daughter who filed the suit for partition of V's property and delivery to her of a half share on the ground that her grandmother had obtained an absolute estate under the will of V and that, on the death of her aunt K, the property devolved by the right of inheritance on her and the first and second defendants.

Held: V had no right to bequeath the family estate, which was the joint property of the father and the son, to his widow by the will and, as the plaintiff's case was based entirely on the will, her suit failed. C, though a congenital idiot, was lawfully married and as he had issue, he had shown that he was capable of transmitting heritable blood and the case came completely within *Krishna v. Sami*(1) which laid down that a disqualified person who was capable of transmitting heritable blood was a share-taker, although not a share-enjoyer while his disqualification lasted.

It is a fundamental rule of Hindu law that a son born to a member of a joint family has on birth the right to share in the family estate. The fact that a son is born with an affliction which disqualifies him from enjoying his share does not rob him of his birthright. The affliction merely prevents his enjoyment of the right while the affliction lasts. The fact that the ancient texts recognize that his son, should one be born to him, has the right to share in the family estate is in itself an indication that he is a member of the coparcenary.

APPEAL against the decree of the Court of the Subordinate Judge of Ramnad at Madura in Appeal No. 103 of 1936 (Appeal Suit No. 62 of 1936, District

(1) (1885) I.L.R. 9 Mad. 64 (F.B.).

Court, Ramnad) preferred against the decree of the Court of the District Munsif of Ramnad in Original Suit No. 565 of 1934.

AMIRTHAMMAL
v.
VALLIMAYIL
AMMAL.

R. Ramamurthy Ayyar for *A. Swaminatha Ayyar* and *S. Tyagaraja Ayyar* for appellants.—Veerakumara had a son Chellakrishna, who was a congenital idiot. While the son was alive the father made a will bequeathing all the family property to his widow. The plaintiff, basing her title on the will, sues for partition and delivery of a half share in the family property. If the will is found valid she succeeds, otherwise her suit fails. The validity of the will depends on the question whether Chellakrishna was a coparcener along with his father when the will was executed by his father. If he was a coparcener the father had no right to execute the will and bequeath the family property to his widow, and the will would be invalid. It is submitted that Chellakrishna, though he was a congenital idiot, could lawfully marry and transmit heritable blood to his children, that he was a share-taker, though not a share-enjoyer while the disqualification lasted, and that therefore he was a coparcener together with his father when the will was executed. In these circumstances, the will of Veerakumara is invalid. *Krishna v. Sami*(1) and *Muthusami Gurukkal v. Meenammal*(2) support this view.

[LEACH C.J.—What are the texts of Hindu law which have bearing on the subject?]

[Mitakshara, Chapter II, Section X, Placita 1 to 11 and Sarasvati Vilasa, Placita 148 and 149 were referred to.] The texts say that idiots, and other disqualified persons mentioned therein, are excluded from participating in the joint family property; but on the removal of the defect the right of participation revives. The disqualified person can marry and he can transmit to his offspring the right of a coparcener, provided the issue are free from defects.

Krishna v. Sami(1) is a case of a deaf and dumb person, but the decision applies to the present case also. The ancient texts of Hindu law were considered. It says that a disqualified person who is capable of transmitting heritable blood is a share-taker, although not a share-enjoyer while

(1) (1885) I.L.R. 9 Mad. 64 (F.B.).

(2) (1918) I.L.R. 43 Mad. 464.

AMIRTHANMAL
v.
VALLIMAYIL
AMMAL.

the disqualification lasts. When the disqualification is removed he becomes a share-enjoyer. The disqualified person can transmit the right of enjoyment to his issue provided they are free from any defect. It is also pointed out that the theory that an estate once vested in a full owner cannot be divested is subject to exceptions. This is an authoritative decision by a Bench of five Judges and is not overruled by any decision of the Privy Council.

Muthusami Gurukkal v. Meenammal(1) is a case of supervening insanity and the decision holds that the disqualified member is entitled to take the whole property by survivorship when the other members of the family die. It states that the right to take a share comes into existence at birth and subsists all through, though it is incapable of enforcement at the time of partition, because of the existence of the disqualification. The disqualified person can lawfully marry and have children. Though he is entitled only to maintenance, it is not intended that his heirs should be deprived of their inheritance. The other members of the family should preserve the estate and manage it for the benefit of the issue of the disqualified member. In *Pudiava Nadar v. Pavanasa Nadar*(2) it was held that a person born blind cannot be a coparcener but it is *obiter*. In *Venkateswara Pattar v. Mankayammal*(3) while distinguishing between a congenital and a supervening disqualification VARADACHARIAR J. observed that the congenitally disqualified man would not acquire a right by birth. But the question for decision in the present case did not arise there. [*Commissioner of Income-tax, Punjab v. Krishna Kishore*(4) was also referred to.] In a joint family where there is a disqualified member, if the other members of the family divide the family property by partition and take shares, they take it conditionally. When the disqualification of the member is removed, or when the disqualified member begets a qualified son, the disqualified member or his son will be entitled to demand possession of his share and the other members are bound to give it.

In view of the decision in *Krishna v. Sami*(5) Chellakrishna, though a congenital idiot, was a coparcener with his

(1) (1918) I.L.R. 43 Mad. 464.

(2) (1922) I.L.R. 45 Mad. 949 (F.B.).

(3) (1934) 69 M.L.J. 410.

(4) I.L.R. [1942] Lah. 1 (P.C.).

(5) (1885) I.L.R. 9 Mad. 64 (F.B.).

AMIRTHANMAL
v.
VALLIMAYIL
AMMAL.

father at the time the will was executed by his father and the father had no power to make the will and the will is invalid. In the result the suit of the plaintiff which is based on the will must fail.

K. Bhashyam Ayyangar (with him *T. R. Srinivasan* and *R. Viswanathan*) for respondent.—The first question is as to the rights of Chellakrishna, who was a congenital idiot, in the joint family property. That depends on the correct interpretation of the Mitakshara, Chapter II, Section X, and the Sarasvati Vilasa, Placitum 149, which have been accepted and acted upon in *Krishna v. Sami*(1) and *Pudiava Nadar v. Pavanasa Nadar*(2).

The Mitakshara is of paramount authority in this Province. The right by birth of a son in ancestral property is recognised in Chapter I, Section 1, Placitum 23. The provisions contained in Placita 1 to 15 in Chapter II, Section X, are by way of correction to what has been mentioned earlier as to the succession of sons and others. The rights of disqualified persons are defined in these placita, which alone govern their rights. Placitum 5 states that disqualified persons are excluded from participation, that they do not take shares and that they should be allowed only maintenance. Again, as to the sons of such disqualified persons, only the aurasa and the kshetraja are given rights and that too if they are free from disqualifications, but not the other sons. Thus it is clear that the disqualified persons have only the restricted rights mentioned in these and no more. Then what is the effect that should be given to Placitum 149 of the Sarasvati Vilasa? Even taking Foulkes' translation of the word "amsa" as "share" to be correct, which was not accepted by SCHWABE C.J. in *Pudiava Nadar v. Pavanasa Nadar*(2), the legal result is only to make the disqualified persons potential coparceners. "A share certainly belongs to them" must be understood only in this sense. Otherwise there would be a conflict between the Mitakshara and the Sarasvati Vilasa and the former being of paramount authority must prevail. The conflict would be avoided by understanding the Sarasvati Vilasa in this sense. Any other construction is not correct.

(1) (1885) I.L.R. 9 Mad. 64 (F.B.).

(2) (1922) I.L.R. 45 Mad. 949 (F.B.).

AMIRTHHAMMAL
v.
VALLIMAYIL
AMMAL.

Now coming to the decisions, *Krishna v. Sami*(1) is in my favour. After discussing the texts, the conclusion is given at page 77: "their right to share is latent or may come into existence at a future time. . . . When it comes into existence, . . . it is to be recognised." Further, the basis of that decision was that the property vested in the disqualified person's brother who was the surviving coparcener and on the birth of a son to the disqualified person, there was a *divesting* by such son. In the face of this decision it is not possible to contend that a share vested in the disqualified person and that the right continued, he being only debarred from enjoying the share, i.e., claiming partition. Moreover this is how *Krishna v. Sami*(1) was understood by the Full Bench in *Pudiava Nadar v. Pavanasa Nadar*(2). Two questions were referred to the Full Bench: (i) whether a congenitally blind man was *excluded from inheritance* and (ii) whether the rule had become obsolete. Hence the statement at page 961 that he does not become on birth entitled to a share is not *obiter*. Otherwise the conclusion would be wrong. Further, a father with a son suffering from a serious disqualification is held to be sonless; *Nagammal v. Sankarappa Naidu*(3). In any event a distinction must be made between a congenital disqualification and a supervening one; see *Venkateswara Pattar v. Mankayammal*(4). If the disqualification exists at the time of the birth when the right comes into existence, there could be no vesting. *Muthusami Gurukkal v. Meenammal*(5) is a case of supervening disqualification and is in this view inapplicable to this case.

Again, even for the application of the text of *Sarasvati Vilasa*, the disqualified person must be fit for marriage, but an idiot is not; see Mayne's *Hindu Law*, Tenth Edition, pages 150 to 153 and the authorities cited therein.

The next question is whether the will would be operative even if Chellakrishna had a share in the property but without a right to claim partition. The principle that a coparcener cannot make a will does not apply when the only other coparcener is a disqualified person who cannot claim partition.

(1) (1885) I.L.R. 9 Mad. 64 (F.B.). (2) (1922) I.L.R. 45 Mad. 949 (F.B.).
(3) (1930) I.L.R. 54 Mad. 576. (4) (1934) 69 M.L.J. 410.
(5) (1918) I.L.R. 43 Mad. 464.

The right to interdict an alienation is based upon the right to claim the share by partition and hence where the latter is absent the former also does not exist. [*Sartaj Kuari v. Deoraj Kuari*(1), *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards*(2), *Shibaprasad Singh v. Prayagkumari Debee*(3), *Veeranna v. Sayamma*(4) were referred to.] There being no person entitled to attack the alienation at the time it took effect, i.e., at the time of the death of Veerakumara, the will is operative.

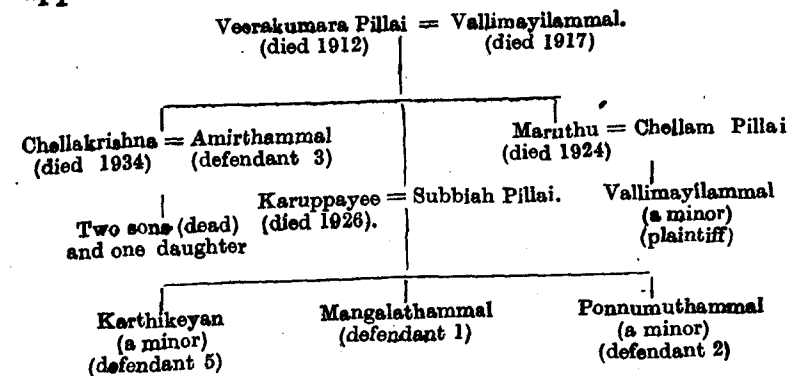
R. Ramamurty Ayyar in reply.—When there is a conflict between the right of survivorship and the right of devise, it is the right of survivorship that prevails; see *Venkateswara Pattar v. Mankayammal*(5).

Cur. adv. vult.

JUDGMENT.

LEACH C.J.—The question raised in this appeal is whether a congenital idiot has the status of a coparcener notwithstanding that he is excluded from the enjoyment of his share.

The following genealogical tree will assist in the appreciation of the facts:—



Veerakumara Pillai's son Chellakrishna was a congenital idiot, but his father married him to Amirthammal and by her he had two sons and a

(1) (1888) I.L.R. 10 All. 272 (P.C.). (2) (1899) I.L.R. 22 Mad. 383 (P.C.).
(3) (1932) I.L.R. 59 Cal. 1399 (P.C.). (4) (1928) I.L.R. 52 Mad. 398.
(5) (1934) 69 M.L.J. 410.

AMETHAMMAL
v.
VALLIMAYIL
AMMAL.
—
LEACH C.J.

daughter. Both the sons were born after the death of Veerakumara Pillai in 1912, but both of them had died by 1917. It has not been suggested that either of them was similarly afflicted. Veerakumara Pillai left a will, dated 13th February 1912, by which he bequeathed all his property, which was ancestral, to his widow, to whom he gave full powers to alienate. Veerakumara Pillai had also two daughters, Karuppayee and Maruthu. His widow died in 1917, the younger daughter in 1924 and the elder daughter in 1926. The elder daughter was survived by a son and two daughters, who are respectively the fifth, first and second defendants in the suit. The younger daughter had a daughter, who is the plaintiff.

The suit was instituted in the Court of the District Munsif of Ramnad for a decree for partition of the property which Veerakumara Pillai had left to his widow and the delivery to the plaintiff of a half share. Her case was that her grandmother had obtained an absolute estate under the will of her grandfather and that on the death of her aunt, Karuppayee, in 1926, the property devolved by the right of inheritance on her and the first and the second defendants. The claim was contested by the third, fourth and fifth defendants. They averred that Chellakrishna was not a congenital idiot and that the will left by Veerakumara Pillai was invalid. The District Munsif and the Subordinate Judge of Ramnad on appeal held that Chellakrishna was a congenital idiot and this finding is now conclusive. The District Munsif also held that the will was valid and the Subordinate Judge again agreed with him. This appeal is from the decree of the Subordinate Judge and the appellants are the third, fourth and fifth defendants.

If Chellakrishna was in law a coparcener with his father, the latter admittedly had no right to bequeath the property held by him to his widow, because in such circumstances it would constitute the joint property of the father and the son. The answer to the question whether Chellakrishna was a coparcener depends, according to the decision of this Court in *Krishna v. Sami*(1), on whether he was capable of transmitting heritable blood and therefore it will be necessary to consider whether a congenital idiot can lawfully marry.

In order to decide this appeal the Court is called upon to examine certain of the ancient texts and the reported decisions quoted to the Court in the course of the arguments. The most important of the texts are to be found in Chapter II, Section X, of the Mitakshara. In placitum 1 Vijnaneswara quotes the following text of Yajnavalkya as an exception to the rule of succession "of the son, the widow and other heirs":—

"An impotent person, or outcast and his sons, one lame, a mad man, an idiot, a blind man, and person afflicted with an incurable disease, and others (similarly disqualified), must be maintained, excluding them, however, from participation."

In placitum 2 "an idiot" is defined as

"a person deficient in understanding, meaning one incapable of discriminating good from bad".

In placitum 3 we find this statement:

"Manu likewise ordains, 'Impotent persons and outcasts are excluded from a share of the heritage; and so are persons born blind and deaf as well as mad men, idiots, the dumb, and those who have lost a sense.'"

Placitum 5 reads as follows:—

"Those persons are excluded from participation. They do not share the estate. They must be supported by an

AMETHAMMAL
v.
VALLIMAYIL
AMMAL.
—
LEACH C.J.

(1) (1885) I.L.R. 9 Mad. 64 (F.B.).

AMIRTHAMMAL
v.
VALLIMATHI
AMMAL.
LEACH C.J.

allowance of food and raiment only; and, the penalty of degradation is incurred, if they be not maintained. For Manu says, 'But it is fit, that a wise man should give all of them food and raiment without stint to the best of his power; for he, who gives it not, shall be deemed an outcast'. 'Without stint' signifies 'for life'."

The words "those persons" with which this placitum commences refer to the persons described in placitum 1 as being excluded from participation.

Placitum 7 makes it clear that when the disqualification is removed the right of participation follows. It is in these words:

"If the defect be removed by medicaments or other means at a period subsequent to partition, the right of participation takes effect, on the same principle on which 'when the sons have been separated, one, who is afterwards born of a woman equal in class, shares the distribution' is based."

The placita which have bearing on the rights of the sons of disqualified heirs are placita 9, 10 and 11, which read as follows:—

Placitum 9: "The disinheritance of the persons above described seeming to imply disinheritance of their sons, the author adds: 'But their sons, whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects'."

Placitum 10: "The sons of these persons, whether they be legitimate offspring or issue of the wife, are entitled to allotments, or are rightful partakers of shares; provided they be faultless or free from defects which should bar their participation, such as impotency, etc."

Placitum 11: "Of these the impotent man may have issue of the wife; the rest may have legitimate progeny likewise. The specific mention of 'legitimate' issue and 'offspring of the wife' is intended to forbid the recognition of other sons."

Placitum 149 of the Sarasvati Vilasa also has an important bearing, but it is not necessary to quote the

whole of it. In explaining the doctrine of exclusion as stated by Manu the commentator states:

"*Jatyandhabadhirau*.—From this coupling together, (a) it follows that they have shares, but that they should, though having shares, be supported as they could marry. From the use of the word 'tadha' (similarly), the secret meaning is that the lame, etc., if capable of the sacrament of marriage take shares, and should be maintained."

"*Unmaththajadamukascha*.—From this grouping together, it follows that they also should be maintained and do not take shares, it must be understood, if they are not worthy of marriage."

The term *Jatyandhabadhirau* has been translated as "congenital blind and deaf" and the term *Unmaththajadamuka* as "insane, idiot and dumb." The translations of the ancient texts which I have quoted are those given in Setlur, and for the purposes of this case they have been accepted as being accurate, except the word "not" in the last line of the passage quoted from Sarasvati Vilasa has been omitted.

It will be observed that according to Vijñaneswara an idiot, together with other afflicted persons, is excluded from participation in the property of the family while he remains afflicted, the right of participation arises when the disqualification is removed, and an afflicted person is capable of transmitting to his offspring the full rights of a coparcener, if the offspring is not afflicted, notwithstanding that his father remains afflicted. Whether the text should be read as laying down that a congenital idiot is a coparcener with his rights suspended during the period of his affliction, or whether his rights as a coparcener only commence when his disqualification is removed is another matter and must be decided in the light thrown by the reported decisions, which I will now proceed to examine.

AMIRTHAMMAL
v.
VALLIMATHI
AMMAL.
LEACH C.J.

AMIRTHANMAL
v.
VALLIMATHIL
AMMAL.
LEACH C.J.

allowance of food and raiment only; and, the penalty of degradation is incurred, if they be not maintained. For Manu says, 'But it is fit, that a wise man should give all of them food and raiment without stint to the best of his power; for he, who gives it not, shall be deemed an outcast'. 'Without stint' signifies 'for life'."

The words "those persons" with which this placitum commences refer to the persons described in placitum 1 as being excluded from participation.

Placitum 7 makes it clear that when the disqualification is removed the right of participation follows. It is in these words:

"If the defect be removed by medicaments or other means at a period subsequent to partition, the right of participation takes effect, on the same principle on which 'when the sons have been separated, one, who is afterwards born of a woman equal in class, shares the distribution' is based."

The placita which have bearing on the rights of the sons of disqualified heirs are placita 9, 10 and 11, which read as follows:—

Placitum 9: "The disinherison of the persons above described seeming to imply disinherison of their sons, the author adds: 'But their sons, whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects'."

Placitum 10: "The sons of these persons, whether they be legitimate offspring or issue of the wife, are entitled to allotments, or are rightful partakers of shares; provided they be faultless or free from defects which should bar their participation, such as impotency, etc."

Placitum 11: "Of these the impotent man may have issue of the wife; the rest may have legitimate progeny likewise. The specific mention of 'legitimate' issue and 'offspring of the wife' is intended to forbid the recognition of other sons."

Placitum 149 of the Sarasvati Vilasa also has an important bearing, but it is not necessary to quote the

whole of it. In explaining the doctrine of exclusion as stated by Manu the commentator states:

"*Jatyandhabadhirau*.—From this coupling together, (a) it follows that they have shares, but that they should, though having shares, be supported as they could marry. From the use of the word 'tadha' (similarly), the secret meaning is that the lame, etc., if capable of the sacrament of marriage take shares, and should be maintained."

"*Unmaththajadamukascha*.—From this grouping together, it follows that they also should be maintained and do not take shares, it must be understood, if they are not worthy of marriage."

The term *Jatyandhabadhirau* has been translated as "congenital blind and deaf" and the term *Unmaththajadamuka* as "insane, idiot and dumb." The translations of the ancient texts which I have quoted are those given in Setlur, and for the purposes of this case they have been accepted as being accurate, except the word "not" in the last line of the passage quoted from Sarasvati Vilasa has been omitted.

It will be observed that according to Vijnaneswara an idiot, together with other afflicted persons, is excluded from participation in the property of the family while he remains afflicted, the right of participation arises when the disqualification is removed, and an afflicted person is capable of transmitting to his offspring the full rights of a coparcener, if the offspring is not afflicted, notwithstanding that his father remains afflicted. Whether the text should be read as laying down that a congenital idiot is a coparcener with his rights suspended during the period of his affliction, or whether his rights as a coparcener only commence when his disqualification is removed is another matter and must be decided in the light thrown by the reported decisions, which I will now proceed to examine.

AMIRTHANMAL
v.
VALLIMATHIL
AMMAL.
LEACH C.J.

AMIRTHAMMAL
v.
VALLIMAYIL
AMMAL.
LEACH C.J.

The first case and the most important of the reported decisions of this Court is that in *Krishna v. Sami*(1), which was heard by a Bench of five Judges. The plaintiffs' grandfather, one Sami Reddi, the father of the first defendant, and the grandfather of the second and third defendants were undivided brothers. The plaintiffs' father was born deaf and dumb, and the plaintiffs were born after the death of their grandfather. They claimed to be entitled to a share in the family estate as it stood in the lifetime of their father. The District Munsif held that the plaintiffs were not entitled to sue as they were born after the death of their grandfather, and in support of his ruling relied on the decisions of the Calcutta High Court in *Pāreshmani Dasi v. Dinanath Das*(2), which was decided by a Bench, and *Kalidas Das v. Krishan Chandra Das*(3), which was decided by a Full Bench. On appeal, the Subordinate Judge reversed the decision of the District Munsif and the first and second defendants appealed to this Court. Their contentions were: (i) that as the plaintiffs' father by reason of his affliction could not inherit and as their grandfather had died before they were born, they acquired no right by birth in the family estate, and (ii) that the property having devolved upon the defendants by right of inheritance before the plaintiffs were born their subsequent birth could not divest the defendants of their right to any portion of the property. This Court agreed with the Subordinate Judge that the Calcutta decisions were inapplicable, being decisions under the Dayabhaga law, and held that under the Mitakshara law the sons of a deaf and dumb member of an undivided Hindu family are entitled to a share

(1) (1885) I.L.R. 9 Mad. 64 (F.B.). (2) (1868) 1 B.L.R. (A.C.) 117.
(3) (1869) 2 B.L.R. 103 (F.B.).

of the estate in the lifetime of their father, notwithstanding that they were born after the death of their grandfather, and that in such a case the estate vests on the death of the grandfather in the qualified heirs, subject to the contingency of its being divested on the recovery of the disqualified brother or the birth of a qualified heir. The judgment of the Court was delivered by that eminent Chief Justice of this Court, Sir CHARLES TURNER, who examined with great care all the texts bearing on the questions raised in the appeal. TURNER C.J. pointed out that the decision in *Kalidas Das v. Krishan Chandra Das*(1) proceeded mainly on two grounds; first, on the rule that an estate once vested in a full and absolute owner cannot be divested, and secondly, on an inference drawn from the texts of the Mitakshara which declare that a disqualified person whose disqualification is removed after partition is entitled to share in like manner as an after-born son. TURNER C.J. then observed:

"Analogy is intended to illustrate and not to limit. The analogy between the case of the disqualified person and the case of the after-born son is incomplete if the opinion of the Calcutta High Court be adopted, and the true meaning of the analogy appears to be explained by the author of the *Sarasvati Vilasa*. There are classes of disqualified persons who cannot be relieved of their disqualification and cannot transmit heritable blood. There are classes who, though they may be unable to be relieved of their disqualification, are capable of transmitting heritable blood. Their right to share in the family wealth is latent, or may come into existence at a future time as it does in the case of the after-born son. When it comes into existence, either in the person of the formerly disqualified heir or of his son, it is to be recognized. If capable of transmitting heritable blood, they are share-takers though not at the time share-enjoyers. If the son of a disqualified person is born in his grandfather's lifetime and his father dies, he is at once entitled to be recognized as a

(1) (1869) 2 B.L.R. 103 (F.B.).

AMIRTHAMMAL
v.
VALLIMAYIL
AMMAL.
LEACH C.J.

AMIRTHAMMAL
v.
VALLIMAYIL
AMMAL.
LEACH C.J.

member of the coparcenary; the only ground for depriving him of that right, if his father dies after the grandfather's death, is insistence on the rule against divesting an estate once vested."

TURNER C.J. proceeded to point out that the rule prohibiting the divesting of an estate once vested in a full owner cannot be laid down without exception, in respect of property governed by the Mitakshara law, and concluded his judgment with this statement:

"The existence of a valid power creates a potentiality of inheritance, which may be likened to that of a son in the womb. The estate is taken conditionally. It is difficult to distinguish these cases from that of the disqualified share-taker, who may afterwards become qualified to demand possession or who may beget a qualified son."

Hindu law makes no difference between a person who is born deaf and dumb and a congenital idiot. In the judgment in *Krishna v. Sami*(1) it is clearly laid down that a disqualified person who is capable of transmitting heritable blood is a share-taker, although not while his disqualification lasts a share-enjoyer. He only becomes a share-enjoyer when the disqualification is removed, but he can transmit a right of enjoyment of the family properties to his issue and it matters not whether the issue is born before or after the grandfather's death. The Court is asked to ignore *Krishna v. Sami*(1), but this cannot be done unless it is manifest that it has been overruled by the Privy Council or must be regarded as an obsolete decision, for which I can see no warrant.

In *Muthusami Gurukkal v. Meenammal*(2) the Court had to consider the position in a case of supervening insanity. It was held that the right of a member of a joint Hindu family to share in ancestral property is a right which comes into existence at birth

(1) (1885) I.L.R. 9 Mad. 64 (F.B.). (2) (1918) I.L.R. 43 Mad. 464.

and is not lost, but is only in abeyance, by reason of an affliction which carries with it disqualification. Consequently, on the death of all other members of the joint family the disqualified member takes the whole of the property by survivorship. In delivering the judgment of the Bench, SESHAGIRI AYYAR J. said:

"If the exclusion is not based on original sin or subsequent incapacity to offer oblations and the like, the suggestion that it was due to a belief in the inability of the heir to manage temporal affairs appears more plausible. Very likely the rule is an outcome of a hazy notion that the property should be preserved for the disqualified person by those who are related to him. The law as to guardianship has developed much in later days. Even now it is not perfect. It looks as if the old law-givers by providing for maintenance did not intend to deprive the heir of his inheritance, but only to provide for its management during incapacity."

SESHAGIRI AYYAR J. discussed the question further in the light of what is stated in the *Sarasvati Vilasa* and came to the conclusion that the right to a share comes into existence at birth, and subsists all through, although it is incapable of enforcement at the time of partition, because of the disqualification then existing. This decision is in keeping with the judgment in *Krishna v. Sami*(1) which was referred to.

The decision of this Court in *Pudiava Nadar v. Pavanasa Nadar*(2) conflicts with *Krishna v. Sami*(1) and *Muthusami Gurukkal v. Meenammal*(3), particularly with the latter. In *Pudiava Nadar v. Pavanasa Nadar*(2) this question was referred to a Full Bench:

"Is a Hindu who is congenitally blind thereby excluded from the inheritance or has the rule become obsolete?"

(1) (1885) I.L.R. 9 Mad. 64 (F.B.). (2) (1922) I.L.R. 45 Mad. 949 (F.B.).
(3) (1918) I.L.R. 43 Mad. 464.

AMIRTHAMMAL
v.
VALLIMAYIL
AMMAL.
LEACH C.J.

AMIRTHAMMAL
v.
VALLIMAYIL
AMMAL.
LEACH C.J.

One Kanakku Nadan had four sons, the plaintiff, the ninth defendant, Subbiah Nadan and Ulagamuthu Nadan. The plaintiff separated from his father, who lived with his other three sons, one of whom (the ninth defendant) was afflicted with congenital blindness. Kanakku Nadan, who had died before the date of the suit, had conveyed his property to his son-in-law, who in turn conveyed it to the second and third defendants. The plaintiff challenged the validity of these transactions. When he filed the suit the only brother alive was the ninth defendant. The defendants contended that the fact that the ninth defendant was alive was a bar to the suit. The plaintiff was by reason of the separation outside the family and, if *Muthusami Gurukkal v. Meenammal*(1) was rightly decided, the family estate had devolved upon the disqualified member as he was the sole surviving member of the joint family, the plaintiff having left it. The Court, which consisted of SCHWABE C.J. and OLDFIELD and COUTTS TROTTER JJ., held that the plaintiff, notwithstanding that he had separated from the family, was entitled to maintain the suit, and apparently he was given a decree for possession of the property. The Court considered that the blind brother was excluded from the inheritance and that the rule of exclusion had not become obsolete.

SCHWABE C.J. regarded the text of Yajnavalkya quoted by Vijnaneswara in placitum 1 of section X of the second chapter of the Mitakshara as authority for the opinion that a person born blind is not a coparcener. He ventured to criticize the judgment of TURNER C.J. in *Krishna v. Sami*(2) in that it placed

(1) (1918) I.L.R. 43 Mad. 464. (2) (1885) I.L.R. 9 Mad. 64 (F.B.).

reliance on the Sarasvati Vilasa. He considered that the word "share" would be better translated as "interest". I do not know on what SCHWABE C.J. based his opinion, but it is to be observed that the translation used in *Krishna v. Sami*(1) by TURNER C.J. is an accepted translation and that he was sitting with MUTTUSAMI AYYAR J., who possessed, I understand, a knowledge of Sanskrit. My learned brothers who are now sitting with me are in that fortunate position and they tell me that the word "share" is a translation of the Sanskrit word *amsa* which means "fraction" and therefore in this connection should be translated as "share". I am not prepared to accept *Pudiava Nadar v. Pavanasa Nadar*(2) in preference to *Krishna v. Sami*(1) where the two decisions conflict, but even if I were so inclined I should not be able to follow *Pudiava Nadar v. Pavanasa Nadar*(2) because the decision in *Krishna v. Sami*(1) is a decision of a larger Bench and therefore is an overriding authority.

The only other decision of this Court which calls for mention is that given in *Venkateswara Pattar v. Mankayammal*(3). It was decided by VARADACHARIAR and BURN JJ. and, in delivering the judgment of the Bench, VARADACHARIAR J. said :

" Among members of the joint family, placitum 7 of the Mitakshara does not in terms draw a distinction between cases of congenital disqualification and cases of supervening disqualification. But, here again, the logical application of the theory of right by birth, may justify a differentiation between the two cases, because the congenitally disqualified man would not have acquired a right by birth at all. The mere fact that the right of maintenance is equally available

(1) (1885) I.L.R. 9 Mad. 64 (F.B.). (2) (1922) I.L.R. 45 Mad. 949 (F.B.).
(3) (1934) 69 M.L.J. 410.

AMIRTHAMMAL
v.
VALLIMAYIL
AMMAL.
LEACH C.J.

AMIRTHAMMAL
v.
VALLIMATIL
AMMAL.
LEACH C.J.

in both cases does not compel the view that the legal status must be taken to be the same in both cases."

The facts in that case did not call for a decision of the first question raised in this appeal and I do not read the judgment as expressing a definite opinion on the question under discussion.

I regard *Krishna v. Sami*(1) as being binding on the Court, but I go further and say that I respectfully agree with all that is said in the judgment delivered in that case. It is a fundamental rule of Hindu law that a son born to a member of a joint family has on birth the right to share in the family estate. The fact that a son is born with an affliction which disqualifies him from enjoying his share does not rob him of his birthright. The affliction merely prevents his enjoyment of the right while the affliction lasts. The fact that the ancient texts recognize that his son, should one be born to him, has the right to share in the family estate is in itself an indication that he is a member of the coparcenary. In *Commissioner of Income-tax, Punjab v. Krishna Kishore*(2) the Privy Council expressly recognized that under Hindu law, where the estate is impartible and the holder is joint with his kinsmen, it is the undivided family and not the holder who is the owner of the estate. Only the senior member has the right of enjoyment of the properties forming the family estate, unless there be a custom giving the junior members a subsidiary right of maintenance out of them. I can see no difference in principle here and this provides an additional reason for reading the words "excluding them from participation" used in the quotation from Yajnavalkya in placitum 1 of section X, Chapter II, of the Mitakshara as meaning exclusion from enjoyment of the share

(1) (1885) I.L.R. 9 Mad. 64 (F.B.). (2) I.L.R. [1942] Lah. (P.C.).

while the affliction continues. The main reason is what is stated in the subsequent placita and in *Sarasvati Vilasa*.

I turn now to the question whether a congenital idiot can be lawfully married. Placita 9, 10 and 11 of Chapter X clearly contemplate the marriage of a disqualified person and *Sarasvati Vilasa* which is an accepted authority in Madras emphasizes this. The learned Advocate for the respondent has said that in these days it is unthinkable that a congenital idiot should be allowed to marry, and has pointed to the observations of the learned editor of the tenth edition of Mayne embodied in pages 150 to 153 of that edition. There is to be found there the statement that the marriage of a lunatic, an idiot or an impotent person is invalid under Hindu law and reliance is placed on the decision of the Privy Council in *Mouji Lal v. Chandrabati Kumari*(1). On the basis of that decision the learned author regards the judgment of this Court in *Venkatacharyulu v. Rangacharyulu*(2) as being erroneous. I shall refer to these cases in more detail in a moment, but before doing so I may point out that at page 106 of the sixth edition of the work, the last edited by Mr. Mayne himself, there is this statement:

"As the great and primary object of marriage is the procuring of male issue, physical capacity is an essential requisite, so long as mere selection of a bridegroom is concerned; but a marriage with a eunuch is not an absolute nullity as with us. Mental incapacity stands in the same position. While the matter rested in contract, no Court, I imagine, would treat a promise to marry a lunatic or an idiot as binding; but the marriage, if celebrated, would be valid." In the light of the texts which I have quoted I regard this as the correct statement of the law. Although

(1) (1911) I.L.R. 38 Cal. 700 (P.C.). (2) (1890) I.L.R. 14 Mad. 316.

AMIRTHANMAL
v.
VALLIMAYIL
AMMAL.
LEACH C.J.

infant marriages are now prohibited by statute the Hindu law recognized the validity of infant marriages. When a minor is married it means that his father or guardian has arranged the marriage for him.

In *Mouji Lal v. Chandrabati Kumari*(1) Sir ARTHUR WILSON, in delivering the judgment of the Board, observed that the objection to a marriage on the ground of mental incapacity must depend on a question of degree. The Judicial Committee was not, however, called upon to consider in that case the question whether there could be a lawful marriage of a congenital idiot. Their Lordships were considering whether an adult who had previously married, was so mentally afflicted that he was incapable of entering into a contract for a second marriage.

In *Venkatacharyulu v. Rangacharyulu*(2) MUTTU-SWAMI AYYAR and SHEPHARD J.J. observed:

"There can be no doubt that a Hindu marriage is a religious ceremony. According to all the texts it is a samskaram or sacrament, the only one prescribed for a woman and one of the principal religious rites prescribed for purification of the soul. It is binding for life because the marriage rite completed by saptapadi or the walking of seven steps before the consecrated fire creates a religious tie, and a religious tie when once created, cannot be untied. It is not a mere contract in which a consenting mind is indispensable. The person married may be a minor or even of unsound mind, and yet, if the marriage rite is duly solemnized, there is a valid marriage."

In *Muthusami Gurukkal v. Meenammal*(3) SESHAGIRI AYYAR J. said:

"The view is that, if any of the excluded persons is capable of marriage and of begetting children, their shares should be managed for their benefit, and they should be given maintenance. This seems to follow from Manu, Chapter IX,

(1) (1911) I.L.R. 38 Cal. 700 (P.C.). (2) (1890) I.L.R. 14 Mad. 316.
(3) (1918) I.L.R. 43 Mad. 464.

Sloka 203. The professors of the Science of Eugenics may rightly protest against this tacit assumption by the ancient sages that an insane person can marry; but so long as the State does not prohibit such marriages the law cannot be abrogated. The ancient law-givers even provided for the begetting of children on the wife of the incapacitated person. They seem to have been as anxious for giving facilities for the procreation of children as some of the sanest publicists and the heads of States after the Great War are to recognize and encourage the rearing up of offspring however begotten. However that may be, the view of the author of *Sarasvati Vilasa* is more in consonance with the view that the right exists, but is only obscured for the time being. Mr. Srinivasa Ayyangar suggested that the parenthetical clause about capacity for marriage, suggested by the author of the *Sarasvati Vilasa*, does not destroy the root doctrine that the right is enforceable only, if and when there is full mental capacity at the date of partition. But the author distinctly says that the share should be managed because of the possibility of marriage, thereby indicating that it exists and is not lost altogether."

I consider that the opinions expressed in *Venkatacharyulu v. Rangacharyulu*(1) and *Muthusami Gurukkal v. Meenammal*(2) and by Mr. Mayne in the sixth edition of his work are preferable to the opinion expressed by the learned author of the tenth edition. It is undoubtedly abhorrent to a modern mind that a congenital idiot should be allowed to marry, but the Court here can only have regard to the personal law, and the personal law of the Hindu undoubtedly does regard such a marriage as being possible.

In the present case Chellakrishna's father arranged his marriage and his wife gave birth to two sons. For the reasons given I hold that Chellakrishna was lawfully married and as he had issue he has shown that he was capable of transmitting

(1) (1890) I.L.R. 14 Mad. 316. (2) (1918) I.L.R. 43 Mad. 464.

AMIRTHANMAL
v.
VALLIMAYIL
AMMAL.
LEACH C.J.

AMIRTHANMAL
v.
VALDIMAYIL
AMMAL.
LEACH C.J.

heritable blood, which means that the case comes completely within *Krishna v. Sami*(1). In these circumstances his father had no right to bequeath the family estate to his widow and as the plaintiff's case rests entirely on the will her suit fails. My learned brothers agree with this conclusion and consequently the suit will be dismissed with costs throughout.

KRISHNASWAMI AYYANGAR J.—I agree.

SOMAYYA J.—In view of the importance of the question arising in this case, I wish to add a few words.

The question for decision is whether a disqualified person is a coparcener and has a title to his legitimate share of the family property notwithstanding the disqualification, being only excluded from enjoyment during the period of disqualification.

On this difficult question we derive no help from the *Mitakshara*, the well-known commentary of *Vijnaneswara* on the text of *Yagnavalkya*. The point is clarified in the *Sarasvathi Vilasa*, a work of very high authority in Southern India. The author elucidates the position in *placita* 148 and 149.

148. *Manu* also describes those who are ineligible for heritage: "Impotent persons and outcasts do not take shares: so also those who are blind, and those who are born deaf, madmen, idiots, and the dumb, and those who are memberless."

The commentator's remarks on this text are set out in *placitum* 149. He takes each word in *Manu's* text and gives his own commentary. First he takes impotent persons and outcasts, the corresponding Sanskrit expression being *हीनपत्ति* a compound noun in which both the impotent persons and the outcasts are

mentioned together. As regards these persons (impotents and outcasts) the commentator states that they do not take shares. The Sanskrit expression is *अनंशौ*. *Amsa* means a share derived from the Sanskrit root *अंश्* = to divide. The commentator says that these two classes of persons are पोष्यौ "to be maintained by their brothers who are eligible for the heritage, or by those who take the estate, or by those who take the women".

Then he takes the born blind and the born deaf. In the corresponding Sanskrit text these two are mentioned in a compound noun *जात्यन्धबधिरौ*. The commentator says what their status is. This is important and the original of the commentary runs thus:

जात्यन्धबधिराविति द्वित्योक्त्या तयोरंशो ऽस्त्येव ।
किंवंशयुक्तावपि पोष्यौ विवाहसम्भावात् ॥

Foulkes translates this passage thus:

"Those who are born blind and those who are born deaf', the pair thus mentioned, though a share *certainly* belongs to them, are to be nourished and cherished, notwithstanding their being endowed with a share, because they are marriageable."

He further explains the meaning:

"By the use of the word 'so', the inner meaning is, that deformed persons, if they are eligible for marriage, are share-takers, and are to be nourished and cherished."

The word "share-taker" is here obviously used in contrast with "share-enjoyer" i.e., they are not share-enjoyers because they are excluded from participation. But, as the commentator says, a share undoubtedly does exist. *अंशोऽस्त्येव*. The word एव is a very significant one.

AMIRTHANMAL
v.
VALDIMAYIL
AMMAL.
SOMAYYA J.

(1) (1885) I.L.R. 9 Mad. 64 (F.B.).

ANANTHAMMAL
v.
VALLEMMATHIL
ANMAL.
SOMAYYA J.

Then he takes madmen, idiots and the dumb, these three being comprised in one compound noun in Sanskrit, मन्मदमूर्खमूढ. This is translated by Foulkes thus:

"Madmen, idiots and the dumb, by being mentioned in a group, these also are to be nourished and cherished, but they are not share-takers. 'Even if they are eligible for marriage' is to be supplied, etc., etc."

"Even if they are eligible for marriage" as given in Foulkes' translation is not a correct one. The original Sanskrit expression is विवाहाय न वेद् and means: "If they are not eligible for marriage' is to be supplied". The letter न denoting 'not' is omitted in the translation. So the meaning is: If these people, madmen, idiots and the dumb, are not eligible for marriage, then they are not share-takers, implying that, if they are eligible for marriage, they are certainly share-takers. We are not concerned with the rest of this chapter.

The expression अस्त्येव "astyeva" means they do take shares. The word 'एव' is a very significant expression. Apte in his Sanskrit-English Dictionary, page 316, explains the word एव "eva" thus:

"This particle is most frequently used to strengthen and emphasize the idea expressed by a word 'just-quite-exactly'."

According to this author, therefore, if the persons who are disqualified are capable of contracting a marriage, they are undoubtedly sharers.

I agree generally with the judgment just delivered by my Lord the Chief Justice.

V.V.C.

APPELLATE CIVIL.

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

SAIT PARASURAM BYAS (PETITIONER), APPELLANT,

v.

THE SUB-COLLECTOR, RAJAHMUNDY, AND
ANOTHER (RESPONDENT AND REFERRING OFFICER),
RESPONDENTS.*

1942,
March 26.

Land Acquisition Act (I of 1894), sec. 23—Market price—Lease for a term from East India Company with prospect of having land converted into ryotwari tenure—Lessee's interest in the unexpired term of lease together with the added value arising from such prospect to be valued in fixing market price.

A claimant under the Land Acquisition Act was the successor in title of a lessee under a lease granted by the East India Company and on the date of the notification under section 4 of the Act the lease had still a few years to run. The Government had issued an order the effect of which was that it would ordinarily convert such leaseholds into ryotwari tenure and regard the lessee as being entitled to a patta.

Held: The market price of the claimant's interest in the land acquired was his lessee's interest when the notification appeared, together with the added value arising from the prospect of having the land converted into a ryotwari tenure at the end of the lease.

APPEAL against the decree of the District Court of East Godavari at Rajahmundry, dated 23rd February 1939, and passed in Original Petitions Nos. 26 and 32 of 1937.

V. Govindarajachari for appellant.

D. A. Krishna Variyar for Government Pleader
(K. Kuttikrishna Menon) for first respondent.
Second respondent was not represented.

* Appeal No. 144 of 1940.

PARASURAM
BYAS
v.
SUB-COLLECTOR,
RAJAHMUNDRY.
LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises an interesting question with regard to the market price of certain land in the town of Rajahmundry acquired by the Government in proceedings instituted under the Land Acquisition Act. When the notification was issued under section 4 of the Act on 25th January 1937, the appellant and the second respondent appeared as claimants to the land. The question of the respective interests of the appellant and the second respondent has not yet been decided, but the appeal can proceed on the footing that the appellant is entitled to the amount awarded in the proceedings. The District Judge of East Godavari has found that on the date of acquisition the market value of the land which measured 11,541 square feet was Rs. 1,676-13-0, to which was to be added the solatium of fifteen per cent. A lease of the land for a term of ninety-nine years was granted to Arbuthnot and Company by the East India Company on 4th July 1848 and therefore the term expires on 3rd July 1947. The appellant claims to be the successor in title of Arbuthnot and Company. The figure of Rs. 1,676-13-0 represents the freehold value of the land but the District Judge held that the lessee was only entitled to one-eighth of that value, relying on a statement in the Land Acquisition Manual published by the Government of Madras. The appellant does not claim to be entitled to compensation on the basis of full ownership, but he says that, under an order of the Government issued on 28th October 1898, he would, if the land had not been acquired, be entitled at the expiry of the lease to hold the land on ryotwari tenure and the fact that there existed this right added to the market value of his interest in the property as the lessee on the date of notification.

PARASURAM
BYAS
v.
SUB-COLLECTOR,
RAJAHMUNDRY.
LEACH C.J.

The order of the Government of Madras, dated 28th October 1898, on which the appellant relies, cancelled the orders of the Government previously issued under which leases for ninety-nine years could be converted into permanent holdings with a fixed assessment. The order directed that such leases would be dealt with in future in accordance with the following principles:—

“(i) Where the lease has actually expired and the land has legally reverted to the Government, ordinary ryotwari pattas will be issued, the lands being classed as dry or wet in accordance with ordinary settlement principles.

(ii) Where the lease is still running, the leaseholder will ordinarily be given the option of taking an ordinary ryotwari patta subject to periodical revision. If, however, the rent reserved under the lease is higher than the settlement rates, the lease should be allowed to run to its term, a ryotwari patta reserving for the unexpired term an assessment equal to the rent reserved under the lease.

(iii) Where the leased lands are in towns, the rates prescribed for the assessment of town sites should be applied instead of rates calculated in the ordinary settlement principles.”

Mr. Govindarajachari contends that the appellant is much in the same position as a lessee whose lease gives to him the right to a renewal, and in this connexion he has referred to the decision in *Bogg v. Midland Railway Co.*(1). Mr. Govindarajachari is putting his case too high when he says that the order of the Government of 28th October 1898 gives him a right to hold the land under ryotwari tenure. The order does not go to this extent, but it indicates that the Government will ordinarily convert such leaseholds into ryotwari tenure and regard the lessee as being entitled to a patta. Although this does not amount to an absolute right, the fact that this is the course which the Government ordinarily takes would tend to increase

(1) (1867) L.R. 4 Eq. 310.

PARASURAM
BYAS
v.
SUB-COLLECTOR,
RAJAHMUNDRY.
LEACH C.J.

the value of the lessee's interest. Section 23 of the Land Acquisition Act provides that the market value to be taken is the market value on the date of the notification, which means the market price ruling immediately before the publication of the notification. Therefore the market price of the appellant's interest in the land acquired was his lessee's interest, plus the added value arising from the prospect of having the land converted into a ryotwari tenure at the end of the lease.

Mr. D. A. Krishna Variyar, who has appeared on behalf of Government, has suggested that the lessee's right to compensation could not be anything more than that based on the unexpired portion of the lease, because the Government, having decided to acquire the land, would not be prepared to follow the course laid down in its own order of 28th October 1898. But this argument overlooks the fact that all that the Court is concerned with is what the value of the lessee's interest was in the market when the notification appeared, and the market value must be based on all the rights which the lessee had and on his potential rights.

In *Vallabhadas Naranji v. The Collector*(1) the Privy Council held that the value of the land which in itself was worthless, but had a potential use for salt works was the market value of the potentiality. Anticipating the argument that there was not an absolute right in the appellant to have the lease converted into ryotwari tenure, Mr. Govindarajachari referred to the case of *Holt v. Gas Light and Coke Co.*(2). There a volunteer corps obtained land on lease for the purpose of using it as a rifle range.

(1) (1929) 56 M.L.J. 750 (P.C.). (2) (1872) L.R. 7 Q.B. 728.

PARASURAM
BYAS
v.
SUB-COLLECTOR,
RAJAHMUNDRY.
LEACH C.J.

There were three blocks. The land at both ends was held by the corps under lease; but the intermediate land was held under a licence which could be terminated at any time. The respondent company acquired the land at one end and the question was what was the principle on which compensation should be awarded. It was suggested on behalf of the respondent company that, as the intervening land was held merely under a licence which depended on the will of the owner, the acquisition of the adjoining portion meant no loss in respect of the land held under the licence. In this connexion COCKBURN C.J. said:

"What matters it that between the two there intervenes a piece of land which does not belong to the parties claiming compensation except this, that, inasmuch as their right to use that land as part of the range depended on the will or licence obtained from the owner of the land, it was precarious. But inasmuch as there was no reason to suppose he would alter his will in respect of it and change his mind, and give them notice that the licence or permission given should be withdrawn, I see no reason why the Jury should not, looking at the whole state of things, come to the conclusion that substantially this was not of so precarious a tenure but that they might infer that the existing state of things would not be altered; and that that which had been used before as an entire rifle range would have been so continued, and, consequently, that the land had a value which it would not have lost but for the intervention and act of the company; and, therefore, there should be some compensation for this loss."

Before the land acquisition proceedings were instituted here, there was no reason to believe that Government would not grant to the lessee ryotwari tenure at the end of his period or during it if he applied, and if the holding of the land under ryotwari tenure had a value, that value increased the market price of the lessee's interest. The District Judge has not taken into consideration this factor and the case will be remanded to him to decide in the light of this

PARASURAM
BYAS
v.
SUB-COLLECTOR,
RAJAHMUNDRY.
LEACH C.J.

judgment what the value of the lessee's interest in this land really is. The parties will be at liberty to adduce fresh evidence should they so desire.

The appellant is entitled to costs, but we do not think he should be given full costs because he has stamped his memorandum of appeal on the basis that he is entitled to the full Rs. 1,676-13-0. An order for half the usual costs will meet the case. The court-fee will be refunded.

G.R.

APPELLATE CIVIL.

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

KATHERSA ROWTHER (APPELLANT), APPELLANT,

v.

ABDUL RAHIM SAHIB AND TWO OTHERS (RESPONDENTS),
RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. VIII, r. 6 (1)—
Defendant pleading set-off, to be deemed plaintiff within
O. II, r. 2—Defendant pleading set-off in a former suit for
less than the amount due to him—Later suit by defendant's
assignee for balance due—Bar under O. II, r. 2.*

A filed a suit against B for the recovery of Rs. 2,891-5-4 in a District Munsif's Court. B, who was entitled to recover from A a sum in excess of the pecuniary jurisdiction of the District Munsif's Court, namely Rs. 3,000 with interest, pleaded a set-off under Order VIII, rule 6 (1), Civil Procedure Code, stating that he was liable only for Rs. 1,151-6-3. He stamped his written statement claiming the set-off on the sum of Rs. 1,151-6-3. The District Munsif found that B was indebted only in the sum of Rs. 1,151-6-3 and that more than this sum

* Letters Patent Appeal No. 12 of 1941.

was due by A to B. On this basis he dismissed the suit. Subsequently B assigned to C the balance of the amount owing to him by A after giving credit to Rs. 1,151-6-3. C thereafter filed a suit against A to recover the said balance.

Held that a defendant who pleads a set-off under Order VIII, rule 6, of the Code of Civil Procedure, is to be deemed to be a plaintiff within the meaning of Order II, rule 2, and that Order II, rule 2, was a bar to the above suit.

Naubut Pattak v. Mahesh Narayun Lal(1) followed.

APPEAL under Clause 15 of the Letters Patent against the decree of ABDUR RAHMAN J. in Second Appeal No. 226 of 1939 preferred against the decree of the District Court, Madura, in Appeal Suit No. 14 of 1938 (Original Suit No. 28 of 1936, Court of Subordinate Judge, Dindigul).

T. V. Muthukrishna Ayyar for K. V. Krishnaswami Ayyar and K. S. Ramamoorthy for appellant.

T. M. Krishnaswami Ayyar and B. Somanatha Rao for respondents.

The JUDGMENT of the Court was delivered by LEACH C.J.—The question which arises here is whether the defendant who pleads a set-off under Order VIII, rule 6, of the Code of Civil Procedure, is to be deemed to be a plaintiff within the meaning of Order II, rule 2, and consequently has to suffer the consequences of an omission. Although the point of law can be stated shortly, the facts of the case are somewhat complicated and it is necessary in order to appreciate the position to refer to them at some length.

Seeni Rowther, the father of the first and second defendants, had four sons, the other two being named Muhammad Abdulla and Abdul Rahiman respectively. The father died on 4th January 1922, and in the following year the sons decided to partition the assets before discharging the debts due by the estate. Each

KATHERSA
v.
ABDUL RAHIM.

LEACH C.J.

(1) (1905) I.L.R. 32 Cal. 654.

KATHERESA
v.
ABDUL RAHIM.
LEACH C.J.

of the brothers was allotted specific properties and he undertook to discharge specified debts. The terms of the partition were set out in a deed, dated 1st August 1923. Each brother agreed that, if he did not discharge the debts for which he undertook responsibility, any brother called upon to pay could claim against the defaulting brother a charge on the properties allotted to him. In Original Suit No. 522 of 1915 of the Court of the Town Munsif of Madura a money decree was obtained against the father. He failed to pay the decretal amount and when the sons partitioned the estate there was due under this decree a sum of Rs. 2,548 which the first defendant undertook to pay. In Original Suit No. 105 of 1914 in the Court of the Subordinate Judge of Madura a mortgage decree had been passed against the father, and on 1st August 1923 the amount due to the decree-holder was a sum of Rs. 36,000. Under the terms of the partition the first defendant was required to pay Rs. 10,795 of this sum, the second defendant Rs. 10,090, Muhammad Abdulla Rs. 13,495, and Abdul Rahiman Rs. 1,620.

The first defendant failed to pay the amount due to the decree-holder in Original Suit No. 522 of 1915. The result was that the decree-holder attached property which had been allocated in the partition to the second defendant. On 12th September 1925 the attached property was sold and the purchaser obtained possession. The value of the property was Rs. 3,000. The second defendant and Muhammad Abdulla failed to pay their shares of the decree obtained against the father in Original Suit No. 105 of 1914 and in order to avoid a sale of the properties which had been allotted to the first defendant and Abdul Rahiman, they were compelled to pay what was outstanding. In this connection the first defendant had to expend Rs. 2,691-5-4.

KATHERESA
v.
ABDUL RAHIM.
LEACH C.J.

In Original Suit No. 26 of 1931 of the Court of the District Munsif of Palni the first defendant sued to recover from the second defendant and Muhammad Abdulla the Rs. 2,691-5-4. The second defendant pleaded that he was only responsible for Rs. 1,151-6-3 of this amount and that he was entitled to recover from the first defendant a sum in excess of the pecuniary jurisdiction of the Court, namely, in excess of Rs. 3,000, by reason of the default which the first defendant had made in paying the amount due to the decree-holder in Original Suit No. 522 of 1915. By this plea of set-off he sought to defeat the first defendant's suit and at the same time leave himself free to bring a suit for any balance which might be due to him. The District Munsif held that the second defendant was indebted to the plaintiff, the present first defendant, in the sum of Rs. 1,151-6-3 as claimed by the first defendant but that more than this sum was due by the first defendant to the second defendant and on this basis he dismissed the suit. On appeal the learned Subordinate Judge, Dindigul, agreed with this decision, as did ABDUR RAHMAN J. on second appeal to this Court.

On 13th November 1935 the second defendant assigned to the present appellant the balance of the amount owing to him by the first defendant, after giving credit for the Rs. 1,151-6-3. On 2nd September 1936 the appellant instituted in the Court of the Subordinate Judge of Dindigul the present suit to recover from the first defendant the balance of his indebtedness to the second defendant. The pleas raised by way of defence included the contention that the suit was barred by reason of the provisions of Order II, rule 2, of the Code of Civil Procedure, and that all that the appellant had received was a mere assignment of a right to sue which meant that the suit

KATHERSA
v.
ABDUL RAHIM.
LEACH C.J.

could not be maintained. The Subordinate Judge held that the suit was not barred by reason of Order II, rule 2, but he upheld the contention that the assignment was the assignment of a mere right to sue and therefore the suit was bad. On appeal the District Judge of Madura disagreed with the Subordinate Judge that there had been an assignment of a mere right to sue and also disagreed with him on the question of the applicability of Order II, rule 2. The District Judge considered the provisions of that rule were fatal to the suit. The appellant then appealed to this Court and his appeal was heard by ABDUR RAHMAN J., who agreed with the District Judge that Order II, rule 2, was a bar. The present appeal is from the judgment of ABDUR RAHMAN J. under Clause 15 of the Letters Patent, the learned Judge having given the requisite certificate.

Order VIII, rule 6 (1), states that where, in a suit for the recovery of money, the defendant claims to set-off against the plaintiff's demand an ascertained sum or money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as in the plaintiff's suit the defendant may present a written statement containing the particulars of the debt sought to be set-off. Sub-rule 2 says that this written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off. Therefore the defendant who pleads a set-off is in the position of a plaintiff. Moreover his written statement has to be stamped according to the value of the relief he claims.

Order II, rule 2 (1), says that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but he may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. Sub-rule 2 says that, when a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished. Sub-rule 3 states that, when a person is entitled to more than one relief in respect of the same cause of action, he may sue for all or any of such reliefs, but if he omits any, except with the leave of the Court, he shall not be allowed to sue later for the relief omitted. This rule makes it quite clear that a cause of action cannot be split up although reliefs may be if the Court agrees. If the plaintiff omits part of the claim which he is entitled to make in respect of the cause of action, he has for ever lost his right to the part of the claims omitted.

The question whether the defendant who pleads a set-off is bound by Order II, rule 2, was discussed by a Bench of the Calcutta High Court in *Nawbut Pattak v. Mahesh Narayan Lal*(1) and it was held that he was. The position was discussed at length by MOOKERJEE J. whose judgment ABDUR RAHMAN J. accepted as embodying a correct statement of the law. We agree. Order VIII, rule 6 (2), requires the written statement put in by a defendant pleading a set-off to be such as to enable the Court to pronounce a final judgment both in respect of the plaintiff's claim and of the defendant's claim.

On behalf of the appellant, Mr. T. V. Muthukrishna Ayyar says that the District Munsif who tried Original

(1) (1905) I.L.R. 32 Cal. 654.

KATHERBA
v.
ABDUL RAHMAN.
LEACH C.J.

Suit No. 26 of 1931 was content to proceed with the case on the lines of the second defendant's written statement and therefore, his client, who stands in the shoes of the second defendant, should be allowed to adopt the case which was indicated in the written statement. It is manifest that the second defendant ought not to have been allowed to rest his plea of set-off on the written statement which he filed. His claim against the first defendant was for Rs. 3,000 and interest from 12th September 1925, which therefore was in excess of the jurisdiction of the District Munsif's Court. There were two courses open to the second defendant when the first defendant sued him. He could either set up his own claim by way of set-off and confine it to the sum of Rs. 3,000, the limit of the pecuniary jurisdiction of the Court, or he could file a separate suit in the Court of the Subordinate Judge and ask the Subordinate Judge to transfer the first defendant's suit to his Court and try the two suits together. He adopted neither course and merely stamped his written statement to the value of Rs. 1,151-6-3. The fact that the second defendant succeeded in persuading the District Munsif to dispose of the first defendant's suit on the lines indicated by the second defendant does not mean that he is now outside Order II, rule 2. For the reasons given in *Nawbut Pattak v. Mahesh Narayun Lal*(1) we consider that Order II, rule 2, has application, and this means that the appellant cannot carry the matter further.

Before us, as before ABDUR RAHMAN J., the appellant laid great stress on the decision of MATHEW J. in *Webster v. Armstrong*(2). That case had reference to the practice in County Courts in England in 1885

(1) (1905) I.L.R. 32 Cal. 654.

(2) (1885) 54 L.J. Q.B. 236.

KATHERBA
v.
ABDUL RAHMAN.
LEACH C.J.

when there was no right of counter-claim. The defendant could plead a set-off, but merely in bar of the suit. He could not ask for a decree in his favour for any balance that might be due. ABDUR RAHMAN J. considered that this case had no application and we again agree. The position is now very different in England because a defendant can bring a counter-claim, and under the provisions of Order XIX, rule 3, of the Rules of the Supreme Court, the Court has power to pronounce a final judgment in the same action both on the original and on the cross-claim. We are bound by the provisions of the Code of Civil Procedure and our reading of Order VIII, rule 6, in conjunction with Order II, rule 2, is that the appellant was precluded by the course taken by the second defendant in the former suit from bringing this present action. Consequently the appeal fails and will be dismissed with costs of the first respondent.

We trust that this decision will see an end to litigation in connection with the estate of Seeni Rowther. It is now over twenty years since he died and the attitude adopted by the first and the second defendants with regard to their liability to pay their shares of the debts of the estate does not redound to their credit. The sons got possession of all the assets but some of the creditors were kept out of their money for a long time. The present suit was instituted some six years ago and has been pressed in four Courts with the same result in each of them.

G.R.

APPELLATE CIVIL.

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

1942,
February 24. PALANI MUDALIAR AND ANOTHER (RESPONDENTS 1 AND 2),
APPELLANTS,

v.

M. NATARAJAN alias AMALORPAVANATHAN AND
ANOTHER (APPLICANT AND RESPONDENT 3),
RESPONDENTS.*

*Advancement—Doctrine of—Indian Christians—
Inapplicability to—Indian Trusts Act (II of 1882), sec. 82.*

The English doctrine of advancement does not apply to Indian Christians. The doctrine is entirely unknown to the personal laws of the vast majority of the inhabitants of India and Indian Courts have persistently refused to apply it to the Hindus and the Muhammadans.

Case law reviewed.

APPEAL from the order and judgment of KRISHNASWAMI AYYANGAR J., dated 21st July 1941, and passed in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 143 of 1941 in Insolvency Petition No. 36 of 1941.

M. Ramachandra Rao and K. N. Pandalai for appellants.

N. Srinivasa Ayyangar for first respondent.

Official Assignee (V. Tyagarajan), second respondent, appeared in person.

Cur. adv. vult.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—The main question to be decided in this appeal is whether the English doctrine of advancement

* Original Side Appeal No. 35 of 1941.

applies to Indian Christians. The rule does not apply to Hindus or Muhammadans; see *Gopeekrist Gosain v. Gungapersaud Gosain*(1), *Lakshmiah Chetty v. Kothandarama Pillai*(2), *Bilas Kunwar v. Desraj Ranjit Singh*(3) and *Moulvie Sayyud Uzhur Ali v. Mussumat Bebee Utaf Fatima*(4). In *Maung Tun Pe v. B. K. Haldar*(5) a Full Bench of the Rangoon High Court held that it did not apply to Burmese Buddhists. In *Kerwick v. Kerwick*(6) the Privy Council held that the presumption of an advancement does apply to persons who are born in India of English parents and have resided in India all their lives, except for occasional visits to England. Admittedly there is no decision of the Privy Council or of Indian Courts which has extended the application of the principle.

Before discussing further the question whether the doctrine of advancement applies to Indian Christians, it will be convenient to set out the relevant facts. The appeal arises out of an application filed by the first respondent in insolvency proceedings in this Court. The insolvent, Ponnammuthammal, is the wife of the first respondent who applied for a declaration of his title to a half share in a house and its site known as No. 53, Avadhanam Papier Street, Choolai, Madras. This property was purchased on 29th August 1938 in the name of the insolvent and one Harry Daniel who had married the daughter of the first respondent and the insolvent. The price paid was Rs. 6,500. The first respondent had been employed as a guard by the South Indian Railway Company, Limited. He retired in the month of January 1938, when he was paid the sum of Rs. 7,000 which was standing to his credit

PALANI
v.
NATARAJAN.
LEACH C.J.

(1) (1854) 6 M.I.A. 53. (2) (1925) I.L.R. 48 Mad. 605 (P.C.).
(3) (1915) I.L.R. 37 All. 557 (P.C.). (4) (1869) 13 M.I.A. 232.
(5) (1936) I.L.R. 14 Ran. 242 (F.B.). (6) (1920) I.L.R. 48 Cal. 260 (P.C.).

PALANI
v.
NATARAJAN.
LEACH C.J.

in the provident fund of the company, and later a sum of Rs. 2,175 which represented a gratuity for good service. The first respondent's case is that out of the moneys which he received from the railway company he provided altogether Rs. 2,500 and this has been held to be the case by the learned Judge sitting in Insolvency (KRISHNASWAMI AYYANGAR J.). When the transaction was entered into, the first respondent paid Rs. 1,500 and the father of Harry Daniel, Rs. 2,000. The balance, Rs. 3,000, was advanced by the vendors on the security of a mortgage of the property entered into by the insolvent and her son-in-law. The mortgage was discharged the same year. Out of the Rs. 3,000 due to the vendors, Rs. 1,000 was advanced by the first respondent and Rs. 2,000 was raised on a mortgage in favour of the Madras City Co-operative Bank, Limited. This deed of mortgage is dated 5th November 1938 and was executed by the first respondent, his wife, their son, their two daughters, and their son-in-law.

The property was divided into two residences, one in which the first respondent and his wife lived and the other in which their daughter and their son-in-law lived. On 28th November 1940 the insolvent executed a deed of settlement of her interest in the property in favour of her husband, her son and the daughter who had married Harry Daniel. The consideration was stated to be her natural love and affection for the beneficiaries. The deed contains these recitals:

"Whereas the settlor and one Harry Daniel jointly purchased the houses and ground 53, Avadanam Papier Road, and 4-A, Dharmaraja Koil street, Choolai, Madras, more particularly described in the schedule hereto by a deed of sale, dated the 20th day of August 1938 and whereas the settlor is in possession and occupation of one half of the said properties

and whereas the settlor has been in indifferent health for some time and desires to settle her half share in the said properties in favour of her husband, Amalorpavanathan, and her children, Louis Victor and Magalamari Ammal, the beneficiaries, out of her natural love and affection and with a view to provide for them."

The insolvent was adjudicated on 8th April 1941 and the order of adjudication was based on this deed of settlement. On 25th April 1941 the first respondent filed an application in the insolvency proceedings in which he asked for a declaration that he was the owner of half of the property and that his wife was merely a benamidar for him to this extent. He also asked for an order permitting him to remain in possession of the portion of the house occupied by him and his wife. This is the application which has given rise to the appeal. The learned Judge held that the wife was a benamidar for her husband, but his judgment makes it clear that he did not arrive at this conclusion without hesitation. The evidence, to use the learned Judge's language, is meagre, but it is certainly sufficient to establish the fact that the first respondent did provide Rs. 2,500 of the money required for the purchase of the property. In fact this has not been disputed before us. It is also accepted that if the wife is to be deemed a benamidar the husband is entitled to a half share in the property.

The appellants are creditors of the insolvent and they oppose the husband's application. In the first place they say that the Rs. 2,500 must be regarded as a loan by the first respondent to his wife. In the alternative they say that it must be regarded as an advancement to the wife for her own benefit; in other words, that he intended to make a gift of the property to her. The first contention calls for little comment. There is no evidence from which it can be concluded

PALANI
v.
NATARAJAN.
LEACH C.J.

PALANI
v.
NATARAJAN.
LEACH C.J.

that the husband intended to make a loan to his wife. In paying this money he was either intending to benefit his wife or he was using her as a benamidar.

I return now to the question whether the English doctrine of advancement applies. Both the husband and the wife are Indians of the full blood and profess the Roman Catholic faith. Being Indians they cannot claim to come within the English rule, unless the Court is prepared to hold that it should be applied on grounds of justice, equity and good conscience. I can see no reason for its application on any of these grounds. The doctrine is entirely unknown to the personal laws of the vast majority of the inhabitants of this country and Indian Courts have persistently refused to apply it to the Hindus and the Muhammadans. In delivering the judgment of the Privy Council in *Gopeekrist Gosain v. Gungapersaud Gosain*(1) KNIGHT BRUCE L.J. said :

"It is clear that in the case of a stranger the presumption is in favour of its being a *benamee* transaction, that is a trust ; but it is clear also that in this country, where the person in whose name the purchase is made is one for whom the party making the purchase was under an obligation to provide, the case is different ; and it is said that that ought to be deemed the law of India also, not because it is the law of England, but because it is founded on reason and the fitness of things, if I may use the expression, or natural justice, that on such grounds it ought to be considered the law of India. Now, their Lordships are not satisfied that this view of the rule is accurate, and that it is not one merely *proprii juris*."

Later in this judgment KNIGHT BRUCE L.J. observed :

"Various reasons may be urged against the abstract propriety of the English rule. It is merely one of positive law, and not required by any rule of natural justice to be incorporated in any system of laws, recognising a purchase

PALANI
v.
NATARAJAN.
LEACH C.J.

by one man in the name of another, to be for the benefit of the real purchaser. Their Lordships, therefore, are not prepared to act against the general rule, even in the absence of peculiar circumstances ; but in India there is what would make it particularly objectionable, namely, the impropriety or immorality of making an unequal division of property among children. This might be more striking where there were more sons than one ; but if the objection exists, it does not become less where there is only one son, for the father may have others, and in such a case the same objectionable consequences would follow as where several sons were in being."

It seems to me that these observations which are embodied in a judgment of the Judicial Committee are fatal to the plea that the English doctrine of advancement can be applied legitimately to Indians. Religious belief is not a factor in the application of the doctrine and therefore there is no reason for making an exception in the case of Indian Christians. Consequently, I hold that the presumption which is associated with the doctrine does not arise here.

Section 82 of the Indian Trusts Act, 1882, provides that where property is transferred to one person for a consideration, paid or provided by another person, and it appears that the other person did not intend to pay or provide the consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration. Therefore as the first respondent provided the money for the purchase of a half of the property, a half must be regarded as being his, unless the evidence justifies the conclusion that he intended to make a gift to his wife. The appellants say that the evidence does justify this conclusion. They point to the fact that, when the insolvent and her son-in-law obtained a loan from the Madras City Co-operative Bank, Limited, he allowed them to represent to the bank that they were the owners of the

(1) (1854) 6 M.I.A. 53.

PALANI
v.
NATARAJAN.
LEACH C.J.

property and to raise money on this basis. Then they point to the fact that he allowed his wife to settle the property on him and their son and married daughter instead of obtaining from her a declaration that she was merely his benamidar.

Are these facts sufficient to establish an intention on the part of the first respondent to make a gift in favour of his wife? KRISHNASWAMI AYYANGAR J. did not think they were sufficient and his decision cannot be disturbed unless it is shown to be wrong. The burden is upon the appellants and I am not prepared to say that the burden has been discharged. It was, of course, improper for the first respondent not to disclose the full facts to the Madras City Co-operative Bank, Limited, but he did join in the mortgage which was created in its favour and it is very likely that he thought that this was enough. His wife was an ostensible owner and he was not. Neither do I find the fact, that the first respondent allowed his wife to execute a deed of settlement instead of a declaration of his ownership, surprising, having regard to the mentality which is so often shown by litigants in a similar position. His wife owed money to the appellants who had obtained a decree against her, and it is very probable that he considered that the best method of safeguarding himself was a deed of settlement. The conduct of the first respondent is no doubt blameworthy, but this is not the deciding factor. The question which the Court has to decide is whether the evidence justifies the conclusion that the first respondent intended to make a gift to his wife, and for the reasons given I agree with the learned Judge that it is not sufficient for the purpose.

The appeal will be dismissed with costs in favour of the first respondent.

G.B.

APPELLATE CIVIL.

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

A. RAJAGOPALA IYER AND TWO OTHERS
(DEFENDANTS), APPELLANTS,

v.

S. RAMACHANDRA IYER (PLAINTIFF), RESPONDENT.*

Indian Contract Act (IX of 1872), sec. 126—Surety—Rights of—Not exhaustive in granting relief to person in the position of surety—Applicability in India of third category of cases mentioned in Duncan, Fox & Co. v. North and South Wales Bank(1) in suitable cases for granting relief to persons standing in the position of sureties by making available to them security in the hands of creditor whose debts they discharged—Transfer of Property Act (IV of 1882), sec. 58 (e)—English mortgage—Mortgage deed containing following provisions, namely, (i) in a certain event the date of payment was changed from one date to another date and (ii) the mortgagor should pay the cost of insurance and other charges—Character of mortgage not changed—First provision does not amount to mortgagor not agreeing to pay the debt on a certain date and second provision does not detract from the absolute transfer to the mortgagee within sec. 58 (e).

R was made a party to a mortgage deed executed by S (his father) in favour of B. R. made himself liable for the repayment of the debt, although not as a mortgagor. S was the only mortgagor and R was referred to in the deed as "the party of the second part" and it recited that R had agreed to join at the request of the mortgagee. The deed did not describe him as a surety and his liability was not expressly stated to be limited to default on the part of the mortgagor. In effect, R was brought in in case of need and his position was in reality that of a surety. After the death of S the mortgage was discharged out of moneys belonging to R. R claimed that he was entitled to the benefit of the security

* Original Side Appeal No. 41 of 1940.
(1) (1880) 6 App. Cas. 1.

RAJAGOPALA
v.
RAMACHANDRA.

(held by B) as against a purchaser of the property (covered by the security) in a court-sale held in pursuance of execution proceedings under a money decree obtained against the representatives of the estate of S. As against R it was contended that the suit was barred under article 132 of the Limitation Act and that article 147 was not applicable because the mortgage, though one in form an English mortgage within section 58 (e) of the Transfer of Property Act, was really an anomalous mortgage within section 58 (g), in that it contained the following provisions, namely: (i) If the mortgage debt should not be repaid on the due date, interest shall be charged at seven per cent per annum and if the interest is paid regularly every month, the date for payment shall be extended from 8th October 1916 to 8th April 1919; (ii) the mortgagor shall pay the fire insurance premiums, quit rent, assessment rates, taxes and other outgoings for the time being payable in respect of or charged upon the property; and (iii) the extension of time for the payment of the mortgage debt was not accompanied by a stipulation that the mortgagee should reconvey.

Held :—The Court, in granting relief to a person in the position of a surety, is not confined to contracts of guarantee within the meaning of section 126 of the Indian Contract Act and is free to apply the principles of equity unless the position is governed by some positive provision of Indian law. The Court is entitled in a suitable case to apply the principles stated in *Duncan, Fox & Co. v. North and South Wales Bank*(1). The present case fell within the third category of cases referred to in the above case and R was entitled to the benefit of the security.

Held further :—The mortgage was an English mortgage. The fact that in a certain event the date of payment is changed from 8th October 1916 to 8th April 1919 does not mean that the mortgagor has not contracted to pay the debt on a certain date within section 58 (e) of the Transfer of Property Act and the fact that the mortgagor has agreed to pay the cost of insurance and other charges does not detract from the absolute transfer to the mortgagee.

Case law reviewed.

(1) (1880) 6 App. Cas. 1.

APPEAL from the judgment and decree of ^{RAJAGOPALA}
SOMAYYA J., dated 16th February 1940 and 2nd May ^{v.}
1940, respectively and passed in the exercise of the ^{RAMACHANDRA.}
Ordinary Original Civil Jurisdiction of the High
Court in Civil Suit No. 146 of 1937 (pauper).

A. C. Sampath Ayyangar for appellants.

K. S. Sankara Ayyar for respondent.

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 respondent for the
redemption of a mortgage. The case presents some
unusual features and it is necessary in order to appreciate the questions involved in the appeal to state in detail the history of the case. The respondent's father, S. Subramania Ayyar, was indebted to the appellants' father, Ayyaswami Ayyar, on two promissory notes. Ayyaswami Ayyar died on 14th September 1919 and Subramania Ayyar on 15th October 1919. In 1920 the appellants instituted a suit against the widow of Subramania Ayyar, and D. Venkatarama Ayyar and M. Gopala Ayyar, who had been nominated by him as the executrix and the executors of his will. On 4th March 1921 a decree was passed in favour of the appellants for Rs. 2,939-11-0. In execution of that decree the appellants attached the property now in suit and bought it at the sale held in pursuance of an order of the Court passed in the execution proceedings. The sale certificate was issued to them on 22nd January 1925 and the appellants obtained possession on 14th May 1925. The present suit was instituted by the respondent on 14th April 1937.

The respondent's father had insured his life with the Gresham Life Assurance Society, Limited, and with the Oriental Government Security Life Assurance

LEACH C.J.

RAJAGOPALA
v.
RAMACHANDRA.
LEACH C.J.

Company, Limited. The assured assigned to his wife and the respondent, who is his eldest son, the policy issued by the former company, and the policy issued by the latter company to them and to his three other sons. In the Court below it was taken that the assignment of the second policy was only to the sons of the assured, but we have allowed the appellants to put in an extract of the assignment register and this establishes that the widow was also one of the assignees. Subramania Ayyar was indebted to a person named Johnstone and to a Mrs. Booth. To Johnstone he owed Rs. 5,145-13-4 and to Mrs. Booth, Rs. 7,000. To secure the debt to Mrs. Booth he mortgaged to her the property now in suit. On 25th October 1920, when the debt due to Mrs. Booth was discharged, there was owing Rs. 7,204-2-8. It is the respondent's case that the debt was repaid to the extent of Rs. 4,000 out of the moneys received from the Gresham Life Assurance Society, Limited, and the balance of Rs. 3,204-2-8 out of the moneys received from the Oriental Government Security Life Assurance Company, Limited. The moneys obtained from the two insurance companies did not form part of the deceased's estate. The policies having been assigned by the testator during his lifetime, on his death the assignees became entitled to receive payment by reason of the assignments, not by reason of his will. On the ground that the mortgage in favour of Mrs. Booth was discharged out of the moneys received from these insurance companies in which he had an interest, the respondent claims that he is entitled to the benefit of the security held by her and to consequential relief.

SOMAYYA J., who tried the suit, held that, of the Rs. 4,000 which was paid out of the money received from the Gresham Life Assurance Society, Limited,

Rs. 2,000 came from the respondent. Of the Rs. 3,204-2-8 which was paid out of the money received from the Oriental Government Security Life Assurance Company, Limited, the learned Judge held that one-fourth, namely, Rs. 801-0-8, was the respondent's money. As the respondent had only a one-fifth share, the figure should have been Rs. 640-12-11. Having found that the respondent had paid Rs. 2,801-0-8 towards the discharge of Mrs. Booth's mortgage SOMAYYA J. gave him a decree for this sum with interest at seven per cent per annum, and directed that the property be sold in default of payment. The sale was, however, avoided as the appellants paid the money into Court.

The appellants challenge the validity of the decree passed by the learned Judge on several grounds. They say: (i) The evidence does not establish that the respondent contributed towards the discharge of the mortgage in favour of Mrs. Booth, (ii) the respondent is not in law entitled to the benefit of the security, even if he did contribute to the repayment of Mrs. Booth's mortgage, and (iii) the suit is barred by the law of limitation.

We agree with the finding of the learned Judge that the mortgage in favour of Mrs. Booth was discharged out of the moneys received from the insurance companies, to the extent of Rs. 4,000 out of the moneys received from the Gresham Life Assurance Society, Limited, and to the extent of Rs. 3,204-2-8 out of the moneys received from the Oriental Government Security Life Assurance Company, Limited. We also agree with the learned Judge that the respondent was entitled to a half of the moneys received from the Gresham Life Assurance Society, Limited, but, as already pointed out, he was not entitled to

RAJAGOPALA
v.
RAMACHANDRA.
LEACH C.J.

RAJAGOPALA
v.
RAMACHANDRA.
LEACH C.J.

a fourth, but only to a fifth of the money received from the other company.

The main question in this appeal is whether the respondent is entitled to the benefit of the security held by Mrs. Booth. The learned Judge considered that the respondent could not be regarded as a surety within the meaning of section 126 of the Indian Contract Act, but that his case fell within the third category of the cases referred to in the judgment of Lord SELBORNE in *Duncan, Fox & Co. v. North and South Wales Bank*(1). Lord SELBORNE said that there were three classes of cases in which a surety or a person in an analogous position is entitled to the benefit of security held by the creditor, namely: (i) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety to which agreement the creditor thereby secured is a party; (ii) those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (iii) those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid.

The respondent was made a party to the mortgage deed executed by his father in favour of Mrs. Booth and he made himself liable for the repayment of the debt, although not as a mortgagor. There was only one mortgagor, the father. The respondent was referred to "as the party of the second part", and the deed

(1) (1880) 6 App. Cas. 1.

recites that he had agreed to join in at the request of the mortgagee. The document does not describe him as a surety and his liability is not expressly stated to be limited to default on the part of the mortgagor; but reading the document as a whole, it is quite clear that he was brought in in case of need and that his position was in reality that of a surety. We agree with the learned Judge that this case falls within the third category of cases referred to in *Duncan, Fox & Co. v. North and South Wales Bank*(1).

The Court in granting relief to a person in the position of a surety is not confined to contracts of guarantee within the meaning of section 126 of the Indian Contract Act and the Court is free to apply the principles of equity unless the position is governed by some positive provision of Indian law and therefore the Court is entitled in a suitable case to apply any of the principles stated in *Duncan, Fox & Co. v. North and South Wales Bank*(1). This was recognized by this Court in *Vyavan Chettiar v. Official Assignee of Madras*(2), although it was held in that case that *Duncan, Fox & Co. v. North and South Wales Bank*(1) was not in point. There, two Nattukottai Chettiars borrowed Rs. 1,00,000 from a bank on a promissory note which they both signed as makers. The bank having paid over the money, each took Rs. 50,000 for his own purposes. One of them became insolvent and the other being jointly and severally liable was called upon to repay the Rs. 1,00,000 due to the bank. The question was whether the solvent borrower who had repaid the bank was entitled to the benefit of securities which the insolvent borrower had deposited with it. The Official Assignee contended

(1) (1880) 6 App. Cas. 1.

(2) (1932) I.L.R. 55 Mad. 949.

RAJAGOPALA
v.
RAMACHANDRA.
LEACH C.J.

that he was not and the Court upheld the Official Assignee. The judgment in *Duncan, Fox & Co. v. North and South Wales Bank*(1) was discussed and it was held that the case did not fall within the third category as stated by Lord SELBORNE, because the debt was not wholly of one, but equally of both the Chettiers. In the present case the debt was wholly that of the mortgagor. It is common ground that the property mortgaged was the separate property of the father and that the father had the benefit of the whole of the mortgage loan.

Turning now to the question of limitation, unless the mortgage is in the English form the suit will be governed by article 132 of the Limitation Act and therefore will be out of time. The learned Judge held, however, that the mortgage was in the English form and that the appropriate article was article 147 which provides for a period of limitation of sixty years. Suits for foreclosure of sale of a mortgage in the English form fall within this article. This was decided by the Privy Council in *Vasudeva Mudaliar v. Srinivasa Pillai*(2). Section 58 of the Transfer of Property Act sets out the requirements of an English mortgage. The mortgagor must bind himself to repay the mortgage money on a certain date and transfer the mortgaged property absolutely to the mortgagee, subject to a proviso that the mortgagee will retransfer it to the mortgagor upon payment of the mortgage money as agreed. The learned Advocate for the appellants admits that these conditions are fulfilled, but he says there are other conditions which are not usually found in a mortgage of the English form and therefore this mortgage must be regarded as an anomalous mortgage in which case it will not fall within article 147 of the

(1) (1880) 6 App. Cas. 1.

(2) (1907) I.L.R. 30 Mad. 426 (P.C.).

RAJAGOPALA
v.
RAMACHANDRA.
LEACH C.J.

Limitation Act. The additional provisions in the deed which the learned Counsel for the appellants relies on here are these: (i) If the mortgage debt should not be repaid on the due date, interest shall be charged at seven per cent per annum and, if the interest is paid regularly every month the date for payment shall be extended from 8th October 1916 to 8th April 1919; and (ii) the mortgagor shall pay the fire insurance premiums, quit-rent, assessment rates, taxes and other outgoings for the time being payable in respect of or charged upon the property. He also says that although there is a provision for the extension of the time for the payment of the mortgage debt it is not accompanied by a stipulation that the mortgagee should reconvey and that this changes the character of the mortgage.

Unless these provisions can be read as altering the obligation of the mortgagor to pay the mortgage debt on a specified date or detract from the absolute nature of the transfer, the mortgage must be regarded as being in the English form. The fact that in a certain event the date of payment is changed from 8th October 1916 to 8th April 1919 does not mean that the mortgagor has not contracted to pay the debt on a certain date within the meaning of section 58 (e) of the Transfer of Property Act, and the fact that the mortgagor has agreed to pay the cost of insurance and other charges does not detract from the absolute transfer to the mortgagee. In *Raja Janki Nath Ray v. Syed Asad Reza*(1) the Patna High Court held that a stipulation which gave the mortgagor options with regard to part payment and extension of time for repayment of the principal sum did not affect a clause

(1) (1935) I.L.R. 14 Pat. 560.

RAJAGOPALA
(S.N.) v.
RAMACHANDRA.
LEACH C.J.

in the mortgage bond under which the mortgagor bound himself to pay the mortgage money on a certain date. Nor did a provision in the bond requiring the mortgagor to pay in addition to the mortgage debt and interest, further advances and sums paid by the mortgagee for the protection and preservation of the mortgaged property and Government revenue, rents and all other costs, charges and expenses incurred in connexion with the property make the mortgage any the less an English mortgage within the definition given in section 58 of the Transfer of Property Act.

For the appellants reliance has been placed upon the decision of the Calcutta High Court in *Satya Charan Srimani v. Ramkinkar Banerjee*(1) where it does appear that the view was taken that a provision in a mortgage deed requiring the mortgagor to pay "rent, royalty, cesses, taxes, rates, assessments and impositions which now are or hereafter may be payable in respect of the said premises" did change the character of the mortgage. But dissent from this view is indicated by the decision of the same Court in *Cohen v. Baidya Nath Mukherji*(2). It may be mentioned that *Satya Charan Srimani v. Ramkinkar Banerjee*(1) was carried to the Privy Council, but there it was held that it was not necessary to decide whether the mortgage in that case was in the English form; *Ramkinkar Banerji v. Satya Charan Srimani*(3). We are not prepared to accept *Satya Charan Srimani v. Ramkinkar Banerjee*(1) as embodying a correct indication of the answer to be given here.

There is no substance in the third contention of the appellants. The mortgage deed contains a stipulation that the mortgagee shall reconvey on payment

(1) (1935) 62 C.L.J. 28.

(2) I.L.R. [1937] 1 Cal. 359.
(3) I.L.R. [1939] 1 Cal. 283 (P.C.).

being made on 8th October 1916 and this stipulation must be read as applying also, in the event of the time being extended, to 8th April 1919.

For the reasons given we hold that the additional provisions in the mortgage deed in suit do not alter the character of the mortgage. Consequently we concur in the finding of SOMAYYA J. that the mortgage is in the English form, which means that the suit was filed in time.

The appeal fails except as regards the decretal amount. As already indicated the respondent is only entitled to Rs. 2,640-12-11, but this sum will carry interest at the rate fixed by SOMAYYA J. The decree of the trial Court will be varied to this extent. The parties will pay and receive proportionate costs. Out of the money in deposit in Court, so much of it as is due to the respondent under the decree passed by this Court will be paid out to him on his complying with the other requirements of the decree.

Solicitor for appellants—N. T. Shamanna.

G.R.

RAJAGOPALA
v.
RAMACHANDRA.
LEACH C.J.

APPELLATE CIVIL.

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

1942,
February 11.

GALI RAMA NAIDU (FIRST DEFENDANT), APPELLANT,

v.

MUPPALA GANGI REDDI AND TWO OTHERS (PLAINTIFF
AND DEFENDANTS 3 AND 4), RESPONDENTS.*

Indian Limitation Act (IX of 1908), sec. 14—Official Receiver filing an application under ss. 53 and 54 of Provincial Insolvency Act (V of 1920) for setting aside alienations by insolvents—Annulment of adjudication—Creditor instituting suit under sec. 53 of Transfer of Property Act (IV of 1882) for avoiding the said alienations—Computation of period of limitation of suit—Period taken by Official Receiver in prosecuting application under ss. 53 and 54—Creditor not entitled to the exclusion of—Competency of creditor to file suit during pendency of insolvency proceedings.

On 22nd August 1933 an Official Receiver filed an application under sections 53 and 54 of the Provincial Insolvency Act praying for an order setting aside two alienations by an insolvent, dated 29th January 1931. On 14th December 1936 the District Judge wrongly annulled the adjudication and indicated that the creditors should institute a suit for the setting aside of the conveyances under section 53 of the Transfer of Property Act. He also expressed the opinion that the time taken by the Official Receiver, in conducting the above-mentioned proceedings for setting aside the alienations, would be excluded in computing the period of limitation for the suggested suit. On 4th May 1937 a creditor instituted a suit for a declaration that the conveyances were void as against creditors under section 53 of the Transfer of Property Act. It was, *inter alia*, contended by the defendant that the period taken by the Official Receiver in conducting the above-mentioned proceedings cannot be excluded under section 14 of the Indian Limitation Act in computing the period of limitation of six years under section 120 of the Indian Limitation Act.

* Second Appeals Nos. 910 and 1071 of 1940.

Held: Although the Official Receiver represented the creditors in the proceedings before the insolvency Court, yet it cannot be said that the present plaintiff prosecuted those proceedings within the meaning of section 14 of the Indian Limitation Act. RAMA
v.
GANGI REDDI

Further, the present suit could have been filed by the creditor during the pendency of the insolvency proceedings. Hence the suit was barred by limitation.

APPEALS against the decree of the District Court of Chittoor in Appeal Suits Nos. 151 and 172 of 1939 preferred against the decree of the Court of the Subordinate Judge of Chittoor in Original Suit No. 38 of 1938 (Original Suit No. 177 of 1937, District Munsif's Court, Chittoor).

A. C. Sampath Ayyangar, A. Bhujanga Rao and D. R. Krishna Rao for appellant.

P. V. Rajamannar and K. Subba Rao for first respondent.

Other respondents were not represented.

The JUDGMENT of the Court was delivered by LEACH C.J.—These two second appeals have been referred to a Bench for decision as a question of limitation arises and there is no direct authority on the point. LEACH C.J.

An examination of the record discloses an unfortunate state of affairs. The second and third respondents are the sons of one Muneappa Naidu, who died in the month of February 1931. The father and the sons were joint. On 29th January 1931, a fortnight before the death of Muneappa, he and his sons disposed of the whole of the family property. By a registered conveyance they transferred to the appellant in Second Appeal No. 910 of 1940 part of the family estate and the rest of it to the appellant in Second Appeal No. 1071 of 1940. The consideration

RAMA
v.
GANGI REDDI.
LEACH C.J.

for the transfer first mentioned was said to be Rs. 2,000 and for the second, Rs. 1,000.

On 5th December 1931, the second and third respondents were adjudicated insolvents by the Subordinate Judge of Chittoor on a petition filed by the first respondent and two other creditors. The transfers to the appellants were made the basis of the order of adjudication. The order of adjudication was passed without opposition. The second respondent, in fact, agreed to the adjudication. At that time the third respondent was a minor and therefore the order of adjudication, so far as he was concerned, was invalid. On 21st April 1934 the Subordinate Judge annulled his adjudication.

On 22nd August 1933 the Official Receiver filed an application under sections 53 and 54 of the Provincial Insolvency Act, in which he asked for an order setting aside the conveyance to the appellant in Second Appeal No. 910 of 1940, and a similar application in respect of the conveyance to the appellant in Second Appeal No. 1071 of 1940. By an order, dated 3rd March 1936, the Subordinate Judge held that the transactions had been entered into *bona fide* and that consideration had passed. Consequently he dismissed the petitions. The Official Receiver appealed to the District Judge of Chittoor, who took an unusual course. Instead of hearing the appeal on the merits, he decided to annul the adjudication of the second respondent on the ground that he had not applied for his discharge within the time allowed by the order of adjudication and indicated that the creditors should institute a suit for the setting aside of the conveyances under section 53 of the Transfer of Property Act. The District Judge's reason for adopting this course was that, if the appeal was allowed, it would mean that the

RAMA
v.
GANGI REDDI.
LEACH C.J.

creditors would only get a third interest in the properties conveyed to the present appellants. The father's estate was not being administered in insolvency and the adjudication of the younger son had been set aside. The appeals before the District Judge were concerned merely with the validity of the orders passed by the Subordinate Judge on the applications made by the Official Receiver under sections 53 and 54 of the Provincial Insolvency Act and therefore it was not open to the District Judge in those proceedings to annul the order of adjudication passed against the second respondent. The Judge having seisin of the insolvency proceedings was the Subordinate Judge of Chittoor and he alone could deal with such a matter, unless it came before the District Judge on appeal.

The District Judge directed that the Official Receiver should drop all proceedings relating to the estate of the second respondent and, having indicated that the proper course for the creditors to adopt was to file a suit for a declaration that the alienations made on 29th January 1931 were void under section 53 of the Transfer of Property Act, he added :

"As at present advised, I am of opinion that the time taken up in prosecution of the remedy in the Insolvency Court may be deducted when calculating the period of limitation for filing such a suit."

The article of the Limitation Act which applies is article 120 and the period is six years. The District Judge's order was passed on 14th December 1936, and if a suit under section 53 of the Transfer of Property Act had been filed by the first respondent immediately it would have been in time ; but he did not take action until 4th May 1937, when he instituted the present suit in the District Munsif's Court for a declaration that the conveyances were void as against the creditors under that section. Subsequently the suit

RAMA
v.
GANGI REDDI.
LEACH C.J.

was transferred to the Court of the Subordinate Judge, who tried it. The present appellants contended that the suit was barred by the law of limitation, having been filed more than six years after the date of the conveyances. The Subordinate Judge overruled this objection and held that partial consideration had passed, but that the transactions were not entered into *bona fide*. On this footing he decreed the suit. The present appellants appealed to the District Judge who agreed with the Subordinate Judge on the question of limitation and that the transfers were not entered into *bona fide*; but he disagreed with him on the question whether consideration had passed. In the opinion of the District Judge no consideration at all had passed. The first respondent had filed a cross-appeal in which he objected to the finding of the Subordinate Judge that partial consideration had passed. The result was that the appellant's appeal was dismissed and that of the first respondent was allowed. The appeals now before the Court are from the decrees passed by the District Judge on this occasion.

The findings of the District Judge with regard to the nature of the transaction are conclusive and the Court is merely concerned with the question whether the suit was filed within time. The District Judge considered that section 14 of the Limitation Act applied and that the suit was in time. In my judgment it is manifest that section 14 of the Limitation Act does not apply here. Sub-section 1 of that section says:

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of appeal, against the

defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

RAMA
v.
GANGI REDDI.
LEACH C.J.

Now, in the first place, the plaintiff in the present suit was not the petitioner in the proceedings in the Insolvency Court. The petitioner there was the Official Receiver and, although the Official Receiver represents the creditors, it cannot be said that the present plaintiff was prosecuting those proceedings. The person who was prosecuting the proceedings was the Official Receiver, who was asking that the transfers be set aside under the provisions of sections 53 and 54 of the Insolvency Act which refer to transactions which are void as against the Official Receiver. Here the cause of action falls within the provisions of another Act, the Transfer of Property Act. Moreover the suit which was filed by the first respondent as the result of the order of the District Judge of 14th December 1936 could have been filed by him during the pendency of the insolvency proceedings; see *Chidambaram v. Sellakumara*(1).

Mr. Sampath Aiyangar has contended that section 14 can have no application to any insolvency matter and has referred us to the decision of this Court in *Aiyapparaju v. Venkatakrishnayya*(2). It is not necessary to decide whether proceedings in insolvency are completely outside the scope of section 14, because in any event the section cannot be called in aid by the first respondent in respect of the present suit, which means that it was filed out of time. Therefore both the appeals will be allowed and the suit will be dismissed with costs throughout (one set).

(1) I.L.R. [1942] Mad. 1 (F.B.).

(2) (1922) 44 M.L.J. 303.

RAMA
v.
JANGI REDDI.
LEACH C.J.

It is certainly regrettable that the creditors are not able to get the benefit of any of the property unlawfully conveyed to the appellants on 29th January 1931. Had it not been for the unfortunate opinion expressed by the District Judge with regard to the applicability of section 14 of the Limitation Act, when he was dealing with the appeals arising out of the petitions filed by the Official Receiver, the position might have been very different.

G.R.

APPELLATE CIVIL.

Before Mr. Justice King.

1942,
March 16.

AVASARALA KAMARAJU PANTULU AND ANOTHER
(PLAINTIFFS-APPELLANTS), APPELLANTS,

v.

BALLA SARAMMA (SECOND DEFENDANT-RESPONDENT),
RESPONDENT.*

Limitation Act (IX of 1908), ss. 4 and 12—Appeal against decree—Period of limitation expired during summer vacation—Extension of time, under sec. 4 of the Act, till opening of Court—Instead of filing appeal, copy application filed under sec. 12 of the Act on the date of opening—Extension of time under both sections cannot be combined.

The decree of the first Court against which the appellants desired to appeal was passed on 2nd May 1939. A few days later the Court was closed for the summer vacation and both it and the District Court were reopened on the 19th of June. The period of limitation for appeal is thirty days and thirty

* Second Appeal No. 37 of 1941.

KAMARAJU
v.
SARAMMA.

days expired before the 19th of June, but under the provisions of section 4 of the Limitation Act the appeal could have been presented on the 19th of June. On that date, however, the appellants did not present their appeal, but presented instead a copy application in the Court of first instance. They contended that, inasmuch as they had a right of presenting the appeal on the 19th of June, they had also a right of applying for a copy on that day, and then, availing themselves of the provisions of section 12 of the Act, they could add to the period of limitation the time taken by them from the 19th of June to obtain the copy.

Held that the extension of time which was granted to the appellant by the application of section 4 of the Limitation Act could not be combined with the extension which he sought under section 12 and that the appeal was time-barred when it was presented on the 7th of July.

Under section 4 of the Limitation Act, the only privilege which is granted to the suitor or appellant is that he may file his suit or appeal on the day a Court reopens. If he delays to make his application for a copy until that day, then he is applying for a copy when the period of limitation has already expired. Section 12 of the Act assumes that the time requisite for obtaining a copy of the decree must begin before the prescribed period is over.

The principle of the decision in *Maqbul Ahmad v. Pratap Narain Singh*(1) applied.

Case law discussed.

APPEAL against the order of the District Court of East Godavari at Rajahmundry, dated 30th August 1939 and made in Interlocutory Application No. 327 of 1939 in unregistered Appeal bearing D.R. No. 2555 of 1939 preferred against the decree of the Court of the District Munsif of Rajahmundry in Original Suit No. 249 of 1938.

D. Narasaraaju for appellants.

M. S. Ramachandra Rao for respondent.

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

KAMARAJU
v.
SARAMMA.
KING J.

JUDGMENT.

KING J.—This is an appeal by two would-be appellants in the Court of the learned District Judge of East Godavari. They attempted on the 21st of July 1939 to obtain a favourable order from the learned District Judge under section 5 of the Limitation Act for excusing a delay of nineteen days in presenting their appeal. The learned District Judge refused to excuse that delay and dismissed the petition and as a natural consequence of that order the appeal was rejected.

The argument put forward before me is that the application made by the appellants before the District Judge was really unnecessary, that there was no delay to be excused at all, and that when they first presented their appeal on the 7th of July it was in fact presented in time.

The facts and dates are as follow : The decree of the first Court against which the appellants desired to appeal was passed on the 2nd of May 1939. A few days later the Court rose for the summer vacation, and both it and the District Court reassembled after the summer vacation on the 19th of June. The period of limitation for appeal is thirty days, and thirty days of course expired before the 19th of June but under the provisions of section 4 of the Limitation Act, the appeal could undoubtedly have been presented on the 19th of June. On that date however the appellants did not present their appeal, but presented instead a copy application in the Court of first instance. They now maintain that inasmuch as they had a right of presenting the appeal on the 19th of June they had also a right of applying for a copy on that day, and then, availing themselves of the provisions of section 12 of the Limitation Act, of adding to the period of Limitation the time taken by them from the 19th of June to

1942]

MADRAS SERIES

871

obtain the copy. In support of this position the appellants rely upon *Pandharinath v. Shankar*(1) and *Siyadatun-nissa v. Muhammad Mahmud*(2) and also upon a case in *Saminatha Ayyar v. Venkatasubba Ayyar*(3). It seems to me that *Saminatha Ayyar v. Venkatasubba Ayyar*(3) is distinguishable from this case on the facts, for in that case the judgment against which the appeal was sought to be filed was pronounced on the very last day the Court was sitting, so that it was physically impossible for any application for a copy to have been made on the same day. I have also been referred to other decisions in Madras by the learned Counsel for the appellants; *Subramanyam v. Narasimham*(4) and *Ummathu v. Pathumma*(5). In *Subramanyam v. Narasimham*(4) there is a brief reference to the Allahabad and Bombay decisions but on the facts of that case it was unnecessary to express any agreement with those decisions. In *Ummathu v. Pathumma*(5) one of the learned Judges appears to approve of the Allahabad and Bombay decisions but the other learned Judge doubts whether they are correct. In *Masilamani v. Arunga Mudali*(6) which has been cited by the learned Counsel for the respondent, another Bench of this Court refused to follow *Saminatha Ayyar v. Venkatasubba Ayyar*(3) unless the facts of that case were in all respects reproduced. It seems to me that in these circumstances there is no direct authority in Madras which is binding upon me and with respect I am in agreement with RAMESAM J. in *Ummathu v. Pathumma*(5) in holding that the Allahabad and Bombay decisions referred to by the

KAMARAJU
v.
SARAMMA.
KING J.

(1) (1901) I.L.R. 25 Bom. 586.
(3) (1903) I.L.R. 27 Mad. 21.
(5) (1921) I.L.R. 44 Mad. 817.

(2) (1897) I.L.R. 19 All. 342.
(4) (1920) I.L.R. 43 Mad. 640.
(6) (1920) 12 L.W. 460.

KAMARAJU
v.
SARAMMA.
KING .

learned Counsel for the appellants in support of this appeal are wrong.

In my opinion the real clue to the decision of this appeal is contained in a judgment of the Privy Council reported in *Maqbul Ahmad v. Pratap Narain Singh*(1). That judgment contains an analysis of section 4 of the Limitation Act and shows that section 4 by its very language cannot extend the period prescribed for the presentation of any suit or appeal or application. Its purpose is merely to allow any suitor or applicant to file his suit or application on a date after the expiry of the prescribed period if that period had expired while the Court was not sitting. It was therefore held in *Maqbul Ahmad v. Pratap Narain Singh*(1) that there was no possibility of adding to the period of extension granted by section 4 a further period which was said to fall within section 14. In my opinion although in the decision in *Maqbul Ahmad v. Pratap Narain Singh*(1) the Court was concerned only with the question of combining the periods under section 4 and section 14, the principles of that decision will apply equally to any such attempt at combination. I have already had a somewhat similar case to deal with in a judgment which is reported as *Chidambaram Chettiar v. Venkatasubba Naik*(2). The question there was whether an acknowledgment under section 19 made on a day on which the Court reopened and therefore on the day on which a suit could have been filed under section 4 was an acknowledgment which would avail to extend the period of limitation. I held in that case that it could not have that force. Section 4 presupposes by its very language that the prescribed period had already expired, and under section 19 it was

(1) (1935) I.L.R. 57 All. 242 (P.C.). (2) (1937) 1 M.L.J. 202.

KAMARAJU
v.
SARAMMA.
KING J.

necessary that the acknowledgment should be made within the prescribed period. It seems to me that the same principles will apply to section 12 as they do to sections 14 and 19. Section 12 says that "in computing the period of limitation prescribed" for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded, and also the time requisite for obtaining a copy of the decree. Section 12 therefore assumes that the time requisite for obtaining the copy of decree must begin before the prescribed period is over. It has already been held that under section 4 the right to present a suit or appeal or application on the day upon which a Court reopens is a special right which cannot extend the period of limitation prescribed in the Act. The section presupposes that that period has already expired. It seems to me, therefore, that under section 4 the only privilege which is granted to the suitor or appellant is that he may file his suit or appeal on that particular day and that particular day alone. If he delays in making his application for a copy until that day, then he is applying for a copy when the period of limitation has already expired and, following the principles laid down in *Maqbul Ahmad v. Pratap Narain Singh*(1), I must hold that the extension which is granted to him by the application of section 4 cannot be combined with the extension which he seeks under section 12. It is clear, therefore, to my mind that the appeal in question was time-barred when it was presented on the 7th of July and the view of the appellants themselves that it was necessary for them to apply under section 5 of the Limitation Act was the correct one.

The question then arises whether the learned Judge was right in refusing to excuse the delay. On this point

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

It is contended for the respondent that no second appeal lies in this case and it seems to me that, strictly speaking, that is so, inasmuch as there has been no first appeal in existence; and this appeal is not really an appeal against an order of the District Judge dismissing the appeal but an appeal against an order refusing to excuse the delay, against which no second appeal is provided. I have however heard the legal arguments involved in this case because they appeared to me to be important, and there is no reason why I should not treat this second appeal as if it were a revision petition. Having made that decision I am now unable to interfere with the learned District Judge's order. It is a matter for his discretion to decide whether he should excuse the period of delay or not, and, when he has decided that no sufficient grounds existed for excusing the delay, I do not think it is within my powers of revision under section 115 of the Code of Civil Procedure to interfere with that decision.

In the result this appeal must fail and is dismissed with costs.

V.V.C.

APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice Kunhi Raman.

M. S. PALANIAPPA MUDALIAR (AS GUARDIAN OF HIS
MINOR DAUGHTER MEENAKSHI) (RESPONDENT),
APPELLANT,

1942,
February 2.

v.

THE OFFICIAL LIQUIDATOR, THE PASUPATHI BANK,
LIMITED, COIMBATORE (PETITIONER), RESPONDENT.*

Indian Companies Act (VII of 1913), sec. 184—Application for shares in company by guardian on behalf of minor—Shares issued in name of minor—Contract void—Company in liquidation—Official Liquidator not entitled to claim contribution either from minor or from guardian.

An application to an incorporated company for shares therein was made by a father on behalf of his minor daughter and the company issued shares to and registered them in the name of the minor describing her as a minor. The company went into liquidation subsequently and the Official Liquidator sought to make the minor liable as a contributory. The father contended that the transaction with the minor was void and that the minor was not liable. The Official Liquidator therefore applied to include the father in the list of contributories and the application was granted by the trial Court. On appeal,

held : The father was not liable to be included as a contributory. The application for shares was made by the father on behalf of his minor daughter and there was nothing to show that he had intended to become a subscriber of the company himself.

There is a distinction between a case where the contributory is held to be contracting under an *alias* and a case where there has never been any intention on the part of the person sought to be made a contributory to become a subscriber or of the company to treat him as a subscriber.

* Appeal Against Order No. 421 of 1940.

PALANIAPPA
v.
OFFICIAL
LIQUIDATOR,
PASUPATHI
BANK.

Pugh and Sharman's case(1) and *Richardson's case*(2) distinguished.

In re National Bank of Wales, Limited (Massey and Giffin's case)(3) and *In the matter of the Muslim Bank of India, Ltd. (in liquidation), Lahore*(4) referred to.

APPEAL against the order of the District Court of Coimbatore, dated 26th February 1940 and made in Interlocutory Application No. 722 of 1939 in Original Petition No. 174 of 1939, High Court, Madras.

W. S. Krishnaswami Naidu and P. Rajeswaram for appellant.

Respondent was not represented.

MOCKETT J. The JUDGMENT of the Court was delivered by MOCKETT J.—This civil miscellaneous appeal is from an order of the learned District Judge of Coimbatore made in an application under section 184 of the Indian Companies Act to settle the list of contributories. He was concerned with the eighteenth contributory. He has, by his order, placed the father of the eighteenth contributory on the list and the latter appeals.

We have before us very little material ; but it is evident that the following essential facts were not in dispute. An application was made by M. S. Palaniappa Mudaliar as guardian of his minor daughter Meenakshi for shares and the company issued shares to and registered shares in the name of Meenakshi describing her as a minor. This transaction was void on the face of it. An application for shares cannot be a necessity for a minor ; but the bank evidently regarded it as a valid transaction and the Official Liquidator claimed against the minor for contribution when the company went into liquidation. The minor through her father Palaniappa Mudaliar filed an affidavit setting up her minority and disclaiming

(1) (1872) L.R. 13 Eq. 566.
(3) [1907] 1 Ch. 582.

(2) (1875) L.R. 19 Eq. 588.
(4) I.L.R. [1939] Lah. 299.

any personal responsibility. There was a reply by the Official Liquidator in which he contended that, if the minor was not liable, the father of the minor who signed the application must be deemed to have contracted for the shares and should be placed on the list of contributories. The learned District Judge accepted this contention and has made an order against the father of the eighteenth contributory, the minor Meenakshi Ammal. He based his decision on *In the matter of the Muslim Bank of India, Ltd. (in liquidation), Lahore*(1). In that case YOUNG C.J. and MONROE J. made an order against the father of a contributory who had applied on behalf of his son who, in fact, was a minor. It is not stated that the son's minority was revealed. The learned Judges decided in favour of the Liquidator relying on the English cases. They pointed out that in *Pugh and Sharman's case*(2) the Vice-Chancellor had held that a person who contracted in the name of another not being a legal entity must be deemed to have contracted personally. In that case, which was before the Married Women's Property Act of 1891, an applicant had applied for shares in the name of a married woman, not revealing that fact to the company. MALINS V.C. held that he was liable and that it was quite clear that Sharman intended to become the owner of the shares and derive from them all the benefits that they could give. *Richardson's case*(3) was a case where shares were registered in the name of the minor boy's father, the fact of minority not being revealed to the company, and who signed the minor's name which, of course, he had no authority to do. In *In re National Bank of Wales, Limited (Massey and Giffin's case)*(4) PARKER J.

(1) I.L.R. [1939] Lah. 299.
(3) (1875) L.R. 19 Eq. 588.

(2) (1872) L.R. 13 Eq. 566.
(4) [1907] 1 Ch. 582, 589.

PALANIAPPA
v.
OFFICIAL
LIQUIDATOR,
PASUPATHI
BANK.
MOCKETT J.

PALANIAPPA
v.
OFFICIAL
LIQUIDATOR,
PASUPATHI
BANK.
—
MOCKETT J.

discussed *Pugh and Sharman's case*(1) and *Richardson's case*(2) and described them as being cases in which there was in reality some contractual relation between the company and the person whose name it was sought to be placed on the register. As the learned Judge points out at page 589:

"Both these decisions, which are based on the ground that the person on the register was merely an *alias* of the person whom it was sought to put on the register in his place, appear to me to be clearly distinguishable from *King's case*(3), where the man whom it was sought to put on the register was altogether a stranger to the company."

No case has been cited in which the facts or principle involved are similar to this now before us. There is no suggestion that the Pasupathi Bank, Limited, were unaware of the contributory's minority; they knew they were being invited to contract with a minor and they thought fit to contract with the minor. The application by Palaniappa Mudaliar was made on behalf of his minor daughter. There is nothing on the record to show that he had at any time intended to become a subscriber of the company. There is no evidence that any of his money was used for the purpose. It seems to be clear that the contract was made by both sides under complete misapprehension as to the law, but no misapprehension whatever as to the facts. Under the law it was void. We do not think that either *Pugh and Sharman's case*(1) or *Richardson's case*(2) is of any assistance to the Official Liquidator. The distinction drawn by PARKER J. between cases where the contributory was held to be contracting under an *alias* and cases where there was never any intention on the part of the person sought

(1) (1872) L.R. 13 Eq. 566.

(2) (1875) L.R. 19 Eq. 588.

(3) (1871) L.R. 6 Ch. 196.

to be made a contributory to become a subscriber or of the company to treat him as a subscriber as in this appeal seems to be entirely applicable.

The Official Liquidator has not appeared to support the judgment of the lower Court, but we have had the advantage of an interesting argument and a consideration of all the relevant authorities from the learned Counsel for the appellant, Mr. W. S. Krishnaswami Naidu. In our view this appeal should be allowed with costs which will be paid by the Official Liquidator out of the assets of the bank.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Somayya.

CHERUKURI GANGARAJU (FIRST RESPONDENT),
PETITIONER,

v.

SEEMAKURTI LAKSHMINARAYANAMURTI AND
THREE OTHERS (PETITIONER, SECOND RESPONDENT
AND NIL), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sec. 50—Expunging creditor's name from list of creditors—No power in Court to direct refund of dividend previously paid to such creditor.

Under the Provincial Insolvency Act, an insolvency Court has no power to direct a creditor to whom a dividend has been paid to bring back the amount into Court, merely by reason of the fact that subsequently the name of the creditor is expunged from the list of creditors.

Ex parte Harper. In re Tait(1) followed.

Case law reviewed.

* Civil Revision Petition No. 1687 of 1939.

(1) (1882) 21 Ch. D. 537.

PALANIAPPA
v.
OFFICIAL
LIQUIDATOR,
PASUPATHI
BANK.
—
MOCKETT J.

1942,
March 13.

GANGARAJU
v.
LAKSHMINARA-
YANAMURTI.

PETITION under section 75 of Act V of 1920 praying the High Court to revise the order of the District Court of West Godavari, dated 8th March 1939 and made in Civil Miscellaneous Appeal No. 139 of 1937 (in Interlocutory Application No. 4 of 1937, in Insolvency Petition No. 62 of 1934 on the file of the Court of the Subordinate Judge of Ellore).

V. *Rangachari* for petitioner.

B. V. *Ramanarasu* (*amicus curiae*).

Respondents were not represented.

JUDGMENT.

SOMAYYA J.

SOMAYYA J.—This is a revision petition filed under section 75 of the Provincial Insolvency Act (V of 1920) and the petitioner seeks to revise the order of the District Judge of West Godavari, dated 8th March 1939, passed by him in Civil Miscellaneous Appeal No. 139 of 1937. By that order the District Judge reversed the order of the Additional Subordinate Judge of Ellore passed by him in Interlocutory Application No. 4 of 1937 in Insolvency Petition No. 62 of 1934.

Interlocutory Application No. 4 of 1937 which has given rise to this revision petition was one filed under section 50 of Act V of 1920 for expunging the entry of the petitioner as a creditor in the insolvency. The petitioner was admitted as a creditor and a dividend was paid to him by the Official Receiver. Subsequently Interlocutory Application No. 4 of 1937 was filed for action under section 50 of the Act. The application was resisted mainly on the ground that there were no other assets to be realised by the Official Receiver and the insolvency Court had no power, even if it found that a creditor's name ought to be expunged, to make an order that the amount already paid to him

by way of a dividend should be brought back by him and that therefore an enquiry on the merits was not called for in this case. If, after an order expunging his name from the list of creditors, the Court could not follow it up by making an order directing him to bring back the amount that had already been distributed to him and there was no prospect of any future dividend, then it is clear that an enquiry on the merits would be wholly unnecessary. There were also other applications filed to expunge the names of other creditors from the list. These applications were all heard together by the Additional Subordinate Judge and he decided, relying upon certain authorities to be presently referred to, that the position stated above was the correct one and that therefore there was no need to take evidence on the question whether the various debts were really true debts. He therefore dismissed Interlocutory Application No. 4 of 1937 and also the other applications along with it. Appeals were filed in the District Court of West Godavari and the District Judge reversed the decision of the Subordinate Judge and remanded Interlocutory Application No. 4 of 1937 and other petitions for enquiry on the merits. The District Judge took the view that the Court has got the power to require a person to whom a dividend has been distributed, and whose debt is subsequently directed to be expunged from the list of creditors, to bring back the money into Court. The petitioner challenges the correctness of this order and contends that both in England and in India the position is well established that a creditor to whom a dividend has been paid cannot be directed to bring back that amount merely by reason of the fact that subsequently the debt is expunged from the list of creditors. On an examination of the authorities, I think the position

GANGARAJU
v.
LAKSHMINARA-
YANAMURTI.
—
SOMAYYA J.

GANGARAJU
v.
LAKSHMINARAYANAMURTI.
SOMAYYA J.

advanced by the petitioner is correct and that the view taken by the District Judge is wrong.

In *Ex parte Harper*. In *re Tait*(1) JESSEL M.R., while holding that lapse of time is no bar to a petition for expunging a debt, pointed out that an order expunging the debt would only operate to prevent the creditor from participating in future dividends and that he cannot be called upon to pay back what he had already received. That was a decision under rule 73 of the Bankruptcy Rules, 1870, under which a trustee in bankruptcy who has admitted a proof against the estate is entitled at any time afterwards to apply to the Court to expunge the proof on the ground that it was originally wrongly admitted. This rule corresponds to section 50 of the Provincial Insolvency Act. At page 541, JESSEL M.R. says this :

"There was no limit to the time within which a proof might be expunged. In the cases which I have already mentioned the proof was expunged on the ground that its original admission had been wrong. The new rule is in accordance with the old practice. And no injustice can be done, because any dividends which have been already paid are allowed to be retained by the creditor, and the expunging affects only the right to receive future dividends."

In *In re Searle, Hoare & Co.*(2) LAWRENCE J. approved of the principle that dividends paid already cannot be recovered and held that, while the debt of a creditor was reduced, he is not entitled to participate in the future dividends until and unless the other creditors were paid to the extent to which he was paid. On page 327, LAWRENCE J. refers to the remarks of JESSEL M.R. in the earlier case with approval and then proceeds to say this :

"The mere fact that the trustee cannot recover either payments made to a person whose proof is subsequently

(1) (1882) 21 Ch. D. 537.

(2) [1924] 2 Ch. 325.

expunged or overpayments made to a creditor whose proof is subsequently reduced does not, in my opinion, prevent the operation of the well known principle of equity that a beneficiary who has been overpaid is not entitled to receive any further payment out of the trust fund until the payments to the other beneficiaries are levelled up to the amount received by the overpaid beneficiary."

Williams in his work on Bankruptcy, Fifteenth Edition, at page 528, under rule 24, after setting out rule 24 which corresponds to section 50 of the Provincial Insolvency Act, says this :

"Under rule 73 of 1870, and the previous practice, the trustee was entitled at any time afterwards to apply to expunge a proof which he had originally wrongly admitted, and mere lapse of time was no objection, though the creditor was entitled to retain any dividend already received."

Mulla in his Law of Insolvency says on page 495 :

"The creditor, however, is entitled to retain the dividends already received, the reduction affecting only the right to receive future dividends."

PAGE C.J. who delivered the leading judgment in *A. K. R. M. M. C. T. Chettiar Firm v. S. P. Dayabhoy & Sons*(1) says on page 708 :

"For the reasons that I have given, it is immaterial as between the first respondent and the appellant whether the proof by Musafar's representatives ought or ought not to be expunged, because even if it was ordered that the proof ought to be expunged dividends already paid would not be affected [*Ex parte Harper*. In *re Tait*(2)]."

The decision of the Bombay High Court in *In re Ramachandra Ganuji Waikar*(3) referred to by the lower appellate Court has no application to the present case. There, in ignorance of the existence of the claim of another creditor who had lodged his claim prior to the declaration of a dividend, certain dividends

(1) (1935) I.L.R. 13 Ran. 703, 708.

(2) (1882) 21 Ch. D. 537.

(3) (1922) 104 I.C. 378.

GANGARAJU
v.
LAKSHMINARAYANAMURTI.
SOMAYYA J.

GANGARAJU
v.
LAKSHMINARAYANAMURTI.
—
SOMAYYA J.

were paid out and the question was whether the Court had got the power to compel the creditors who had received the amount to bring back enough to pay the creditor whose claim had been overlooked. The decision in *Ex parte Harper*. In *re Tait*(1) is not even referred to and the case itself relates to a different set of facts.

In *Official Assignee v. S. P. Dayabhoy*(2) LEACH J. (as he then was) says this on pages 236 and 237 :

"The money which has been paid out to a creditor by way of dividend in insolvency proceedings is not recoverable in law, *Ex parte Harper*. In *re Tait*(1) and *A.K.R.M.M.C.T. Chettiar Firm v. S. P. Dayabhoy & Sons*(3). The expunging of a proof only affects the right to receive future dividends, . . . Mr. Kalyanvalla has also relied on a decision of the Bombay High Court in *In re Ramachandra Ganuji Waikar*(4). It was there held by MARTEN J. that, where creditors have been paid more than they were entitled to by way of dividend, the Official Assignee is entitled to recover the excess payment on the ground of mistake under section 72 of the Contract Act. This decision runs contrary to the decision in *Ex parte Harper*. In *re Tait*(1) and the decision in *A. K. R. M. M. C. T. Chettiar Firm v. S. P. Dayabhoy & Sons*(3), but it is not necessary for me to discuss it as the last mentioned case is binding on me."

The case reported as *Panna Lal v. Abdullah*(5) which has been referred to by the Court below decided that, where a distribution was made under an order of adjudication which was later on set aside, the provisions of section 144, Civil Procedure Code, could be applied. Where the adjudication itself was set aside later on, the whole ground for distributing the amounts was taken away and the case would be covered directly by section 144, Civil Procedure Code, read with section 55 of the Provincial Insolvency Act. This decision does not touch the question which calls for decision in

(1) (1882) 21 Ch. D. 537.

(3) (1935) I.L.R. 13 Ran. 703, 708.

(2) A.I.R. 1937 Ran. 234.

(4) (1922) 104 I.C. 378.

(5) A.I.R. 1933 All. 117.

this case. In the present case there was no question of any non-compliance with the rules. The Official Receiver acted quite properly in distributing the amounts in his hands. The District Judge has gone entirely off the track and has indulged in a good deal of criticism against the Official Receiver. For this purpose he called for the various records from the Official Receiver's office and has set out in paragraph 9 of his judgment what he considers the facts which were disclosed by those records and then says that certain irregularities committed by the Official Receiver came to light during the arguments of the appeals. I have been taken through the records and I hold that there is absolutely no justification for any of the District Judge's remarks against the Official Receiver. The District Judge went out of his way and remarked that the Official Receiver would even be personally liable but I see no justification for that remark as well.

I reverse the decision of the lower appellate Court and restore that of the Additional Subordinate Judge with costs here and in the lower appellate Court to be paid by the first respondent. It is regrettable that the respondents did not appear, but their case has not suffered as I requested Mr. B. V. Ramanarasu to help the Court and represent what could be said on their behalf.

N.S.

GANGARAJU
v.
LAKSHMINARAYANAMURTI.
—
SOMAYYA J.

PRIVY COUNCIL.

MERLA RAMANNA, APPELLANT,

v.

CHELIKANI JAGANNADHA RAO AND OTHERS,
RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Hindu law—Mitakshara—Joint family—Intention of coparceners to remain joint—Transaction of division for purposes of pretence—Ineffectual to create division in status.

D and K were brothers of whom K was the younger. They, along with K's two sons and others, were members of a joint Hindu family governed by the Mitakshara law. In 1900 K purported to sell his one-tenth interest in the joint family properties to his brother D. K died in 1910. In 1928 D executed a promissory note in favour of R for Rs. 10,000 with interest. D died in 1929. After D's death R filed a suit on the promissory note against K's sons, as being persons in possession of D's estate and obtained attachment before judgment of certain joint family properties. In 1931 R obtained a decree limited to assets of D in the hands of the defendants. In 1932 the defendants applied to raise the attachment contending that the properties were not liable to be taken in execution under the decree. It was found that the deed of sale by K in 1910 was merely "nominal" in the sense that it was not intended to have effect upon the rights of parties *inter se*.

Held: Coparceners who intend to remain joint and undivided do not become divided contrary to their intention because for purposes of pretence they refer to their interests as represented by a fractional share in the joint family estate. Such a deed cannot put an end to the *jus accrescendi* or right of survivorship between the coparceners. There being no circumstances calling for the application of the principle of estoppel, K's sons got the properties by survivorship on the death of D in 1929. R was not entitled to have recourse to the attached properties in execution of his decree.

* Present:—Lord THANKERTON, Sir GEORGE RANKIN and Lord Justice CLAUSON.

J.C.*
1941,
March 18.

Appovier v. Rama Subba Aiyan. (*Appovier's case*) (1) considered.

RAMANNA
v.
JAGANNADHA.

APPEAL (No. 11 of 1939) from a judgment and order of the High Court (November 16, 1936) which reversed a judgment and order of the Court of the Subordinate Judge of Cocanada (September 10, 1934).

J. M. Parikh and Ralph Parikh for appellant.

Sir Herbert Cunliffe K.C. and *P. V. Subba Row* for respondents.

The JUDGMENT of the Judicial Committee was delivered by Sir GEORGE RANKIN.—Dharma Rao and Kasibabu were brothers, the former being older than the latter by about nineteen years. The appellant, Merla Ramanna, was a creditor of Dharma Rao in respect of a promissory note executed in 1928 for Rs. 10,000 with certain interest. The first and second respondents (herein called the respondents) are the sons of Kasibabu who died in 1910. The family is governed by the Mitakshara. The third and fourth respondents do not appear and need not be mentioned.

SIR GEORGE
RANKIN.

After Dharma Rao's death in 1929, the appellant sued the respondents in the Court of the Subordinate Judge at Cocanada as being persons in possession of Dharma Rao's estate and, on 27th January 1931, recovered judgment in the usual form limited to assets of Dharma Rao which had come to their hands. Certain immovables in which Dharma Rao had had an interest were attached before judgment and, on 22nd April 1932, the respondents applied to the Subordinate Judge to raise the attachment contending that the properties attached were not liable to be taken in execution under the decree. Their case is that they were coparceners with their uncle in a joint

RAMANNA
v.
JAGANNADHA.
—
SIR GEORGE
RANKIN.

Hindu family governed by the Mitakshara and that on Dharma Rao's death they became entitled by survivorship to the whole interest in the joint family property, the appellant, though a creditor of Dharma Rao, not having taken any steps in his debtor's lifetime to recover his debt.

The appellant, on the contrary, contends that Dharma Rao and Kasibabu had ceased so far as regards the attached properties to be undivided and had become separate in estate by reason of a deed of sale (Exhibit B), dated 22nd March 1900, whereby Kasibabu purported to sell his one-tenth interest therein to his brother Dharma Rao. To this the first answer of the respondents is that the deed was a sham deed not intended to have any effect upon the rights of the parties and not the expression of any agreement between them. Further and in the alternative the respondents contend that, even if the deed of sale was intended to be operative and was entered into *animo contrahendi*, it did not have the effect of dividing the brothers' interest in the attached properties or of bringing to an end the right of the survivor to succeed to the whole interest. This contention is based upon the circumstance that in 1900 other branches of the family were joint with the branch represented by Dharma Rao and Kasibabu and it is said that the members of these other branches are not shown to have had notice of the deed of sale. As their Lordships do not find it necessary to examine this contention it need not be stated more particularly. The respondents also contend that, if Dharma Rao had acquired Kasibabu's one-tenth interest in addition to his own, he had brought the income into the common stock so as to make the properties joint. This contention was raised by the respondents in their petition and, though

it does not seem to have been urged at the hearing before the Subordinate Judge, it was maintained before the High Court with success.

Apart from Exhibit B, their Lordships are satisfied that there is no ground for maintaining that Dharma Rao and Kasibabu's sons had become divided in respect of the properties now in question. The learned Subordinate Judge found that the respondents had "failed to prove that Exhibit B is a sham or a nominal document" but the High Court on appeal thought that "the conclusion is irresistible that Exhibit B the sale deed was a nominal conveyance". The learned Subordinate Judge found in favour of the appellant that Exhibit B operated to divide the interest of the two brothers and, by his order of 10th September 1934, he maintained the attachment. The High Court, having found that Exhibit B was not intended to be acted on, held that it did not operate a division of status as between the brothers. They also held that this would not have resulted from the deed even if it had been a real and not a sham transaction; and that, if a division of interest had taken place by virtue of the deed, the manner in which the income had been treated by Dharma Rao restored the properties comprised therein to the condition of joint family property. The High Court by order, dated 16th November 1936, accordingly held that the appellant was not entitled to have recourse to the attached properties in execution of his decree, and this is the decision now complained of.

There is a good deal of evidence upon the question whether the deed of sale (Exhibit B) was intended by the parties thereto as an agreement between them or was executed merely to bring into existence a document which might, contrary to the truth, appear to have

RAMANNA
v.
JAGANNADHA.
—
SIR GEORGE
RANKIN.

RAMANNA
v.
JAGANNADHA.
—
IN GEORGE
RANKIN.

taken away from Kasibabu his interest in the properties comprised therein. Upon a full consideration of this evidence their Lordships are of opinion that the view taken by MOCKETT and LAKSHMANA RAO JJ. in the High Court has the greater reason and should prevail. In 1900 Kasibabu had just attained the age of eighteen years and Dharma Rao was thirty-seven. Of a total alleged consideration of Rs. 12,500, only Rs. 650 is said to have been paid in cash to Kasibabu at the time, the rest being accounted for in the deed by recitals about debts of the joint family, of the parties' own branch of the family and of Kasibabu personally, and by a statement that Rs. 1,000 had been paid as earnest money. Though accounts kept by Dharma Rao over many years are in evidence there is no satisfactory proof of the existence of the alleged debts of their father and none at all that these were in 1900 pressing or that payments were made by Dharma Rao in discharge of them. It is reasonably clear from these accounts that they draw no distinction between properties sold to Dharma Rao by Exhibit B and other properties in which Kasibabu retained his original interest as a coparcener. He and his family are shown to have been provided for out of the income of the family as a whole down to 1908 when the four branches become divided in status, and thereafter out of the income of the branch. It is not easy to account for such a transaction as the deed discloses, save upon the ground that Kasibabu was thought to be foolish and extravagant and given to bad habits likely to lead to his dissipating his property. There is direct evidence contradicting one of the recitals as to his having taken a loan during his minority, and there is evidence of statements made by Dharma Rao disclaiming that by the deed he had become entitled to his brother's

share. In 1912 at the making of the record of rights no such effect appears to have been given to the deed. There was another deed in 1910 whereby Kasibabu purported to divest himself of other properties in favour of a nominee for Dharma Rao, and there is also to be considered the fact that Dharma Rao in 1927 made an ineffective, because unwitnessed, will purporting to leave all his properties to the respondents. In the present case the oral evidence as to which the Courts in India have differed must be judged mainly upon the probabilities arising out of the proved documents and the admitted facts. Their Lordships think it sufficient to say that the careful and detailed examination of the evidence given by LAKSHMANA RAO J. in his judgment appears to them to be convincing and that they agree with the High Court in regarding the deed of sale as being merely "nominal" in the sense that it was not intended to have effect upon the right of the parties *inter se*.

Even so, and upon the footing that Exhibit B is only a sham, and not a real transaction, the appellant has contended before the Board that it would in law divide the interests of the parties thereto so as to put an end to the *jus accrescendi* or right of survivorship between coparceners. The learned Judges of the High Court do not appear to have contemplated that a document which was not the expression of an agreement at all and not intended to have effect upon the rights of the parties could have the important effect of changing their undivided status. The repeated references in Exhibit B to the one-tenth share of each of the two brothers have been emphasised in argument for the appellant but, while they do not seek in any way to qualify what was said in *Appovier's case*(1), their

RAMANNA
v.
JAGANNADHA.
—
SIR GEORGE
RANKIN.

(1) (1866) 11 M.I.A. 75.

RAMANNA
v.
JAGANNADHA.
—
SIR GEORGE
RANKIN.

Lordships are unable to hold that coparceners who intend to remain joint and undivided become divided contrary to their intention because for purposes of pretence they refer to their interests as represented by a fractional share. Where a third party has been induced to act upon the footing of such a document as Exhibit B, very different questions may arise by reason of estoppel or otherwise, but the question in the present case is limited to the parties themselves and to the immediate effect of the deed. Even a member of a Mitakshara family may sometimes be forgiven for speaking of his "one-third share" instead of using the more accurate but more elaborate expression "the share which if a partition were to take place to-day would be one-third". But in the present case the reference to the shares as "one-tenth" share is part of the pretence of sale. When once the conclusion is reached that Exhibit B is not the expression of any intention or agreement to transfer Kasibabu's interest to Dharma Rao, propriety or impropriety of language matters little, since the deed does not warrant any inference of a previous or independent agreement to hold in divided shares.

Their Lordships are of opinion that it is not shown as regards the properties now in question that Dharma Rao had before his death ceased to be joint with Kasibabu's sons. They will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs to the first and second respondents.

Solicitors for appellant: *Lambert & White.*

Solicitors for respondents: *Hy. S. L. Polak & Co.*

G.R.

PRIVY COUNCIL.

SECRETARY OF STATE FOR INDIA, APPELLANT,

v.

J.C.*
1941,
December 18.

SRIMATH VIDHYA SRI VARADA THIRTA
SWAMIGAL AND OTHERS, RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Madras Irrigation Cess Act (VII of 1865), sec. 1, proviso 1—
"Engagements with the Government"—Measure of extent—
Physical conditions of irrigation channels at village boundary
and not area of land cultivated wet—Ulam case, principles
of—Applicable to whole inam villages also—Right of
inamdar to supply of water free of separate charge—Extent
of—Inam grant—Construction of—"Kattuguthagai village"
—Meaning of—Beds of irrigation channels in inam village,
if vest in inamdar—Madras Inams Act (VIII of 1869),
sec. 1.

The lessee of certain inam lands from the inamdar of the village of Vagaikulam in Tinnevely District sued the Government for recovery of certain sums paid as water cess, under the Madras Irrigation Cess Act, in respect of wet lands on which two crops were raised where one only was raised at the time of the inam settlement in 1864, and of lands which were dry in 1864 and on which wet crops were raised subsequently. The lessee contended that the inamdar was entitled to water free of separate charge within the meaning of the first proviso to section 1 of the Madras Irrigation Cess Act, that the main supply channel, namely, the N.K. channel, so far as it lay within the village boundary, and also the subsidiary channels from which the water was taken to irrigate the wet lands, vested in the inamdar, and that the limit or measure of the inamdar's right to water was not the extent of land cultivated as wet at the time of the inam settlement but was set by the physical conditions, such as the size of the channels and the nature and extent of the sluices or weirs, if any, governing the amount

* Present:—Lord ATKIN, Lord THANKERTON, Lord ROMER, Sir GEORGE RANKIN and Sir SIDNEY ABRAHAM.

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.

of water which entered the channels. The Government, however, contended: (i) that the inamdar had no right in the village lands save as a mere assignee of the Government's right to the revenue or part thereof; (ii) that in any case the inamdar had no title to the N.K. channel or any part thereof or to the subsidiary channels which were wet or river poramboke not covered by the inamdar's title and not recognized at the inam settlement of 1864; (iii) that in any event having regard to the importance of the N.K. channel and the subsidiary channels in the irrigation system which the Government had set up and was working, an exception of them must be read by implication into any grant of the village as a whole; and (iv) that the Government having control of the dam by which alone water was made to enter the N.K. channel, the inamdar was not within the meaning of the proviso "entitled to irrigation," even if he be found entitled to use such water as the Government may choose to allow to flow into the N.K. channel or its subsidiaries.

Held: (i) The inamdar was owner of the lands in such sense that by his inam title he had an "engagement" with the Government, within the meaning of the first proviso to section 1 of the Madras Irrigation Cess Act, entitling him to take without separate charge such water as the channels within the village boundaries may receive from time to time according to the state of the upper water.

(ii) By virtue of the title granted under the inam grant of 1753, which was confirmed in 1864, the inam right of the inamdar extended to all the village lands. The entries in the inam register of 1864 described the village granted as a "whole kattuguthagai village" which meant a whole inam village consisting of lands held upon a fixed favourable assessment.

In the circumstances of the case no weight could be attached to the fact that the words "besides poramboke" had not been inserted into the title-deed made out in 1865 and issued to the inamdar upon a form not specially adapted to the case of whole village inams.

The inamdar was not a farmer of revenue only but was entitled to the lands of the village as a whole.

Meaning of the words "swami-bhogam," "farm of land," "cuttoogottaga," "kattuguttagai," "rokkagutta," "jodi," "jivitam," "poruppu" and "bil-mukta" considered.

M. D. Thirumalayappa v. Karuppayi(1) approved.

Vencataswara Yettiapah Naicker v. Alagoo Moottoo Servagaren(2) followed.

(iii) No reservation from the inam grant could be implied as regards the beds or banks of the subsidiary channels, having regard to their number and distribution throughout the village and to the tanks within the village which are connected with them.

The question whether the reservation of the N.K. channel could be implied in favour of the Government was left open.

(iv) Assuming without affirming that the N.K. channel belonged to the Government, the claim of the Government to levy water cess in the circumstances of the case must still be negatived.

The same principles as were applied in the *Urlam* case, *Prasad Row v. The Secretary of State for India*(3), applied also to the inam village of Vagaikulam. The physical conditions of the channels at the village boundary would provide the measure of the water to which the inamdar was entitled by virtue of the inam grant, and not the extent of land cultivated as wet at the time of the inam settlement.

Yahya Ally Saheb v. Secretary of State(4) and *Sevugan Chettiar v. Secretary of State*(5) approved.

(v) As regards water in some of the subsidiary channels taken from the N.K. channel at points which were near to but not within the village of Vagaikulam and flowing first, if only for a short distance, through channels in land belonging either to Government or to some other proprietor, the inamdar had by virtue of his engagement with the Government, i.e., by virtue of the title granted to him in 1753 and confirmed in 1864, rights analogous to those of a lower riparian owner on a natural stream and any rights which could be claimed as continuous and apparent easements.

(vi) Under the first proviso to section 1 of the Madras Irrigation Cess Act, the inamdar was entitled to irrigation free of separate charge if he had a right to the water by virtue

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.

(1) A.I.R. 1928 Mad. 375.

(2) (1861) 8 M.I.A. 327.

(3) (1917) L.R. 44 I.A. 166; I.L.R. 40 Mad. 886.

(4) A.I.R. 1928 Mad. 97.

(5) A.I.R. 1928 Mad. 261.

SECRETARY OF
STATE FOR
INDIA

VIDHYA
VARADA THIRTA
SWAMIGAL.

of his inam and as one of the rights covered by the jodi which it bore.

When it is said that the inamdar's or zamindar's right to water is measured by the physical conditions at the channel heads it is not of course intended that at all seasons he is entitled to a volume of water amounting to the full capacity of the channels. It is only meant that up to the measure of that capacity he is entitled to such water as can flow into them, the condition of the "river" or "upper channel" being what it is from time to time.

In the case of inam lands which from long before 1865 have had the right to obtain water from ancient Government systems of irrigation, the policy and effect of the first proviso to section 1 of the Irrigation Cess Act of 1865 may be that such rights as they had should continue without separate charge.

CONSOLIDATED APPEALS (No. 63 of 1939), by special leave, from two decrees of the High Court (March 29, 1935) which had affirmed two decrees of the Court of the Subordinate Judge of Tinnevely (November 10, 1927), which in turn had affirmed two decrees of the District Munsif of Ambasamudram (December 21, 1925).

The material facts and the arguments of Counsel are set out in the judgment of the Judicial Committee.

J. Millard Tucker K.C., J. M. Pringle and S. P. Khambatta for appellant.

J. M. Parikh and Subba Row for first respondent.

Other respondents were not represented.

SIR GEORGE
RANKIN.

The JUDGMENT of the Judicial Committee was delivered by Sir GEORGE RANKIN.—This case comes from the Ambasamudram Taluk in the west of the Tinnevely District of Madras. In this taluk are the principal sources of the Tambraparni river, and its irrigation system is both ancient and extensive. Numerous anicuts or dams cross the Tambraparni and its affluents, supplying channels and tanks in a manner

which is acknowledged to reflect the highest credit upon the skill and energy of the ancient Governments who constructed them.

The two suits out of which this appeal arises were brought in the Court of the District Munsif of Ambasamudram against the Secretary of State for India in Council for recovery of certain sums paid as water cess under the Madras Irrigation Cess Act (Madras Act VII of 1865). Both suits had reference to the village of Vagaikulam in Tinnevely, and the plaintiff in each case was a lessee from the head of a math situated in Mysore which claims to have held the village ever since 1753. The first suit was numbered 412 of 1921 and was brought on 21st December 1921, by the math's lessee for the years 1912 to 1921 to recover Rs. 584-5-6 paid for the year 1920. The second suit was numbered 383 of 1924 and was brought on 26th November 1924, by the math's lessee for the years 1922 to 1931 to recover Rs. 707-3-8 paid for the year 1923. These sums had been levied on the footing that the plaintiffs are entitled to free irrigation of the village lands only in respect of the extent recognized as wet at the inam settlement of 1864; hence that water cess is payable in respect of wet land on which two crops have been raised where one only was raised in 1864, and also where a wet crop has been raised on land which was dry land in 1864. The figures of 1864 are: dry land, 67·91 acres; wet land, 329·60 acres.

Save that in the first suit the head of the math was added as a second plaintiff, the only parties are his lessees on the one hand and the Secretary of State in Council on the other. No ryots or other cultivators of the village lands were at any time before the Court as parties.

SECRETARY OF
STATE FOR
INDIA

VIDHYA
VARADA THIRTA
SWAMIGAL.

SIR GEORGE
RANKIN.

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

The suits succeeded before the District Munsif who heard them together and, on 21st December 1925, made decrees negating the Secretary of State's contention as to the measure of the plaintiffs' right and ordering him to refund the monies paid with interest. The Subordinate Judge of Tinnevely dismissed the Secretary of State's appeals on 10th November 1927 and, on second appeals being brought to the High Court at Madras, these also were dismissed on 29th March 1935.

Vagaikulam village is irrigated by water drawn from the Tambraparni into a channel called the North Kodai Melalagion Kāl ("the N.K. channel"). The water is drawn from the river into this channel by a dam or anicut of ancient date—not a permanent or masonry structure but one erected by Government each year by means of palmyra posts and logs—and the water so led into the channel is regulated by a sluice which Government control. The channel is known to have been in existence in the seventeenth century. It leaves the river at a point which is said to be some ten miles from the village of Vagaikulam and it runs northwards until it comes to the western boundary of the village. It crosses the boundary and runs for a considerable distance within the confines of the village but alongside the western boundary. Thereafter its course takes it into a Government village called Manarkoil where it ends in a tank. From that part of its course, both inside and outside the village, where it runs along or is near to the western boundary of Vagaikulam, several branch channels with open heads lead water into the interior of the village. Either directly or by means of tanks the water is then taken to irrigate the lands of this village and of other villages as well;

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

so that Vagaikulam must be regarded as bound in respect of these channels to pay respect to the rights of riparian owners lower down the stream. The Government village of Manarkoil, which gets its water from the N.K. channel after this channel has in its northward course recrossed the western boundary of Vagaikulam, has in the past shared the water of the channel with Vagaikulam village by a system of turns (murai). According to this system Vagaikulam has taken all it can get for three days, and Manarkoil for two days has taken all it can get save that a small fixed quantity of water is allowed to flow into Vagaikulam—the month being thus divided into eighteen days for the inam and twelve for the ayan (Government) village. The plaintiffs make this murai system a separate ground of objection to any claim for water cess, saying that they are entitled by custom to the quantity of water which they have been enjoying irrespective of the extent of cultivation for which it has been used. Their Lordships do not find it necessary however to deal with this contention.

The right of Government to charge the inamdar with water cess in these circumstances depends upon the terms of the Madras Irrigation Cess Act (VII of 1865) as amended by later Acts. By the first section of that enactment as it now stands the inamdar is *prima facie* chargeable in such a case as the present, subject to two provisos, of which the first is of substantive importance for the present appeal:

"Provided that where a zamindar or inamdar or any other description of landholder not holding under ryotwari settlement is by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more."

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

The suits succeeded before the District Munsif who heard them together and, on 21st December 1925, made decrees negating the Secretary of State's contention as to the measure of the plaintiffs' right and ordering him to refund the monies paid with interest. The Subordinate Judge of Tinnevely dismissed the Secretary of State's appeals on 10th November 1927 and, on second appeals being brought to the High Court at Madras, these also were dismissed on 29th March 1935.

Vagaikulam village is irrigated by water drawn from the Tambraparni into a channel called the North Kodai Melalagion Kal ("the N.K. channel"). The water is drawn from the river into this channel by a dam or anicut of ancient date—not a permanent or masonry structure but one erected by Government each year by means of palmyra posts and logs—and the water so led into the channel is regulated by a sluice which Government control. The channel is known to have been in existence in the seventeenth century. It leaves the river at a point which is said to be some ten miles from the village of Vagaikulam and it runs northwards until it comes to the western boundary of the village. It crosses the boundary and runs for a considerable distance within the confines of the village but alongside the western boundary. Thereafter its course takes it into a Government village called Manarkoil where it ends in a tank. From that part of its course, both inside and outside the village, where it runs along or is near to the western boundary of Vagaikulam, several branch channels with open heads lead water into the interior of the village. Either directly or by means of tanks the water is then taken to irrigate the lands of this village and of other villages as well;

so that Vagaikulam must be regarded as bound in respect of these channels to pay respect to the rights of riparian owners lower down the stream. The Government village of Manarkoil, which gets its water from the N.K. channel after this channel has in its northward course recrossed the western boundary of Vagaikulam, has in the past shared the water of the channel with Vagaikulam village by a system of turns (murai). According to this system Vagaikulam has taken all it can get for three days, and Manarkoil for two days has taken all it can get save that a small fixed quantity of water is allowed to flow into Vagaikulam—the month being thus divided into eighteen days for the inam and twelve for the ayan (Government) village. The plaintiffs make this murai system a separate ground of objection to any claim for water cess, saying that they are entitled by custom to the quantity of water which they have been enjoying irrespective of the extent of cultivation for which it has been used. Their Lordships do not find it necessary however to deal with this contention.

The right of Government to charge the inamdar with water cess in these circumstances depends upon the terms of the Madras Irrigation Cess Act (VII of 1865) as amended by later Acts. By the first section of that enactment as it now stands the inamdar is *prima facie* chargeable in such a case as the present, subject to two provisos, of which the first is of substantive importance for the present appeal:

"Provided that where a zamindar or inamdar or any other description of landholder not holding under ryotwari settlement is by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more."

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

The plaintiffs have therefore to make out an engagement between Government and the inamdar entitling the latter to water free of separate charge; but as it is not contended by Government that water cess can be charged in respect of wet crops taken into account at the inam settlement of 1864 the disputed question between the parties is not whether there was any such engagement but what that engagement was—in other words: what is the measure of the right to water which the inam title confers upon the math?

The plaintiffs say that the principles applied by the Board in the *Urlam* case, *Prasad Row v. The Secretary of State for India*(1), are applicable to this case notwithstanding that *Urlam* was a zamindari vested in the zamindar as his permanent property by the Permanent Settlement Regulation XXV of 1802, whereas *Vagaikulam* is an inam village. They contend that the N.K. channel so far as it lies within the village boundary is vested in the inamdar, as also are the subsidiary channels from which the water is taken to irrigate the village lands; hence that the limit or measure of the inamdar's right to water is not the extent of land cultivated as wet, but is set by the physical conditions such as the size of the channels and the nature and extent of the sluices or weirs, if any, governing the amount of water which enters the channels. This is the view which has been unanimously accepted by the Courts in India.

In reply to it the arguments skilfully advanced by Mr. Tucker and Mr. Pringle on behalf of the Secretary of State may be summarised in their Lordships' view as four:—first, that the inamdar has no right in the village lands save as a mere assignee of the Government's right to the revenue or part thereof; secondly,

(1) (1917) L.R. 44 I.A. 166; I.L.R. 40 Mad. 886.

that in any case the inamdar has no title to the N.K. channel or any part thereof or to the subsidiary channels because these are really wet or river poramboke and poramboke is not covered by the inamdar's title and was not recognized as his at the inam settlement of 1864; thirdly, that in any event, having regard to the importance of the N.K. channel and the subsidiary channels in the irrigation system which Government had set up and was working, an exception of them must be read by implication into any grant of the village as a whole; fourthly, that Government having control of the dam by which alone water is made to enter the N.K. channel, the inamdar is not within the meaning of the proviso "entitled to irrigation" even if he be found entitled to use such water as Government may choose to allow to flow into the N.K. channel or its subsidiaries.

It may here be observed that none of these contentions is intended as maintaining that the N.K. channel or any other water channel with which this case is concerned belongs to any cultivator or cultivators, the claim of the defendant being, as his written statement and the issues show, that they belong to Government. He denies the title of the inamdar and claims title in himself. Their Lordships have not before them a claim by a cultivator to have such an interest in the land as is now commonly referred to as the *kudivaram* right. The burden which such a claimant would have to discharge, the principles applicable to his claim and the special considerations which arise where the inamdar is a math were all dealt with by the Board in the *Tanjore* case, *Nainapillai Marakayar v. Ramanathan Chettiar*(1), as well as in

(1) (1923) L.R. 51 I.A. 83; I.L.R. 47 Mad. 337.

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

SECRETARY OF
STATE FOR
INDIA
V.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

Suryanarayana v. Patanna(1) and *Venkata Sastrulu v. Seetharamudu*(2) which were cases from the Northern Circars. But the present issue is between the grantor and grantee of the inam right and has reference to the year 1753 which was the date of the inam grant. It is to be determined on the basis of the grant and on the evidence afforded by the documents which came into existence when the grant was confirmed by the Inam Commissioner in 1864. The ultimate question is whether the math is owner of the lands in such sense that by its inam title it has an "engagement" with Government entitling it to take without separate charge such water as the channels within the village boundaries may receive from time to time according to the state of the upper water. This may or may not be the same as the question: what is the inference to be drawn from the documents as to the existence in 1753 of cultivators having permanent right in the lands of this village? But an answer to the latter question must be given first.

The inamdar's title is derived from an admitted grant made by the Muhammadan ruler in 1753. The written instrument itself is not in evidence or any copy of it, but a copy of it is proved to have been produced to the Inam Commissioner or his officers in 1864. In Exhibit A, which is an extract from the inam register then compiled, it is described as a *parwana*, a word which was applied to written orders of different types and which of itself throws no light upon the matters now in dispute. This register shows that the inam had been put forward and accepted as such on various occasions in documents of 1801, 1804 and 1820, and in an inam register previously compiled or

(1) (1918) L.R. 45 I.A. 209; I.L.R. 41 Mad. 1012.
(2) (1919) L.R. 46 I.A. 123; I.L.R. 43 Mad. 166.

attempted in 1814. It had stood all along in the name of the math and there was no difficulty whatever in establishing fifty years' enjoyment of the inam, which was sufficient under the rules to make a good title apart from the deed of grant itself. From 1816 to 1828, it is recorded, the village had been placed under attachment for arrears of jodi or quit-rent. In the register of 1814 it had been described as "granted on kattuguthagai tenure for the support of Vyasarayam matam" that is, of the math in Mysore State. In the column of the register which describes the liability to tax or revenue the word "kattuguthagai" is followed by the words "or fixed jodi" which their Lordships take to be a correct equivalent of its immediate meaning, as the trial Judge in the present case has so considered it. The word "guthakai" will be found used in the sense of rent or revenue in the *Tanjore* case(1) already mentioned and is probably connected with the word "gutta" or "guta" which occurs in more than one language and in Wilson's Glossary is said to mean "farm, lease or rent". In the *Tanjore* case(1) it was used with a prefix "rokka" signifying money and in the present case the prefix "kattu" is from a word of which the root meaning is to "bind". Etymology however is one thing and the meaning of the word as used may be another. In column 14 of the register of 1864 the word "bil-mukta" is given as an equivalent; this seems to mean "according to agreement" "stipulated" or "fixed" and is sometimes applied to the tenure as well as to the rent or revenue. A "bil-mukta" inam according to Wilson's Glossary is "a grant of land at a low fixed rent". On the face of the register this inam was a whole village

SECRETARY OF
STATE FOR
INDIA
V.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

(1) (1923) L.R. 51 I.A. 83, 85; I.L.R. 47 Mad. 337, 339.

SECRETARY OF
STATE FOR
INDIA

V. VIDHYA
VARADA THIRTA
SWAMIGAL.

SIR GEORGE
RANKIN.

inam—"a whole kattuguthagai village" is the expression in column 21. There are entries which show that there had been no encroachment within the previous fifty years requiring any further imposition to be made—the total area of the village being the same as in 1801. The area of dry and wet poramboke was deducted for the purpose of computing the assessment of the village. Two minor inam areas were added to this inam, the total jodi or quit-rent being raised in this way from Rs. 1,974-13-6 to Rs. 1,981-3-8 by adding the jodi borne by them, but in truth the old jodi was retained for this village. The "extent for title-deed" of this whole village inam is calculated at the figures upon which Government now relies as providing the measure of the inamdar's right to water free of separate charge, viz., dry, 67-91 acres, wet, 329-60 acres. The assessment is put at Rs. 3,091-8-2, the village being described as in a flourishing condition. The decision of the Deputy Collector of the inam commission is dated 1st June 1864—"to be confirmed under Rule III, clause (1), jodi Rs. 1,974-13-6." This refers to the Inam Rules of 1859 which governed the commission and which contained directions as to the terms upon which the different kinds of inams should be recognized according as they were for charitable purposes or were personal grants, grants for services no longer of value or village service grants. In some cases the inams were only continued upon the terms of a jodi or an additional jodi being imposed, in others they were continued only for a life or lives. But the Vagaikulam village being a religious inam—in column 2 *dharma-dayam* is the entry—it came under the third rule and fell to be continued to the holders and their successors without any further interference and permanently so long as the institutions were maintained in an efficient state and

the services continued to be performed. The title-deed was granted on 27th July 1865, in these terms:—

"Title-deed granted to the manager for the time being of Vyasarayaswami matam.

1. On behalf of the Governor-in-Council of Madras I acknowledge your title to the Religious Endowment Inam village of Vagaikulam, in the taluk of Ambasamudram, in the district of Tinnevely claimed to be of acres sixty-seven (67-91) of dry land and acres three hundred and twenty-nine (329-60) of wet land held for the support of the above matam in Sosalai in Mysore territory.

2. This inam is confirmed to you and your successor subject to the existing quit-rent of Rupees 1,981-3-8 per annum to be held without interference so long as the conditions of the grant are duly fulfilled.

3. If you should desire to commute the quit-rent for the payment of a sum of money, once for all, equal to (20) twenty years' purchase of the quit-rent you will be at liberty to do so.

(Signed) —,

Officiating Inam Commissioner.

Coimbatore, 27th July 1865.

Rupees 3,091-8-2. The seal of the Inam Commissioner, Madras."

This deed was issued pursuant to Rule XXX of the Inam Rules which required a title-deed to be "at once furnished to the inamdar acknowledging his title to the inam on its present tenure and specifying the terms upon which this tenure may be converted into a freehold". The form was that numbered 6 in Appendix H to the rules which was the form applicable to religious inams but was not adapted to the particular case of "whole village" inams. For the case of whole village inams it was sometimes, as reported cases show [*Venkataratnammah v. Secretary of State*(1), *Secretary of State v. Raghunatha Tathachariar*(2)], adapted or made clearer by the addition

(1) (1912) I.L.R. 37 Mad. 364 (Foot-note case).

(2) (1912) I.L.R. 38 Mad. 108.

SECRETARY OF
STATE FOR
INDIA

V. VIDHYA
VARADA THIRTA
SWAMIGAL.

SIR GEORGE
RANKIN.

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

in writing in the margin of the words "besides poramboke"; since the area specified as "claimed" could not be the whole area of the village. Inamdars and officials might well think that an inappropriate form needed to be made as plain as possible. In the present case as in most cases the inamdar never attempted to commute the quit-rent and their Lordships say nothing as to other parts of the form which were directed to the right of commutation.

The true inference from these materials as to the character of the inam right granted in 1753 is not much affected by the Madras Acts IV of 1862, IV of 1866 and VIII of 1869. Sometime in 1867 it was discovered that inamdars who had no rights save in the revenue of lands were attempting to evict the proprietors on the strength of the title-deeds which had been granted to them by the inam commission. These deeds and certain expressions in the Inam Rules and in the Acts of 1862 and 1866 led Government to repent of having used phrases such as "freehold", "absolute freehold" and even of the use of the words "land" and "lands" in connexion with inams. Government also discovered that the title-deeds and indeed the scheme of the inam settlement were fundamentally invalid. They had proceeded without legislative sanction and by agreement between the inamdar and the Government under the minute of Sir Charles Trevelyan, dated 13th May 1859, issued at once upon his taking office as Governor. But the lands were not vested in the Government of Madras but in Her Majesty and could only be disposed of in the name of the Secretary of State in Council. To remove this last difficulty an Act of Parliament was required and thus was passed the statute 32 and 33 Victoria, chapter 29. To remove the difficulties created by the ill-advised

language of the Rules, Acts and title-deeds, Madras Act VIII of 1869 referred in its preamble to

"the rights and interests which other persons may have in lands from which the inams are derived or drawn in cases where inam-holders do not possess the proprietary right in the soil but only the right of receiving the rent or tax payable to Government in respect of the inam land as transferees of the Government".

It provided as follows :—

"Nothing contained in any title-deed heretofore issued to any inam-holder shall be deemed to define, limit, infringe or destroy the rights of any description of holders or occupiers of the lands from which any inam is derived or drawn or to affect the interests of any person other than the inam-holder named in the title-deed; and nothing contained in Madras Act IV of 1862 or in Madras Act IV of 1866 shall be deemed to confer on any inam-holder any right to land which he would not otherwise possess."

It is perhaps sufficient for the purposes of the present case to observe that no point whatever need be made or reliance placed on Madras Act IV of 1862; but that the title-deed and the entries in the inam register are evidence of the true intent and effect of the transaction of 1753 and of the character of the right which in 1864 was being recognised and continued. The Act of 1869 creates no presumption that the view entertained by the inam commission was unfounded, and unquestionably in many cases the inam right does comprise the proprietary right in the soil. While the Act extends a certain protection to holders and occupiers of the lands it contains no provision entitling Government to derogate from its own grant or from the grant which it has recognized and confirmed. On the other hand, if once it appears that the grant of 1753 carried no right to the land but only a right in the revenue from the village, the proceedings of the inam commission will have no effect

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.

SIR GEORGE
RANKIN.

to change its character or to vest in the inamdar a subject-matter not belonging to him; *The Secretary of State for India v. Srinivasa Chariar*(1). That, however, is the very question for decision.

In these circumstances, as the entries in the register speak of "kattuguttagai" tenure and of the inamdar as "kattuguttagaidar", the first effort must be to ascertain whether these terms can be shown to import a right to the land itself or an interest limited to the revenue. In the Glossary of Judicial and Revenue Terms, which was published in 1855 by Professor Horace Hayman Wilson, "kattuguttagai" is explained as meaning "land held in farm at a permanently fixed money rent which is usually light". It has been contended on behalf of the Secretary of State that this supports the suggestion that the inamdar in the present case was a mere farmer of the revenue or person interested in a profit rental—in much the same position as the ijaradar of Bengal who is called a "farmer of rents" in the Bengal Tenancy Act [section 22 (3)]. This seems to their Lordships to mistake the meaning of Wilson's definition and it may be as well to ascertain what the words "in farm" mean in the Glossary of 1855 which has been of such great assistance to their Lordships and to all the Courts of India. Professor Wilson held the chair of Sanskrit at Oxford and was librarian to the East India Company, but his Glossary was compiled pursuant to a resolution of the Court of Directors from materials derived from all parts of India as well as from the stores of his own immense erudition. No reader of his preface will have any doubt that many of his definitions or explanations date back in point of language to the early years of

(1) (1920) L.R. 48 I.A. 56, 67; I.L.R. 44 Mad. 421, 431.

the nineteenth century. It is probably true that for almost a hundred years the verb "to farm" has been obsolete or infrequent in colloquial English in the sense of holding land from another or letting it out to another. It is now more commonly employed as meaning "to take fees, proceeds or profits of an office or tax on payment of a fixed sum". But neither in Wilson's Glossary nor in the sources from which he drew was the old meaning obsolete. The ancient operative words of an English lease were "demise, lease and to farm let". The term lease as used in English law is indeed almost as inapt in parts of India as the word "freehold" was found to be. For example, a lease cannot (apart from statute) be made to endure in perpetuity, yet permanent tenancies of one sort or another are almost universal in India and are often without any written instrument of demise. For whatever reason, "to hold land in farm", "farmers of land" and similar words were constantly employed and were employed by Wilson in his Glossary in connexion with land held of another person. For illustration the word "swami-bhogam" may be taken. In a note written in 1816 by Mr. Francis Whyte Ellis, Collector of Madras, and a great authority on Southern India, its languages, and its land tenures as well as upon Hindu law (cf. page 40 of "Replies to Seventeen Questions....Relative to Mirasi Right" Madras, 1818, republished in "Three Treatises on Mirasi Right", edited by C. P. Brown, Madras, 1852) will be found this explanation of "swami-bhogam": "the rent paid for land held in farm from the mirasidar for a fixed period." In Wilson's Glossary the word is defined in the same language: "In the Tamil country it means the share of the produce or the rent which is paid to the mirasidar or hereditary proprietor by

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
SIR GEORGE
RANKIN.

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

the tenant cultivator holding the land in farm for a fixed period." The words "holding in farm" are there applied to the actual cultivator and their meaning cannot be mistaken. Wilson's exposition of such words as "ijara," "thika," "gutta" shows that to him a "farm of land" or "farm of cultivation" is as natural an expression as "farm of revenue or rent".

It so happens that within a few years of the publication of the Glossary the case of *Vencataswara Yetti-apah Naicker v. Alagoo Moottoo Servagaren*(1) came up to the Board on appeal from the Sudder Dewanny Adawlut of Madras. Like this it was a case from Tinnevely. The plaintiff established before all the Courts that, before the defendant's predecessor had been given his zamindary under the Permanent Settlement Regulation XXV of 1802, the plaintiff's ancestors had held the suit lands (fifteen villages) in regard of services of a semi-military nature by a tenure known as *cuttoogootaga* or *java-tha*—that is, at a light fixed jumma; also that in 1805 his father had arranged to take from the zamindar the same lands on a "cuttoogootaga" lease—a permanent lease of the land at a certain rent entitling him to use the land himself or let it out to others. The defendant's story, which was rejected as false, was that the plaintiff had only come upon the land under a temporary lease or *ijara* of 1814, but it is not quite clear how the word "ijara" was intended to be understood. In the case lodged by the defendant as appellant there comes, in the same words as Wilson's Glossary had used, the explanation: "The term 'cuttoogootaga' means land held in farm at a permanently fixed money rent." Again

(1) (1861) 8 M.I.A. 327

it is not clear that this was thought to assist in showing that the plaintiff was a mere farmer of rents. But in any view it was held by all the Courts who dealt with the case that the plaintiff had full right in the villages as he claimed. As the Zillah Court had held, "the right claimed by the plaintiff is of the nature of a dependant talookdaree tenure expressly recognized by the Regulations". The Sudder Court held it to be "a fixed rent tenure". The word which appears in the judgment of the Board as "*java-tha*" and elsewhere in the record as "*jeevithaporooppoo*" means a grant of lands for maintenance at a fixed rent. Mr. Mayne from this decision collected that "*cuttoogootaga*" is a term indicating a perpetual tenure at a low rent for past military services (Hindu Law and Usage, Sixth Edition, page 514, paragraph 398) but, as the present case illustrates and as the inam commission disclosed, this form of tenure may be granted for divers purposes.

The matter does not rest there. The question is as to the meaning of "*kattuguttaga*" in this Tinnevely village inam register. Now the Inam Commissioner, Mr. G. N. Taylor, and his successor, Mr. W. T. Blair, have provided their own dictionaries. Mr. Taylor had to take the orders of Government before settling the inams of this district and his proposals are to be seen in a minute, dated 27th February 1863. This was not put in evidence—perhaps because the contention as to the meaning of "*kattuguttagai*" was not placed before the trial Court. In any case their Lordships refer to this minute only as a dictionary though in fact it was rather more. "*Kattuguttaga*", Mr. Taylor explains, "consists of lands held upon a fixed favourable assessment". He goes on to state that in Tinnevely eighty-seven "*kattuguttaga*" villages are whole

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

inam villages and to show the different descriptions of "kattuguttaga inams" according to their purpose, e.g., pagoda, village goddess, mosque, water pandal, math, etc., and the numbers of each type. At or towards the end of the labours of the commission Mr. Taylor's successor, Mr. Blair, made a final report, dated 30th October 1869, on the entire operations and appended to it a long glossary or descriptive list of inam tenures of the Madras Presidency. *Kattugutta* as the name of a tenure is described thus: "Lands held on a fixed rent less than the full assessment. They have been treated as jodi inams." *Rokka gutta* are "villages held on a fixed money rent the amount of which is somewhat lower than the standard assessment of Government lands". *Jodi* is said to be "an inam subject to a quit-rent". *Jivitam* is accounted for as a Madura term meaning tenures granted by zamindars to relatives or dependants either for subsistence or on condition of performing feudal service. *Poruppu* is said to mean wet or dry lands held on a favourable assessment paid in money. *Bilmakta* means "lands held at a fixed rent below the usual standard".

Lastly, their Lordships find that a recent case before WALLACE J. in the Madras High Court raised the present point; *M. D. Thirumalayappa v. Karuppayi*(1). The question arose on the issue whether the inam village was an estate within the Madras Estates Land Act, 1908, and the suit was between tenants of the village and the inamdar. The tenants relied on the description of the village as "kattuguthagai" and persuaded the District Judge that this implied that the inamdar was only a renter or farmer of the melvaram right from Government.

(1) A.I.R. 1928 Mad. 375.

Wilson's Glossary was cited by WALLACE J. who held that "'kattuguthagai' was in essence a lease or grant of land at a favourable rent . . . there was nothing in the term itself from which one is entitled to infer that what was handed over was only the melvaram". That is the exact point now before their Lordships whose examination of the matter leads them to the same conclusion.

Without undertaking to decide what would be the effect upon the present question of proof that in 1753 cultivators with permanent rights of occupancy were upon the lands of the village and without purporting to determine whether a "kattuguthagai" grant could be made or was ever made in such circumstances as to take effect upon melvaram only, their Lordships are of opinion that the evidence in the present case, which consists in substance of the proceedings of the inam commission, is strong to show that the right of the math was a right to the land and to the whole land of the village. Indeed it is both handsomely and sensibly conceded that this is the *prima facie* effect of the inam commission's acts and words. There is no such evidence direct or indirect as would justify a Court of law in cutting down the effect of the title-deed of July 1865, or in refusing to give full effect to the statements in the inam register, Exhibit A. Of the state of the village in 1753, and the motive of the grant in favour of this Mysore Hindu institution their Lordships are without information. The conditions of 1753 are not directly ascertainable and an imaginative reconstruction, if it were permissible, is rendered both difficult and valueless by the troubled character of the times. Save that the right of the math has been recognised throughout, the history of this matter is a blank from 1753 until the end of the century, when

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

British authority succeeded that of the Nawab of Arcot. From that time there are the materials mentioned in the inam register as relating to the years 1801, 1804, 1814, 1820 and the attachment from 1816 to 1826 for "arrears of jodi". That attachment is said by learned Counsel for the plaintiffs to have been made under Madras Regulation XXVII of 1802, a Regulation of which the language is taken from Bengal Regulation XIV of 1793. It provides for attachment of lands as a means for the recovery of revenue from two classes of persons whom it calls (i). actual proprietors of land, (ii) farmers of land holding farms immediately from Government. The math would not seem to be a "farmer" in this sense and the plaintiffs' argument that it was treated as an "actual proprietor" may well be right; but as the entry in the inam register gives no particulars as to the authority for the attachment and as the language of Regulation XXVII may not be altogether apposite to the Madras conditions their Lordships do not further pursue this line of argument. There is no evidence showing that in later years cultivators have established permanent right in the land as against the math. It does not seem to their Lordships to be in doubt that the inam right extended to all the village lands. It was a whole village inam like many others—a "kattuguthagai village"—in the *olugu* (or account kept of village fields) of 1801 and in the language of the case which came before the Board in 1861; a "whole kattuguthagai village" in the language of the inam register of 1864. In these circumstances it would be unreasonable to attach the smallest weight to the circumstance that the words "besides poramboke" had not been inserted into the title-deed made out in 1865 upon a form not specially adapted to the case of whole village inams.

Upon the whole, therefore, the first two of the appellant's arguments as summarized in a previous passage of this judgment do not in their Lordships' view succeed and the math must be taken to have shown title to the lands of the village as a whole.

But it is necessary to give separate consideration to the contention that the inamdar's right in the lands of the village is subject to an implied reservation of the bed of the N.K. channel in that part of its course which takes it within the western boundary of the village. It has been contended for the appellant that a reservation must also be implied as regards subsidiary channels although within the village, because they too are part of a Government irrigation system. This question is quite unaffected by the provisions of section 2 of the Madras Land Encroachment Act (Madras Act III of 1905) which saves the rights of inamdars. The subsidiary channels do in some cases carry water which serves to irrigate the lands of other villages so as to give them *prima facie* at least some rights as lower riparian proprietors. Even so, however, their Lordships think it quite impossible to imply any reservation of the beds or banks of these subsidiary channels, having regard to their number and distribution throughout the village and to the tanks within the village which are connected with them. So to treat them would alter fundamentally the character and value of the grant. It was pointed out in the *Urlam* case⁽¹⁾ that if any part of the water carried by the channels was to be specially safeguarded in the interest of some other Government village it would be enough to imply a reservation of water rights; and that a reservation of the channels would

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

(1) (1917) L.R. 44 I.A. 166; I.L.R. 40 Mad. 886.

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

raise questions as to the liability of Government for their upkeep and possibly for their management.

There is more to be said for implying in favour of Government a reservation of the N.K. channel itself. In these suits only a few bare facts about this channel have been given in evidence. A reference made in another case, *Ambalavana Pandara Sannathi v. Secretary of State for India*(1), to a boundary mentioned in a grant of 1614 is the proof of this channel's antiquity. No attempt has been made to show the condition of this village or this channel in 1753. The history of the management of the channel is very sketchy, if it can be said to have been attempted by either side. From certain remarks made in the judgment of VARADACHARIAR J. in a previous case between the present parties, *Secretary of State v. Narayana Ayyar*(2), a few more facts may be gathered, e.g., "after flowing through a number of ayan villages and inam villages this channel at its tenth mile enters the Vagaikulam village and after flowing through that village for three quarters of a mile it enters the Government village of Manarkoil and finally empties itself into certain ayan tanks". But at the moment their Lordships have not even the assistance of accurate or sufficiently detailed maps of this channel or proper evidence in explanation of them by a surveyor or engineer with knowledge of the locality. The ownership of this channel has been disputed between Government and the math for a number of years and the question has cropped up and narrowly escaped decision more than once—always it would seem in connexion with some small money claim thus coming before the High Court on second appeal as in this case. It was

(1) (1905) I.L.R. 28 Mad. 539.

(2) A.I.R. 1937 Mad. 523.

very carefully handled by VARADACHARIAR J. in the highly instructive judgment above mentioned. The trial Court in the present case has held that the N.K. channel belongs to the inamdar and this has not been reversed on appeal. Their Lordships have some hesitation in the circumstances in touching that finding but as they have arrived at the conclusion that a decision of this question is not necessary to the disposal of this appeal, the matter may still be left open.

Assuming without in any way affirming that the N.K. channel belongs to Government, their Lordships consider that this appeal of the Secretary of State should be dismissed. They think that the same principles as were applied in the *Urlam* case(1) apply upon that footing to the village of Vagaikulam. Upon this important question of principle they agree with the decisions of the Madras High Court in *Yahya Ally Saheb v. Secretary of State*(2) and *Sevugan Chettiar v. Secretary of State*(3), which were followed by the High Court in this case. In one part of the Board's judgment in the *Urlam* case(1) Lord PARKER dealt with it on the basis that the river Vamsadhara belonged to Government and that the zamindar had a grant from Government of contiguous land through which passed a channel constructed for irrigation and supplied with water from the river. He showed how, when the head sluice and initial portion of a channel were situate in the zamindar's estate, the right or easement of taking water from the river is limited only by the size of the channel and the nature of the sluices and so forth. It is measured by the physical conditions of the channel [cf. *Urlam* case(1)]. In the case of Vagaikulam the channels which lead out of the N.K.

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

(1) (1917) L.R. 44 I.A. 166, 182; I.L.R. 40 Mad. 886, 904.

(2) A.I.R. 1928 Mad. 97.

(3) A.I.R. 1928 Mad. 261.

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

channel have open heads, but the same reasoning covers all the channels which take off from the N.K. channel in that part of its course which is within the village. It is understood however that some water in some of the subsidiary channels is taken from the N.K. channel at points which are near to but not within the village, and flows first, if only for a short distance, through channels in land belonging either to Government or to some other proprietor. It may be that very little water is obtained by Vagaikulam in this way since none of the Courts in India has specifically dealt with the matter upon this footing nor is it specifically raised by the appellant's case as a separate matter. But if water be so obtained by Vagaikulam village the inamdar of Vagaikulam has by virtue of his engagement with Government—that is by virtue of the title granted to him in 1753 and confirmed in 1864—rights analogous to those of a lower riparian owner on a natural stream and any rights which can be claimed as continuous and apparent easements. His position is not materially different from that of the Urlam zamindar in respect of water which came into his estate through the other zamindaris from the Vamsadhara assuming the river to belong to Government. That position is dealt with specifically in the judgment of the Board, cf. *Urlam* case(1), which need not be repeated here. The physical conditions of the channels at the village boundary would provide the measure of the water to which the math was entitled by virtue of its inam grant.

It appears therefore unnecessary to determine the proprietorship of the bed of the N.K. channel and the only remaining question is upon the construction of

(1) (1917) L.R. 44 I.A. 166, 183 ; I.L.R. 40 Mad. 886, 905.

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

the first proviso to section 1 of the Madras Irrigation Cess Act, 1865. The point taken by Mr. Tucker for the appellant is that unless it be shown that Government is obliged by means of the dam across the Tambraparni river to direct water into the N.K. channel and obliged to direct more than is necessary to supply the "mamul wet" of 1864, the inamdar of Vagaikulam is not "entitled to irrigation" within the meaning of the proviso. In strictness of language, what the inamdar is entitled to is water and he needs no authorization from others to use for irrigation such water as is his. In the years 1920 and 1923 or at any other time he has done no more than use the water which came into his channels, directly or not quite directly, from the N.K. channel. As their Lordships construe the proviso he is entitled to this irrigation without separate charge if he has a right to the water by virtue of his inam and as one of the rights covered by the jodi which it bears. In the *Urlam* case(1) it was said by the Board of the zamindari rights that they arose under and were dependent upon engagements with Government embodied in the sanads granted at the permanent settlement and that payment for them was included in the jammās. When it is said that the inamdar's or zamindar's right to water is measured by the physical conditions at the channel heads it is not of course intended that at all seasons he is entitled to a volume of water amounting to the full capacity of the channels. It is only meant that up to the measure of that capacity he is entitled to such water as can flow into them, the condition of the "river" or "upper channel" being what it is from time to time. The math's right, if any, to require that Government shall do or refrain from doing some act in order that

(1) (1917) L.R. 44 I.A. 166, 185 ; I.L.R. 40 Mad. 886, 907.

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

the upper channel shall not run dry is a distinct though a closely connected matter. It seems improbable that Government should desire to put the N.K. channel into disuse or to discontinue any practice upon which generations have relied for their subsistence, especially as it is not denied that Vagaikulam has some right to water and Mannarkoil is an ayan village. Their Lordships gather that many dams in Madras even if partly made of masonry require works of one sort or another to be done at certain seasons of each year in order that they may perform their function. In the case of inam lands which from long before 1865 have had the right to obtain water from ancient Government systems of irrigation, the policy and effect of the first proviso to section 1 of Act VII of that year may be that such rights as they had should continue without separate charge. If so it is a matter for consideration whether this can or ought to be defeated in the particular case of dams which do not function automatically and without some seasonal control. If however such a course of action on the part of Government is properly to be contemplated as a matter of legal right, the right can neither be affirmed nor negatived upon this appeal.

The decree under appeal is really that of the District Munsif which the other Courts in India have affirmed. It orders refund of water cess paid for the years 1920 and 1923, and it declares that Government is not entitled to levy cess "for cultivation that might be made by the plaintiffs in excess of the extents shown in the inam title-deed . . . with the quantity of water that has been flowing and that would flow through the present ventage of the branch channels." In their Lordships' opinion the plaintiffs' right to this relief has been fully made out independently of the question whether the N.K. channel belongs to the

math or to Government. They have been much assisted by the clear and thorough judgment of the trial Court whose presentation of the facts and law has facilitated their task and that of the appellate Courts in India.

They will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs as between solicitor and client of the legal representative of the first respondent in the first appeal, who alone appeared.

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

Solicitor for first respondent : *Harold Shephard.*

N.S.

INCOME-TAX REFERENCE.

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

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

v.

THE G. D. NAIDU INDUSTRIAL EDUCATIONAL
TRUST, COIMBATORE, BY MANAGING TRUSTEE
G. D. NAIDU, RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 4 (3) (i)—Trust deed providing for borrowing by managing trustee for his own purposes on security of trust properties and for selling them for floating companies—Trust not wholly for charitable purpose within sec. 4 (3) (i).

On 24th January 1938, D, the owner of a considerable body of shares in certain transport companies, constituted himself the managing trustee of these shares and of other properties belonging to him. The trust was intended mainly

* Original Petition No. 289 of 1941.

SECRETARY OF
STATE FOR
INDIA
v.
VIDHYA
VARADA THIRTA
SWAMIGAL.
—
SIR GEORGE
RANKIN.

1942,
February 2.

COMMISSIONER
OF INCOME-TAX,
MADRAS

v.
G. D. NAIDU
INDUSTRIAL
EDUCATIONAL
TRUST.

for providing permanent facilities for the improvement of motor, electrical and other industries and transport in the country and for founding an institution providing for research, education and training in that connexion. The deed of trust provided *inter alia* that, so long as D held the office of managing trustee, he should have the power to borrow to any extent on the properties conveyed to the trust and the board of trustees should have power to borrow moneys which were necessary to discharge the debts contracted by D and to sell immovable properties belonging to the trust for the purpose of floating other companies or institutions. During the year of account 1937-38, dividends were declared by the transport companies in which D held the shares. The dividends, however, were not paid to the trust but retained by the companies themselves. On a claim on behalf of the trust for a refund of the income-tax paid in respect of the dividends on the ground that they formed the subject-matter of a trust for charitable purposes under section 4 (3) (i) of the Income-tax Act,

held : that in view of the provisions by which the assets could be utilized for D's own purposes or the purposes of his companies, the deed of trust executed on 24th January 1938 did not create a trust wholly for charitable purposes within the meaning of section 4 (3) (i) of the Act.

REFERENCE to the High Court by the Commissioner of Income-tax, Madras, under section 66 (2) of the Indian Income-tax Act, XI of 1922.

Advocate-General (Sir A. Krishnaswami Ayyar) for M. Subbaraya Ayyar for respondent.—The assessee is entitled to a refund of the income-tax paid on the dividends declared in respect of the shares in the transport companies. Exemption from tax is claimed under section 4 (3) (i) of the Income-tax Act and the question is whether, having regard to the several clauses of the trust deed read as a whole, an effective and complete trust wholly for a charitable purpose has not been created thereby. The founder of the trust has constituted himself the managing trustee and very large powers are no doubt vested in him. But that does not affect the completion of the trust. The clause providing for the revocation of the trust deed by the founder if the scheme was found unworkable in his opinion is not by itself material if an effective trust

has been created otherwise by the trust deed. The existence of a power of revocation cannot affect a completed trust; see section 78 of the Indian Trusts Act, the principles of which are equally applicable to charitable trusts. A trust may be effective and complete even though a power of revocation is reserved in the founder. It is a general principle of the law of trusts that the existence of a power of revocation does not by itself derogate from the trust created. The provision for revocation was moreover deleted from the trust deed subsequent to the year of account. That is relevant for the purpose of showing the *bona fides* of the founder that an effective trust was intended to be created by him. The clauses by which the managing trustee is empowered to borrow on the security of the trust properties for his own purposes and for the purposes of the transport companies and by which the ordinary trustees are enabled to raise loans for discharging debts incurred by the managing trustee are all, if read in the context, intended for the promotion of the trust and do not detract from it. They are merely provisions which define a particular mode for investment of the trust funds and what is contemplated is a relationship of creditor and debtor between the trust and the transport companies. A research institute was started in pursuance of the objects of the trust in the very next year after the year of assessment. That again shows that an effective trust was intended to be and was in fact created by the founder.

K. V. Seshu Ayyangar for petitioner.—Under the terms of the trust deed the control of the trust is vested in the founder who is also the managing trustee. He had powers to start new businesses and companies and could also borrow in respect thereof. The words in the clauses "devote for increasing the income of the companies" do not mean that the transport companies are intended to be treated as borrowers from the trust. The position is really analogous to the case of a trust carrying on business for profit and in such a case the trust is clearly liable to pay income-tax.

The JUDGMENT of the Court was delivered by LEACH C.J.—On 24th January 1938, one G. D. Naidu, a gentleman largely interested in motor engineering and transport companies in the Coimbatore District, created the G. D. Naidu Industrial Educational Trust

COMMISSIONER
OF INCOME-TAX,
MADRAS

v.
G. D. NAIDU
INDUSTRIAL
EDUCATIONAL
TRUST.

LEACH C.J.

COMMISSIONER
OF INCOME-TAX,
MADRAS
v.
G. D. NAIDU
INDUSTRIAL
EDUCATIONAL
TRUST.
LEACH C.J.

and purported to endow it with the shares held by him in six transport companies of which he had the control and immovable property worth Rs. 1,10,000. Mr. Naidu constituted himself the managing trustee of the trust and gave himself full power to deal with its assets. This reference arises out of a claim made under section 4 (3) (i) of the Indian Income-tax Act by Mr. Naidu, as the managing trustee, for a refund of the tax paid in respect of dividends declared on the shares held in these transport companies. The income-tax authorities refused to allow a refund. Their reason was that the shares were not held under trust wholly for charitable purposes within the meaning of the section. The managing trustee having asked the Commissioner of Income-tax to state a case to this Court under section 66 (2) of the Income-tax Act, the Commissioner has referred this question :

"Whether on a proper construction of the instrument of trust, dated 24th January 1938, the properties in question were held under trust for charitable purposes within the meaning of section 4 (3) (i) of the Indian Income-tax Act."

The transport companies in which Mr. Naidu was interested had accumulated their profits from the date of their incorporation in 1932, but after the execution of the deed of 24th January 1938 they declared dividends amounting in the aggregate to Rs. 3,49,155, of which Rs. 2,75,340 represented the dividends on Mr. Naidu's shares. The Rs. 2,75,340 was not, however, paid over to the trustees. The money remained with the companies. All that the trust received were promissory notes of the face value of Rs. 2,75,340.

The objects of the trust may be stated shortly as follows :—

(i) to provide permanent facilities for the improvement of motor, electrical and other industries

and transport in the country ; (ii) to found an institution providing for research, education and training in this connexion ; and (iii) to ensure the permanence and efficiency of the institution by placing at its disposal the workshops and the motor transport concerns in which the founder is interested.

If the assets which Mr. Naidu purported to set apart were to be devoted directly to such objects, no doubt the trust would be entitled to the refund claimed ; but the deed clearly shows that the contemplated institution was not to be brought into being immediately and that the companies in which Mr. Naidu was interested were to have the benefit of these assets set apart by him. Clause 54 of the deed provides that, so long as Mr. Naidu holds the office of managing trustee, he shall have the power to borrow to any extent on the properties conveyed to the trust and that the board of trustees shall be able to borrow moneys which are necessary to discharge debts contracted by Mr. Naidu. The power given to him is not limited to borrowing for the purpose of the trust. Apparently he can borrow moneys for his own purposes on the security of the assets set apart by him. By clause 55 the trustees are empowered, so long as Mr. Naidu holds the office of managing trustee, to sell immovable properties belonging to the trust "in expanding or floating industrial institutions", in other words, for the purpose of floating other companies. Clause 59 provides that the trustees may advance to the companies in which Mr. Naidu is interested moneys for (a) discharging their liabilities, (b) purchasing and substituting diesel or other more economical engines for the petrol engines on buses run by them, and (c) constructing passenger sheds and garages and other "amenities and facilities" for the use of the transport services "wherever the trust is interested".

COMMISSIONER
OF INCOME-TAX,
MADRAS
v.
G. D. NAIDU
INDUSTRIAL
EDUCATIONAL
TRUST.
LEACH C.J.

COMMISSIONER
OF INCOME-TAX,
MADRAS

G. D. NAIDU
INDUSTRIAL
EDUCATIONAL
TRUST.

LEACH C.J.

Clause 60 deals with the foundation of the proposed institution. It reads as follows:—

“That the trustees shall as early as they consider it expedient utilize the trust for the purpose of starting an institute for industrial and scientific research and training with a factory attached thereto, for the manufacture of all or any types of automobiles, electrical plants, mills and other machinery and all accessories and equipment therefor, or other goods approved by the board of trustees from time to time, for providing training to deserving persons irrespective of sex, caste, creed or colour in such scientific research, experimental work and manufacture or industries.”

The foundation of the institution was apparently to be left over until the companies had made sufficient money for the purpose. By clause 71 Mr. Naidu reserves to himself the power to revoke the trust at any time.

In view of the provisions of the deed by which the assets can be utilized for Mr. Naidu's own purposes or the purposes of his companies, it is impossible for him to contend with reason that the deed creates a trust wholly for charitable purposes. The idea that some day the institution contemplated by the deed may be founded is not sufficient compliance with the section.

It is said that in 1939 Mr. Naidu made considerable alterations in the trust deed and that these alterations remove the objections now referred to. Whether the deed as it now stands creates a trust which is entitled to the benefits of section 4 (3) (i) is a question with which the Court is not concerned. It is concerned only with the question whether a trust was created wholly for charitable purposes in the year of account, 1937-38, and it is obvious that this was not the case. The Commissioner of Income-tax has correctly appreciated the situation and the question referred will be

answered in accordance with the opinion expressed by him.

The Commissioner is entitled to his costs which we fix at Rs. 250.

N.S.

COMMISSIONER
OF INCOME-TAX,
MADRAS

G. D. NAIDU
INDUSTRIAL
EDUCATIONAL
TRUST.

APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Byers.*

SRI SRI SRI NARAYANA SOORU DEVU GARU,
RAJAH OF TARLA AND ANOTHER (DEFENDANTS
1 AND 2), APPELLANTS,

v.

GUDURU RAMA RAO PANTULU GARU
(PLAINTIFF), RESPONDENT.*

*Indian Limitation Act (IX of 1908), sec. 19—Acknowledgment
of liability—Initialling of, sufficient—Full signature not
necessary.*

Initialling by a creditor of a statement of his liabilities in acknowledgment of the correctness of the same constitutes full compliance with the requirements of section 19 of the Indian Limitation Act; signature in full is not required for constituting an acknowledgment of liability within the section.

Lakshmanacharyulu v. Venkataramanujacharyulu(1) over-ruled.

Tavudu v. Venkataratnam(2) followed.

Velivalli Brahmaiah, In re(3) distinguished.

APPEAL against the decree of the Court of the Subordinate Judge of Chicacole in Original Suit No. 40 of 1938.

* Appeal No. 78 of 1940.

(1) (1920) 51 M.L.J. 414.

(2) (1935) I.L.R. 59 Mad. 72.

(3) (1930) I.L.R. 54 Mad. 252.

1942,
March 10.

RAJAH OF
TARLA
v.
RAMA RAO.

K. V. Krishnaswami Ayyar and B. V. Ramanarasu for appellants.

P. Somasundaram for Advocate-General (Sir A. Krishnaswami Ayyar), C. Sambasiva Rao and C. Siva Rao for respondent.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—The appellant is the Rajah of Tarla and he seeks to escape from liability in respect of a promissory note executed by himself and his father, who is now dead. The appellant's case is entirely devoid of merits, but, notwithstanding this, he would be entitled to succeed on technical grounds if the legal arguments advanced on his behalf were sound. The Subordinate Judge of Chicacole, from whose decree this appeal has been preferred, found against the appellant on the facts and on the law, and we concur in his findings. The attitude of the appellant towards his creditor is certainly one which does not commend itself to the Court.

On 16th June 1931 the appellant and his father executed a promissory note in favour of the Zamindar of Pata Tekkali for the sum of Rs. 6,000, which the payee had advanced to them in order that they might discharge in part a mortgage of the family estate. It is admitted that the mortgage had been created for family purposes. The estate is an impartible one within the meaning of the Madras Impartible Estates Act (II of 1904). On 2nd December 1937 the payee endorsed the instrument to the respondent. The appellant's father died in the month of May 1938 and on 14th December of that year the respondent instituted the present suit to recover a sum of Rs. 9,896 which he claimed was then due on the promissory note. The appellant was sued personally and as representing his father's estate. He had been

RAJAH OF
TARLA
v.
RAMA RAO.
—
LEACH C.J.

appointed to act as the receiver in a mortgage suit instituted by another creditor. Various defences were raised, but on appeal the appellant's case has been confined to these contentions: (i) The suit is time-barred; (ii) the acknowledgment of liability made by the appellant's father on which the respondent relies to save limitation, even if it amounts to an acknowledgment within the meaning of section 19 of the Limitation Act, does not bind the appellant; and (iii) the respondent cannot maintain the suit against the appellant because he is not the assignee of the debt, but merely the indorsee of the promissory note.

On 15th May 1934 a sum of Rs. 500 was paid towards principal and interest then due on the instrument. The fact of payment was indorsed on the promissory note and the indorsement signed by the appellant and his father. On 15th May 1935 a sum of Rs. 1,000 was paid in reduction of the debt and a similar acknowledgment indorsed on the promissory note. In this instance the father alone signed. The promissory note was indorsed to the plaintiff by the payee on 2nd December 1937. The indorsement is in these words:

"The principal and interest due under this pro-note is Rs. 9,100 (in words rupees nine thousand one hundred). As we have received the said sum from Gudur Rama Rao Garu, resident of Vizianagaram, endorsement of transfer has been made in favour of the said Rama Rao and the pro-note delivered. You alone should recover the principal and interest due under the said pro-note without our being liable therefor."

Mr. K. V. Krishnaswami Ayyar, on behalf of the appellant, contends that this cannot be read as an assignment of the debt, but merely as an indorsement of the promissory note. Mr. Somasundaram, on behalf of the respondent, does not dispute the correctness of

RAJAH OF
TARLA
v.
RAMA RAO.
LEACH C.J.

this contention and the case will proceed on the basis that the respondent is merely the holder of the instrument and not the assignee of the debt.

In the month of January 1937 the appellant and his father were endeavouring to arrange for a loan of Rs. 3,00,000 to pay off the debts due by the estate; and in this connection a statement of the liabilities was drawn up. In this statement was included the amount due on the promissory note in suit and the statement was initialled by the father. The Subordinate Judge has found as a fact, and we agree with him, that the father remained the manager of the family up to the time of his death, notwithstanding that in the year 1930 he gave to his son a power of attorney. This power was executed in order that the son might help his father in the management of the estate. The statement of liabilities drawn up in January 1937 was prepared under the appellant's directions and that he checked it is shown by the fact that he made a correction in green ink.

The first contention raised in connection with the plea of limitation is that this statement does not amount to an acknowledgment of liability. This contention is entirely devoid of substance. The document is headed "Tarla Estate. Statement of Liabilities." The particulars of the debts are set out in six columns. In the first column is given the date, in the second column the name of the creditor, in the third the nature of the debt, whether on a mortgage or on a promissory note, in the fourth the amount borrowed, in the fifth the payments made in reduction of the debt and in the sixth column the rate of interest. This obviously is a statement of liabilities and, as already indicated, it is initialled by

the appellant's father as an acknowledgment of its correctness.

It is then said that the statement does not fulfil the requirements of section 19 of the Limitation Act, because the appellant's father merely initialled it, whereas he should have signed his name in full. This argument is based on two decisions of this Court. The first case is *Lakshmanacharyulu v. Venkataramanujacharyulu*(1). That case was decided by ODGERS J., who held that initials were not equivalent to a signature and therefore initials were not sufficient for a valid acknowledgment under section 19. If this judgment is to be followed, it means that the appeal must be allowed; but we are not prepared to follow it. We consider that it does not express a correct statement of the law. We shall return to this question in a moment. The second case is *Vellivalli Brahmaiah, In re*(2) which was decided by SUNDARAM CHETTI J., also sitting alone. The question there was whether a Magistrate who initialled a judgment could be deemed to have signed it. The learned Judge held that the Code of Criminal Procedure required the signature in full. That case merely concerned the provisions of the Code of Criminal Procedure and it has no application here, where we are merely concerned with what is meant by the word "signed" in section 19 of the Limitation Act.

In *Tavudu v. Venkataratnam*(3) VENKATASUBBA RAO J. held that the initialling of an acknowledgment was equivalent to having signed. He pointed out that on principle there was no reason for holding that the word "signed" should be construed as meaning "signed in full". It was immaterial whether the statement was initialled or signed so long as there

RAJAH OF
TARLA
v.
RAMA RAO.
LEACH C.J.

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

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

(3) (1935) I.L.R. 59 Mad. 72.

RAJAH OF
TARLA
v.
RAMA RAO.
LEACH C.J.

was a writing underneath which verified the acknowledgment. The learned Judge considered the judgments of ODGERS J. and SUNDARAM CHETTI J. in the two cases I have mentioned and he regarded, as I do, the decision in *Lakshmanacharyulu v. Venkataramanujacharyulu*(1) as being erroneous. Here we have a statement of liabilities and at the foot of it the appellant's father has written his initials in acknowledgment of the correctness of the statement. I have no hesitation in holding that this constitutes full compliance with the requirements of section 19. It may be mentioned that in *Lord St. John v. Boughton*(2) it was held that initials were sufficient. In that case the person who gave the acknowledgment was not able to write himself owing to an attack of gout and the document was initialled by his daughter on his behalf, his name appearing above the initials.

The main question is whether the initialling of the statement of liabilities by the father operates to extend the liability against the son. Sub-section 2 of section 21 says that nothing in sections 19 and 20 renders one of several joint contractors chargeable by reason only of a written acknowledgment signed, or of a payment made by, or by the agent of, any other or others of them. Clause (b) of sub-section 3 states, however, that for the purpose of sections 19 and 20, where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorized agent of, the manager of the family for the time being shall be deemed to have been made on behalf of the whole family. For the appellant it is said that this clause does not help the respondent. It is acknowledged that it would help him if he

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

(2) (1838) 9 Sim. 219; 59 E.R. 342.

were suing on the debt, but he is not; and therefore it is said that sub-section 2 governs the situation. On behalf of the respondent, it is said that as the father was the manager of the family and as it was a family debt, his acknowledgment of liability operates to extend the appellant's liability on the instrument. The correctness of the respondent's assertion may be open to doubt, but it is not necessary to decide this question because on the evidence there can be no doubt that the father signed the statement on behalf of himself and as the agent of his son. The son prepared the document on behalf of himself and his father and left it to his father to verify the statement, which he did.

For these reasons the appeal will be dismissed with costs.

G.R.

APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Byers.*

P. K. SUBRAHMANIA IYER (RESPONDENT),
APPELLANT,

v.

K. T. S. THANDAVAMURTHI CHETTY (PETITIONER),
RESPONDENT.*

*Receiver—Nature of possession of—Decree of competent Court
in favour of a person declaring charge on certain property—
Property vested in a receiver of Court—Person guilty of
contempt of Court in attaching said property without per-
mission of Court—Effect of—Decree not affected by said
contempt of Court.*

N and T were brothers. Their father died in 1931 leaving a will by which he bequeathed property (E) to N and property

* Original Side Appeal No. 6 of 1942.

RAJAH OF
TARLA
v.
RAMA RAO.
LEACH C.J.

1942,
March 20.

SUBRAHMANIA
v.
THANDAVA-
MURTHI.

(K) to T who was then a minor. In 1936 the estate of the minor was vested in the Official Trustee of Madras and as guardian of T's property he obtained probate of the will. N had by that time taken possession of both the properties. In 1937 the Official Trustee filed a suit against N for the recovery of possession of T's interest in his father's estate basing his claim, firstly, on the will and, alternatively, on the right of T to a partition of his father's estate. The Official Trustee was appointed receiver in the suit. By that time N had mortgaged property (E). As a result of certain proceedings between N and his mortgagee, (E) was sold and the balance of Rs. 1,927-5-3 after discharging the mortgage was paid to the credit of the suit filed by the Official Trustee. In 1938 one S filed a suit against N for specific performance of an agreement between them by which N was alleged to have agreed to execute a mortgage of (E) to S. The Official Trustee was not made a party to this suit. In 1938 S obtained an attachment before judgment of Rs. 1,927-5-3 lying to the credit of the suit by the Official Trustee. In 1939 S obtained a decree. Since (E) had been by that time sold, specific performance could not be given. The Court gave a money decree for Rs. 780 with interest and costs and a charge on the property to the extent of the decretal amount which, in the circumstances that had happened, was effective only as regards the money lying to the credit of the suit by the Official Trustee. At all material times the attachment obtained by S remained effective to the extent of the claim of S against N and the Official Trustee took no steps to challenge it. The suit filed by the Official Trustee in 1937 was decided in his favour in 1940 in which T was held entitled to (K) and mesne profits against N to the extent of Rs. 3,150. On the strength of this decree the Official Trustee applied in 1941 for an order for attachment of the balance of the sale-proceeds of (E) which then remained to the credit of the suit. S resisted the same relying on the charge given in his favour in the suit by him against N for specific performance.

Held: The appointment of the Official Trustee as receiver did not amount to giving T a charge. The receiver was an officer of the Court appointed to hold the property for the benefit of the person who could show a title to it. In the first suit filed by the Official Trustee N was held entitled to (E). S obtained a decree of a competent Court against N that he was

entitled to a charge for the decree amount on the balance of sale-proceeds of (E) lying in Court. So long as the decree stood S was entitled to priority. The fact that S was guilty of contempt of Court in attaching the property vested in a receiver of Court without permission or that the Official Trustee was not a party to the suit filed by S against N did not affect the question involved in the case.

APPEAL from the judgment and order of KRISHNASWAMI AYYANGAR J., dated 5th day of December 1941, and passed in exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2941 of 1941 in Civil Suit No. 79 of 1937.

K. Rajah Ayyar for *M. Ramachandran* for appellant.

T. M. Krishnaswamy Ayyar for *R. Thirumalai-thathachariar* for respondent.

The JUDGMENT of the Court was delivered by LEACH C.J.—The question here is whether a decree passed by the City Civil Court declaring that the appellant is entitled to a charge over the proceeds of the sale of property belonging to one Natesa is effective as against the respondent, who is Natesa's brother. In 1931 Sabapathi Chetty, the father of Natesa and the respondent, died leaving a will dated 15th October 1931 by which he bequeathed to Natesa a house known as 2/46 Erulappan Street, Madras, and to the respondent a house known as 17 Kumarappa Mudali Street. The respondent was then a boy of about ten years of age. On 28th October 1936 the estate of the minor was vested in the Official Trustee of Madras and as the guardian of the respondent's property he obtained probate of the father's will. Natesa had taken possession of both the properties and the Official Trustee was compelled to file a suit (Civil Suit No. 79 of 1937) on the Original Side of this Court to recover possession of the minor's interest in his father's estate. The

SUBRAHMANIA
v.
THANDAVA-
MURTHI.
—
LEACH C.J.

Official Trustee based his case on two grounds. In the first place he contended that the respondent was entitled to the property representing No. 17 Kummappa Mudali Street by reason of the will. In the second place he said that, even if the will were invalid, the respondent was entitled to have the properties partitioned and his share delivered to him. The Court appointed the Official Trustee as the receiver in the suit. It transpired that after his father's death Natesa had created a mortgage on the property left to him. By an order of the Court this property was sold and the mortgage discharged out of the proceeds. There remained a balance of Rs. 1,927-5-3, which was paid into Court to the credit of the suit.

On 17th February 1938 the appellant instituted Original Suit No. 244 of 1938 in the City Civil Court against Natesa for a decree for specific performance of an agreement to execute in his favour a mortgage of the Erulappan Street property. He averred that he had advanced moneys to Natesa in anticipation of the mortgage. In the alternative he asked for a charge on the property to the amount of Natesa's indebtedness to him. On 8th August 1938 the appellant applied for an attachment before judgment of the Rs. 1,927-5-3 lying to the credit of the Official Trustee's suit in this Court. The appellant had not received permission of this Court to apply for the attachment of these moneys, and as for the time being they were vested in the Official Trustee in his capacity of receiver in Civil Suit No. 79 of 1937, the appellant's action amounted to contempt of Court, but his action was not resented and the attachment remained effective until 27th of July 1939.

On 9th January 1939 the appellant was granted a decree in his suit against Natesa. The Erulappan

Street property had by this time been sold and therefore it was not possible for the Court to give a decree for specific performance of the mortgage, but it gave a money decree for Rs. 760, with interest and costs, and a charge on the property to the extent of the decretal amount. The property having been converted into money and part of the money spent in discharging the mortgage over the property, the charge could only be effected, if at all, on the money lying to the credit of the Official Trustee's suit in this Court. In the meantime, namely on 18th August 1938, the Official Trustee as receiver applied for the payment out to him of the money in Court. On this application VENKATARAMANA RAO J. passed this order :—

“The balance of the amount, deducting the amount of the attachment may be paid to the Official Trustee. I leave it to the Official Trustee whether he should contest the attachment.”

The attachment referred to in this order was, of course, the attachment obtained by the appellant in the City Civil Court and it meant that the attachment was to remain effective to the extent of the appellant's claim against Natesa, unless the Official Trustee took steps to challenge it. The Official Trustee took no steps to challenge the attachment until the appellant applied to this Court for an order allowing him to withdraw sufficient of the money in Court to satisfy his decree against Natesa. When this application was made, the Official Trustee objected, and as a result of his objection the Master held that the attachment was invalid, because at the time it was made it had not been decided to whom the balance of the sale-proceeds of the Erulappan Street property belonged.

On 26th January 1940 SOMAYYA J. gave judgment in the Official Trustee's suit. The learned Judge

SUBRAHMANIA
v.
THANDAVA-
MURTHI.
—
LEACH C.J.

SUBRAHMANIA
v.
THANDAVA-
MURTHI.
LEACH C.J.

found the will to be valid and consequently held that the respondent was entitled to the Kumarappa Mudali Street property with mesne profits from the date on which Natesa took possession. As the result of investigation it was found that the respondent was entitled to a sum of Rs. 3,150 by way of mesne profits. On 4th March 1941 the Official Trustee, as the decree-holder in Civil Suit No. 79 of 1937, applied for an order attaching the balance of the sale-proceeds of the Erulappan Street property lying to the credit of the suit. It was then the appellant's turn to object. Relying on the charge which the City Civil Court had given him, he resisted the application of the Official Trustee, and the Master held that his objection was well founded. The respondent appealed and KRISHNASWAMI AYYANGAR J. reversed the decision of the Master. The learned Judge considered that the decree of the City Civil Court was invalid as against the receiver in Civil Suit No. 79 of 1937, and on this ground he reversed the Master's order. This appeal is from the order of the learned Judge.

Mr. Rajah Ayyar, on behalf of the appellant, admits that his client was guilty of contempt in applying for the attachment of the moneys which the Official Trustee as receiver was entitled to hold in Civil Suit No. 79 of 1937, but he pertinently points out that no complaint was ever made on this ground and that his client's action in applying for attachment does not affect his present case. He contends that his client was entitled, as against Natesa, to ask for a charge on Natesa's property or the moneys realized by the sale without impleading the receiver, but even if he ought to have made the receiver a party, the fact that he did not do so does not mean that the decree passed by the City Civil Court can be regarded as a nullity. The

receiver knew of the suit, but he did not seek to be made a party and at no time did he offer any objection to the reliefs which the appellant was seeking. When the Official Trustee himself applied for the attachment of the moneys in Court after he had obtained a decree in his suit, he did so not as receiver but as the Official Trustee.

In *Kumar Suttia Suttia Ghosal v. Rani Gopal Moni Debi*(1) the Calcutta High Court held that a receiver is not a necessary party to a suit for possession of immovable property where the facts were these. The petitioners claimed to be the absolute owners and had been in possession as *howladars* of certain land in the District of Khulna. A receiver had been appointed to take charge of these lands but persons claiming adversely to the petitioners were in actual possession. The petitioners desired to bring a suit against those persons for possession and sought to join the receiver as a party. The Court held that the receiver was not a necessary party. In *Administrator-General v. Dasai Goundan*(2) WALLIS J. followed this decision and referred to the case of *Smith v. The Earl of Effingham*(3).

In the last mentioned case a receiver had been appointed in a suit in which the priority of different encumbrances on an estate was to be determined. A person who claimed to be the first incumbrancer had not been made a party to that suit and he filed a bill of his own to establish his right. It was held that the receiver was not a necessary party to his suit.

The learned Advocate for the respondent relies on the decisions in *Mrs. Levina Ashton v. Madhabmoni Dasi*(4), *Fraser and Ross v. Krishnaswami Aiyer*(5) and

SUBRAHMANIA
v.
THANDAVA-
MURTHI.
LEACH C.J.

(1) (1897) 5 C.W.N. 27.

(2) (1910) 9 M.L.T. 300.

(3) (1844) 7 Beav. 357; 49 E.R. 1103.

(4) (1910) 14 C.W.N. 560.

(5) (1922) I.L.R. 47 Mad. 47.

SUBRAHMANIA
v.
THANDAVA-
MURTHI.
—
LEACH C.J.

Kalyanasundaram Aiyar v. Narasimha Aiyangar(1). In the first of these cases the Calcutta High Court held that the sale of a foreclosure decree without the leave of the Court while the estate was in the possession of a receiver was illegal and liable to be avoided. The case is no authority for the proposition that the decree of the City Civil Court passed in favour of the appellant is a nullity. Whether it could be set aside at the instance of the Official Trustee as such or as the receiver is, of course, another matter. In *Jotindra Nath Chowdhury v. Sarfaraj Mia*(2) the Calcutta High Court held that, where property in the hands of a receiver is intended to be affected by the result of the suit, the receiver is a necessary party to the suit. Again we do not regard this as an authority for relieving the Official Trustee of the necessity of getting rid of the decree obtained by the appellant, if he wishes to secure for the benefit of the younger brother the moneys which are in Court. In *Fraser and Ross v. Krishnaswami Aiyer*(3) the question was whether the Court should have made the receiver a party to certain execution proceedings, and *Kalyanasundaram Aiyar v. Narasimha Aiyangar*(1) had reference to an assignment taken in good faith. In our opinion these cases also have no bearing on the question under discussion.

It is not necessary for the Court to decide whether the Official Trustee as the receiver in his suit should have been made a party to the appellant's suit or what steps are open to him to take. As far as this appeal is concerned the governing factor is that the appellant was granted a charge in a decree passed by a competent Court of jurisdiction and that decree stands. In these circumstances can it be said that the

(1) (1922) 44 M.L.J. 427.

(2) (1910) 14 C.W.N. 653.

(3) (1922) I.L.R. 47 Mad. 47.

SUBRAHMANIA
v.
THANDAVA-
MURTHI.
—
LEACH C.J.

Official Trustee as representing the respondent is entitled to priority? We think not. The appointment of the Official Trustee as receiver did not give the respondent a charge. The receiver was an officer of the Court appointed to hold the property in suit for the benefit of the person who could show a title to it. The respondent had no title to the moneys in Court. They belonged to his elder brother, and when the Official Trustee was granted a decree the respondent had no greater rights than were conferred by the decree. The appellant was in a better position because a Court of competent jurisdiction had given him a charge over the moneys. In these circumstances we consider that the decision of the Master should not have been disturbed.

The appeal will be allowed with costs and the Official Trustee will be directed to re-deposit the money into Court.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth.

TITTI KRISHNAMURTHI (PETITIONER), PETITIONER,
v.

SRI JAGANNADHAPADHI KHADANGA (COUNTER-
PETITIONERS), RESPONDENTS.*

Madras Agriculturists Relief Act (IV of 1938), sec. 3 (2), proviso (B)—Profession tax—Assessment—Incompetency of Court to go into question of legality or otherwise of assessment for purpose of Act.

It is not open to a Court dealing with a matter under the Madras Agriculturists Relief Act (IV of 1938) to go into the question whether a person who has in fact been assessed to profession tax, has been assessed legally or illegally.

* Civil Revision Petition No. 2151 of 1940.

1942,
March 23.

KRISHNA-
MURTHI
v.
JAGANNADHA-
PADHI.

PEITION 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 Special Deputy Collector of Chicacole Division, dated 16th June 1940, and passed in Miscellaneous Application No. 165 of 1938.

B. Jagannadha Das for petitioner.

Kasturi Seshagiri Rao for respondents.

JUDGMENT.

WADSWORTH J.—The only question in this revision petition is whether the petitioner is excluded from the definition of agriculturist on the ground that he paid profession tax for two years preceding 1st October 1937 so as to come within proviso (B) to section 3 (2) of the Madras Agriculturists Relief Act (IV of 1938). The facts are clearly established. The petitioner was assessed to profession tax for four years from 1933 to 1937. Apparently he made a protest in 1937, but there was no appeal filed in respect of any tax for any of these four years. In 1938 when the arrears of tax were demanded he objected that he had no property within the limits of the panchayat board and did not carry on any trade within those limits. Thereupon the president took legal advice and, on being advised that the tax was not properly payable, he requested the orders of the Inspector of Local Boards whether he should enforce the collection of the tax or write it off as irrecoverable. The Inspector advised the panchayat board that the demand was illegal, and that it should not be written off, but should be expunged from the tax register. These proceedings were in March 1939 and it is reasonable to assume that when this reference to the Inspector of Local Boards was made everyone was aware that the importance of assessment to profession tax was in the

KRISHNA-
MURTHI
v.
JAGANNADHA-
PADHI.

WADSWORTH J.

light of Act IV of 1938 something more than the actual liability to tax. The learned Deputy Collector has held that the cancellation of the assessment by the president on the order of the Inspector of Local Boards was invalid and will not affect the assessment so far as proviso (B) is concerned. It seems to me that this view is correct. The rules in schedule 4 to the Local Boards Act (XIV of 1920) give a right of appeal against the imposition of the tax and a right to the panchayat to cancel or modify any order passed by the president reducing or remitting a tax; but in the absence of any appeal it is provided that the assessment or demand of any tax shall be final. No power is conferred either upon the president or upon the panchayat to cancel an assessment which has once been made and has not been challenged in appeal within the time allowed. It is open to the panchayat to write off a tax as irrecoverable and no doubt the panchayat may, as an administrative act, instead of writing off the tax, expunge the name of the person assessed from its registers. But this administrative act will not affect the legal position of the person taxed, in order to make a person who has been assessed into one who has not been assessed; and it is certainly not open to the Court dealing with a matter under Act IV of 1938 to go into the question whether a person who has in fact been assessed, has been assessed legally or illegally. In this view I dismiss this civil revision petition with costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth.

1942,
February 12.

YERRANKI PAPPAYYA SASTRI AND ANOTHER
(COUNTER-PETITIONERS 1 AND 2), PETITIONERS,

v.

KOLA APPA RAO AND ANOTHER
(PETITIONER AND THIRD COUNTER-PETITIONER),
RESPONDENTS.*

*Madras Agriculturists Relief Act (IV of 1938), sec. 15—
Arrears of rent—Records showing grant by zamindar to be
service inam not subject to jodi and in the enjoyment of
grantee at the time of inam settlement—Presumption, grant
of melvaram—Post-settlement inam—Rent paid to land-
holder—Stipulation for enhanced rent—Ascertainment of
proper rent—Principles governing rent—Madras Estates
Land Act (I of 1908), ss. 24, 27, 28 and 52 (3).*

In an application under section 15 (4) of the Madras Agriculturists Relief Act (IV of 1938) praying for the cancellation of arrears of rent on the deposit of the rent for faslis 1346 and 1347 at a certain rate, some documents were filed which showed that the land was granted by the zamindar to certain persons in 1811, that the grant was a service inam not subject to jodi and that it was in the enjoyment of the grantee at the time of the inam settlement.

Held: The Court could assume on the above facts that the grant was a grant of *melvaram* and, as the grant was a post-settlement grant, the grantee must be deemed to be a landholder under the Madras Estates Land Act and a tenant paying rent to him could apply under section 15 of the Madras Agriculturists Act to have the arrears of rent scaled down.

A contract for an unlawful enhancement cannot be enforced by means of a suit for rent under the Madras Estates

* Civil Revision Petition No. 896 of 1940.

Land Act. It is equally impossible for a landholder in proceedings under section 15 of the Madras Agriculturists Relief Act to insist on the ryot depositing rent at a rate which represents an unlawful enhancement. A Court dealing with a deposit under section 15 must necessarily find out what is the correct rate of rent in accordance with the principles laid down in the Madras Estates Land Act.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908), praying the High Court to revise the order of the Court of the Sub-Collector of Narasapatam, dated 21st November 1939, and made in Miscellaneous Petition No. 6 of 1938.

B. Jagannadha Das and *C. V. Dikshitulu* for petitioners.

P. Satyanarayana Raju for respondents.

JUDGMENT.

WADSWORTH J.—This matter arises out of an application under section 15 (4) of the Madras Agriculturists Relief Act (IV of 1938) praying for the cancellation of arrears of rent on the deposit of the rent for faslis 1346 and 1347 at the rate of Rs. 300 per annum. The deposit was accepted and in revision it is contended, firstly, that the lower Court was wrong in assuming that the applicant was a tenant paying rent to a landholder under the Madras Estates Land Act so as to come within the terms of section 15 of Act IV of 1938, and secondly, that the lower Court was wrong in finding that the proper rate of rent was Rs. 300 per annum. The argument on the first point rests on the tenure of the land. The documents filed show that the land was granted by the zamindar to the present petitioners in the year 1811, that the grant was a “sarva inam” not subject to jodi and was in the enjoyment of the grantee at the time of the inam settlement. It is contended that on these facts

PAPPAYYA
v.
APPA RAO.

WADSWORTH J.

PAPPAYYA
v.
APPA RAO.
WADSWORTH J.

the lower Court was not entitled to assume that the grant was a grant of *melvaram* so as to make the grantee a landholder within the definition in the Madras Estates Land Act. The contention is that a grant in inam might be a grant of the *kudivaram* alone, in which case the tenant under the inamdar would not be a ryot paying rent to a landholder but a mere sub-tenant paying rent to a ryot without occupancy right. No doubt the word "inam" is used with considerable differences in its precise connotation; but it certainly implies as a rule a grant free of rent or on a favourable rate of rent. My attention has not been drawn to any case in which a mere grant of the *kudivaram* right has been described as an inam. There are of course very many cases in which there has been a question whether an inam grant was a grant of the *melvaram* alone or a grant of both *varams*. But it seems to me that if the grant were a grant of the *kudivaram* alone, it would not be described or treated as an inam, but as a permanent lease or an ordinary ryotwari assignment.

On the proved facts of the present case it seems to me quite clear that the *melvaram* must have been granted to the inamdar, for the grant was expressly free of jodi. It was not subject to any demand of the zamindar. From this fact it seems to me to follow necessarily that, when the zamindar made this grant, he divested himself of the right to collect the rent; that is to say, he divested himself of the *melvaram*. The grant being clearly a post-settlement grant, the grantee must be deemed to be a landholder under the Madras Estates Land Act, having regard to the definition in section 3 (5) of that Act as including a person owning a part of an estate or a person entitled to collect the rents of a portion of an estate

by virtue of a transfer from the owner or his predecessor-in-title.

The argument with reference to the rate of rent is briefly this.~ For some years past the tenant had been holding the land under a series of *kadapas*, of which those relating to the years 1923 to 1931 have been put in evidence, stipulating for a rent of Rs. 620. Section 52 (3) of the Madras Estates Land Act provides that pattas and muchilikas accepted or exchanged shall remain in force till the commencement of the revenue year for which fresh pattas and muchilikas are accepted, exchanged or decreed. The argument is that when once a patta for a particular rate has been accepted, it is not competent for the tenant to plead in bar of any proceedings for the recovery of the rent that the rate of rent stipulated in the patta is not the correct rate. No authority has been propounded in support of this view which seems to me to run contrary to the principles of the Madras Estates Land Act and contrary to many reported decisions. Section 24 of the Act lays down the basic principle that the rent of a ryot shall not be enhanced except as provided by the Act. Sections 27 and 28 lay down presumptions that the prevailing rate of rent is the correct rate of rent until the contrary is shown. These sections would be meaningless if it were possible for a landholder by getting a muchilika for an enhancement from the ryot to bind the ryot to that enhanced rate until the landholder has been forced to agree to a fresh patta. The argument that section 52 (3) will have no effect if the tenant is entitled in a suit for rent to repudiate the patta which he has accepted seems to me to have little force. The effect of section 52 (3) is to enable the landholder to rely on a previously accepted patta for the purpose of instituting summary proceedings, even when there

PAPPAYYA v. APPA RAO. WADSWORTH J. has been no actual exchange of patta and muchilika for the current year. It is certainly open to a ryot who has accepted a patta to file a suit under section 112 of the Act contesting the legality of the sale for rent as stipulated in the patta on the ground that it represents an enhancement; vide *Desikachariar v. Rangaswami Pillai*(1). And I have held in a case somewhat similar to the present that when an inamdar holding the *melvaram* right in a portion of a permanently settled estate sues his tenant under section 77 of the Estates Land Act for rent on the basis of a *kadapa* which represents an unlawful enhancement, the Court is obliged to give a decree for rent, not on the basis of the unlawful contract, but on the basis of the proper rent determined according to the principles laid down in the Act; vide *Ramayya v. Satyanarayana Jagapathi Raju*(2). A contract for an unlawful enhancement cannot be enforced by means of a suit for rent under the Madras Estates Land Act. Equally, it seems to me, must it be impossible for a landholder in proceedings under section 15 of Act IV of 1938 to insist on the ryot depositing rent at a rate which represents an unlawful enhancement. The Court dealing with a deposit under section 15 must necessarily find out what is the correct rate of rent and, in deciding what is the correct rate of rent, it must be governed by the principles laid down in the Madras Estates Land Act.

On the facts it seems to me that the materials were sufficient to support the decision of the learned Sub-Collector. There is no evidence that the rate of rent of Rs. 620 prevailed before 1923. On the other hand the tenant has produced a *kadapa* of 1881 showing a rate of Rs. 200, another of 1883 showing a rate of

(1) (1932) I.L.R. 56 Mad. 300.

(2) 1939 M.W.N. 903.

Rs. 250 and another of 1894 showing a rate of Rs. 290. He has produced receipts for 1898 showing a rate of Rs. 290 and for 1906 and 1907 a rate of Rs. 300. Exhibit D is a letter of 1922 by the tenant protesting against the rate of Rs. 450 which was then successfully demanded. These materials seem to make it clear that when the Madras Estates Land Act came into force in 1908 the prevailing rate of rent was Rs. 300 and that since that date a steady process of illegal enhancement has been going on. In this view I agree with the decision of the lower Court and dismiss the civil revision petition with costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Happell.

J. P. REGO (SECOND RESPONDENT), APPELLANT

1942,
January 9.

v.

ANANTHAMATHI AND THREE OTHERS (PETITIONERS
1 TO 3 AND FIRST RESPONDENT), RESPONDENTS*.

Code of Civil Procedure (Act V of 1908), ss. 144, 151 and O. XXI, r. 89—Restitution—Inherent powers of Court—Mortgage of family property by manager of joint Hindu family—Property alienated as self-acquired property of manager—Suit on mortgage—Other members contesting mortgagee's claim—Suit decreed—Property sold under decree—Members depositing amount under O. XXI, r. 89, and setting aside sale—Deposit attached by creditor of decree-holder and portion of deposit amount paid to such creditor—Subsequent reversal of decree on appeal—Application for restitution of amount deposited in Court—Powers of Court to grant under sec. 151, sec. 144 being inapplicable.

In a suit filed on a mortgage executed by a member of a joint Hindu family alleging that the mortgaged property

* Appeal Against Order No. 113 of 1940.

REGO
v.
ANANTHA-
MATHI.

was his self-acquired property, other members of the family were also impleaded as parties and they contended that the property was family property and that the mortgage, not having been executed for any purpose binding on the family, was not valid. The trial Court passed a decree in favour of the mortgagee and the property was purchased by him in execution of the decree. The members of the joint family thereupon paid into Court a sum of Rs. 11,470 under Order XXI, rule 89, Civil Procedure Code, and had the sale set aside. The amount deposited in Court was attached by a creditor of the mortgagee and in pursuance thereof a sum of Rs. 9,000 was paid to him for satisfaction of his decree. Subsequently, on appeal by the members of the joint family, the decree on the mortgage was set aside and the suit by the mortgagee was dismissed. The members of the joint family thereafter applied for restitution of the amount paid by them into Court under Order XXI, rule 89, of the Civil Procedure Code.

Held: (i) the mortgagee should refund the sum of Rs. 2,470 received by him together with interest thereon.

(ii) As regards the sum of Rs. 9,000 paid to the creditor of the mortgagee, restitution could not be ordered under section 144 of the Civil Procedure Code as the creditor was not a party to the decree which was reversed on appeal. But restitution could be ordered under the inherent powers of Court under section 151 of the Civil Procedure Code on the principle that a Court had inherent jurisdiction to call back money paid by it owing to an erroneous view to a person not entitled to it. In the absence of circumstances affecting the equities between the parties, it was the duty of the Court to set right the wrong done to its suitors by reason of its own errors.

(*Firm*) *Ratnaji v. Ramakrishnaswamy* (1) approved and followed.

A Court has inherent powers to order restitution of property even in cases which do not strictly fall within the scope of section 144 of the Civil Procedure Code.

Case law reviewed.

APPEAL against the order of the Court of the Subordinate Judge of South Kanara, dated 27th July 1939

(1) A.I.R. 1937 Mad. 95.

and made in Execution Petition No. 170 of 1938 in Original Suit No. 42 of 1931.

G. A. Pais for appellant.

K. Srinivasa Rao for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by HAPPELL J.—The question in this appeal relates to the restitution by the appellant of a sum of Rs. 9,000 with interest to respondents 1 to 3. The sum in question was paid to him in these circumstances. Original Suit No. 42 of 1931 on the file of the Subordinate Judge of South Kanara was a suit to enforce a mortgage executed by the first defendant in favour of the plaintiff. The second and third defendants in the suit belonged to the same joint family as the first defendant, but relief was sought by the plaintiff against the first defendant alone on the ground that the property mortgaged was the self-acquired property of the first defendant and that he had taken the amount advanced under the mortgage for his own purposes. The contention of the defendants was that the property was family property and that there was no family necessity for the loan secured by the mortgage of it. The suit was decreed for the plaintiff on 10th August 1932 and in execution of his decree he brought the property to sale and purchased it himself for Rs. 7,200. The defendants, however, deposited the requisite sum under the provisions of Order XXI, rule 89, Civil Procedure Code, a sum which with incidental charges amounted to Rs. 11,470-10-5, and the sale was set aside. The appellant held a decree in Original Suit No. 71 of 1930 against the plaintiff in Original Suit No. 42 of 1931, and in Regular Execution Petition No. 126 of 1935 he applied for the attachment of Rs. 9,000 out of the sum of Rs. 11,470 in Court. Attachment was ordered.

REGO
v.
ANANTHA-
MATHI.

HAPPELL J.

REGO
v.
ANANTHA-
MATHI.
HAPPELL J.

The appellant then applied for the transfer of the attached sum of Rs. 9,000 to his execution petition in Original Suit No. 71 of 1930. The transfer was ordered on 7th August 1935, and on the same date payment of this sum of Rs. 9,000 to him was made.

Meanwhile, an appeal (Appeal Suit No. 21 of 1933) was pending in the High Court against the decree in Original Suit No. 42 of 1931. Judgment in this appeal was delivered on 9th November 1937. It was held that the mortgaged property was family property and, as it had never been the plaintiff's case that the mortgage was for purposes binding on the family, the result was that the suit was dismissed. Relying therefore on the decree of the High Court, appellants 1 to 3 in Original Suit No. 42 of 1931 applied as petitioners in Execution Petition No. 170 of 1938, the petition out of which the present appeal arises, for restitution of the sum of Rs. 11,470 deposited by them under the provisions of Order XXI, rule 89, Civil Procedure Code, with interest. They prayed (i) for the recovery of the whole amount of Rs. 11,470 from the plaintiff in Original Suit No. 42 of 1931 with interest at six per cent from 5th April 1935 till 5th September 1938, and (ii) for the recovery of Rs. 9,000 from the present appellant with interest at six per cent from 26th July 1935 to 5th September 1938. The learned Subordinate Judge directed that the plaintiff should refund a sum of Rs. 2,470-10-5 with interest at five per cent from 5th April 1935 until the date of payment and that the present appellant should refund the sum of Rs. 9,000 with interest at five per cent from 9th August 1935 until the date of payment. The appeal now under consideration is by the decree-holder in Original Suit No. 71 of 1930 to whom the sum of Rs. 9,000 was paid. Defendants 1 to 3 in Original Suit No. 42 of

REGO
v.
ANANTHA-
MATHI.
HAPPELL J.

1931 are respondents 1 to 3 in the appeal, and the plaintiff in that suit is the fourth respondent. They will hereinafter be referred to by the designation of respondents 1 to 4 respectively.

We have not received in the determination of this appeal any assistance from the order of the learned Subordinate Judge for the reason that his consideration of the petition has proceeded on a mistake of fact which is fundamental in regard to the issue involved in the case. In paragraph 5 of his order he states that the appellant attached the decree in Original Suit No. 42 of 1941. This is not correct. The appellant did not attach the decree. He attached part of the sum deposited under Order XXI, rule 89, Civil Procedure Code, which, if the attachment had not been made, would have been payable to the fourth respondent. Section 144 of the Civil Procedure Code reads :

"Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed ; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal."

There is clear authority in *Anganna Reddi v. Subbaraya Chettiya*(1) that a person who has attached a decree is the representative of the original decree-holder and will be liable in an appropriate case to make restitution under the provisions of section 144, Civil Procedure Code. He is in fact a "party"

(1) (1930) I.L.R. 53 Mad. 796.

REGO
v.
ANANTHA-
MATHI.
HAPPELL J.

within the meaning of the section. As, however, the present appellant did not attach the decree he is not a party to it. His position is merely that of a third party to whom, by order of Court indeed, and that is important, money otherwise payable out to the decree-holder has been paid which, if it had remained in his hands, there is no doubt that the decree-holder would have been obliged to restore. The question, therefore, is whether in law a person in the position of the appellant, not in any technical sense a party to the decree, can be compelled to make restitution of the money paid to him.

Apart from *Anganna Reddi v. Subbaraya Chettiyar*(1) which need not be again referred to, other cases cited, which relate to the exercise by Courts of their inherent powers in cases which do not strictly fall within the scope of section 144, Civil Procedure Code, are *Amba Lal v. Ramgopal Madhoprasad*(2), *Raja Rao v. Ananthanarayanan Chetty*(3), *Govindappa v. Hanumanthappa*(4), *Palaniappa Chettiar v. Ramanathan Chettiar*(5) and (*Firm*) *Ratnaji v. Ramakrishnayya*(6). The effect of these decisions—and others might, if necessary, be cited—is beyond question that the Courts, in ordering restitution after a decree has been varied or reversed, have not considered themselves to be confined to cases which fall strictly within the provisions of section 144, Civil Procedure Code. They have considered that the inherent jurisdiction vested in them by virtue of section 151 of the Civil Procedure Code may be invoked where an order of Court would otherwise do injury to one of its suitors. *Amba Lal v. Ramgopal Madhoprasad*(2) was a case in which

(1) (1930) I.L.R. 53 Mad. 796.

(3) (1921) 42 M.L.J. 308.

(5) (1934) I.L.R. 57 Mad. 849.

(2) (1932) I.L.R. 55 All. 221.

(4) (1912) I.L.R. 38 Mad. 30.

(6) A.I.R. 1937 Mad. 95.

REGO
v.
ANANTHA-
MATHI.
HAPPELL J.

in execution of a simple money decree, the decree-holder purchased the shares of the judgment-debtors in certain joint family properties. There were, however, other decree-holders entitled to rateable distribution and the amounts due to them were paid out of the sale price. Subsequently, it was held on appeal that a partition set up by the judgment-debtors was valid so that most of the properties were released from the sale. The decree-holder then sought to recover by way of restitution the excess amounts paid to the attaching decree-holders. It was held that, even if section 144 did not apply, the Court could grant restitution in exercise of its inherent powers under section 151, Civil Procedure Code. *Raja Rao v. Ananthanarayanan Chetty*(1) is a case relied on for the appellant, since in that case it was held that restitution should not be ordered. The facts were that certain properties attached and brought to sale in execution of a decree were purchased by strangers to the decree and the sale proceeds were rateably distributed among persons holding decrees against the same judgment-debtor. Subsequently in proceedings instituted by certain claimants the properties were held to belong to a trust and they were recovered from the auction purchasers. In these circumstances, an application by the auction purchasers for the refund of the purchase money distributed among the decree-holders entitled to rateable distribution was dismissed, and the appeal from the order of the lower Court was also dismissed. We do not think that this case helps the appellant. In the first place it should be noted that neither AYLING O.C.J. nor VENKATASUBBA RAO J., who delivered separate but concurring judgments, seems to have

(1) (1921) 42 M.L.J. 308.

REGO
v.
ANANTHA-
MATHI.
HAPPELL J.

doubted that a Court could in a proper case order restitution even though the case did not fall strictly under section 144, Civil Procedure Code. The decision was that in the circumstances of the case before the Bench the provisions of section 151, Civil Procedure Code, could not be invoked in favour of the auction purchaser; and the reason for the decision as stated by AYLING O.C.J. was that the extraordinary powers conferred by section 151 should not be invoked where the equities were evenly balanced to cover an order "which only sets right one injustice by the infliction of another, or, as it is said, robs Peter in order to pay Paul". In the second place the facts were different from the facts in the present case. The question was as to the equities between third parties, and the injustice done to the auction purchaser could only be set right by doing an equal injustice to the decree-holders. *Pala-niappa Chettiar v. Ramanathan Chettiar*(1) again is a case in which the inherent powers of the Court were invoked and restitution ordered although the case did not fall within the scope of section 144, Civil Procedure Code, but again the facts in that case are distinguishable from the facts in the present case.

In short, the three cases which we have so far considered, since the facts are different, do not afford any assistance in the determination of the question whether the case now under consideration is a proper case for the application of the provisions of section 151, Civil Procedure Code. As already stated, we have no doubt that the powers of a Court to order restitution are not confined entirely to cases which fall under section 144, but whether the inherent powers of the Court to order restitution should be invoked in a particular case, must depend on the facts of that

(1) (1934) I.L.R. 57 Mad. 849.

REGO
v.
ANANTHA-
MATHI.
HAPPELL J.

case. The fourth case, however, (*Firm*) *Ratnaji v. Ramakrishnayya*(1), seems to us to be directly in point. In that case *A* had brought a suit against *B* for possession of property. Pending the trial of the suit *B* deposited one year's mesne profits, but *A* was not allowed to draw these profits on the ground that he had not asked for future profits. *A* appealed but, while his appeal was pending, *C* who held a decree against *B* attached the mesne profits in Court and they were paid out to him. *A* succeeded in his appeal and on an application by him the Court ordered restitution of the money paid to *C*. VENKATARAMANA RAO J. confirmed the order of the lower Court and dismissed *C*'s appeal. On the facts before us we are unable to see that the position of *C* differs from the position of the appellant in the present case. The inherent jurisdiction vested in the Court must no doubt be exercised in each individual case in accordance with principle and not arbitrarily. The principle on which VENKATARAMANA RAO J. based his decision was that there was inherent jurisdiction in the Court to call back money paid, owing to an erroneous view, to a person not entitled to it. The decision in *Ratnaji v. Ramakrishnayya*(1) is that of a single Judge, but, with respect, we find ourselves in agreement with it and with the principle on which it is based. In the present case the order transferring the sum of Rs. 9,000 to Regular Execution Petition No. 126 of 1935 in Original Suit No. 71 of 1930 was correct and the order directing payment of that sum to the appellant was also correct on the assumption that the decree passed by the Court in Original Suit No. 42 of 1931 was right. It transpired, however, that the decree was wrong and, that being so, the order directing the transfer of the money and the payment

(1) A.I.R. 1937 Mad. 95.

REGO
v.
ANANTHA-
MATHI.
HAPPELL J.

of it to the appellant were also wrong. We are, therefore, of opinion that, if there are no other circumstances affecting the equities as between respondents 1 to 3 and the appellant, it was the duty of the Court to set right the wrong done to its suitors (respondents 1 to 3) by reason of its own errors. We are not prepared, however, at this stage to dismiss the appeal, since the learned Subordinate Judge did not apply his mind to the question whether a relief of an equitable or discretionary nature should or should not be granted and there may be facts affecting the grant of such a relief of which we are not aware. AYLING O.C.J., in *Raja Rao v. Ananthanarayanan Chetty* (1), in refusing to grant relief by way of restitution took into account the fact that the decree held by the decree-holders had become time-barred, and in this case learned Counsel have been unable to tell us whether the appellant's decree against the fourth respondent is time-barred or not. This is only one instance of a circumstance which might affect the grant of relief by way of restitution. There may be others.

We, therefore, set aside the order of the lower Court in so far as it affects the appellant and remand the case for determination on merits in accordance with law and in the light of the observations contained in this judgment. Costs here and below will abide the result.

N.S.

(1) (1921) 42 M.L.J. 308.

APPELLATE CIVIL.

Before Mr. Justice Byers.

THE PROVINCE OF MADRAS REPRESENTED BY THE
COLLECTOR OF MADURA (RESPONDENT),
APPELLANT,

v.

RAO BAHADUR O. N. RAMASWAMI AYYAR,
DEWAN AND AUTHORIZED AGENT OF KANNIVADI
ZAMINDAR (PETITIONER), RESPONDENT.*

Madras Estates Land Act (I of 1908), sec. 190—Order of Collector under sec. 20-A—No second appeal under Act—Orders of Collector under sec. 20-A and of the District Judge on appeal therefrom, not decrees—No second appeal under Code of Civil Procedure (Act V of 1908)—Code of Civil Procedure, ss. 2, 100, 104 and O. XLIII, r. 1.

No second appeal lies from an order of the Collector passed under section 20-A of the Madras Estates Land Act, since it is not one of the sections mentioned in section 190 of the Act. Neither the decision of the Collector under section 20-A nor the decision of the District Judge on appeal therefrom are decrees within the meaning of section 100 of the Code of Civil Procedure. They are merely orders and consequently no second appeal lies under the Code of Civil Procedure.

APPEAL against the decree of the District Court of Madura in Appeal Suit No. 183 of 1939 preferred against the order of the Collector of Madura, dated 6th day of July 1939 and made in R. Dis. No. G. 231 of 1937.

Government Pleader (*K. Kuttikrishna Menon*) for appellant.

V. Govindarajachari for respondent.

* Second Appeal No. 983 of 1940.

1942,
March 6.

PROVINCE OF
MADRAS
v.
RAMASWAMI
ATTYAR.
—
BYERS J.

JUDGMENT.

BYERS J.—This appeal has been brought against a decision of the District Judge of Madura in Appeal Suit No. 183 of 1939 against a decision of the Collector of Madura under section 20-A of the Madras Estates Land Act. It is sufficient to state for the purpose of this appeal that an application was filed under section 20-A of the Madras Estates Land Act by the Zamindar of Kannivadi in respect of four plots of land which he sought to have converted into ryoti land on the ground that they were "old road" which was no longer required for public purpose. The Collector threw the burden of proof on the zamindar to show that the reversionary right did not vest in the Government as the land appeared to have been *lakhiraj* land. On appeal the learned District Judge held that the burden of proof had been wrongly cast on the zamindar and on the evidence available he came to the conclusion that the reversionary right vested in the landholder. The order of the Collector was set aside and the four plots were ordered to be registered as ryoti land. Against this decision this second appeal has been brought.

A preliminary objection has been raised by Mr. Govindarajachari on behalf of the respondent that no second appeal lies. This objection is well founded and must be upheld. He contends that proceedings under section 20-A of the Madras Estates Land Act take the form of an application by the landholder, a ryot, or any other person interested, and the right of appeal regarding suits or applications is provided by section 189 of the Act. This section refers to Parts A and B of the schedule which deal separately with the right of appeal in suits and applications. Proceedings under section 20-A of the Act are referred to as serial

PROVINCE OF
MADRAS
v.
RAMASWAMI
ATTYAR.
—
BYERS J.

No. 5 in Part B and a right of appeal to the District Court is provided against an order directing the conversion of the land into Government ryotwari or land-holder's ryoti land. So far as the Madras Estates Land Act is concerned, the right of second appeal in the case of applications is limited under section 190 of the Act to orders passed on appeal by a District Collector under several specified sections of which section 20-A is not one.

It is conceded that second appeals lie in the case of suits because these result in decrees and the first appellate proceedings before the District Court take the form of decrees also within the meaning of section 100 of the Code of Civil Procedure. Mr. Govindarajachari relies on section 104 read with Order XLIII, rule 1, of the Code of Civil Procedure, and he argues that since the initial proceedings take the form of an application, the order of the Collector thereon is an order and not a decree and the appellate order of the District Court is also an appellate order and not a decree. The distinctions between suits and applications and between decrees and orders are clearly recognized in the Code of Civil Procedure and I am unable to see how the learned Government Pleader can contend that an appeal against proceedings under section 20-A of the Madras Estates Land Act results in a decree and not merely in an appellate order. He has cited the case of *Kamaraju v. The Secretary of State for India*(1), but that case does not afford much help in deciding this question. That case related to the question whether an order by a Forest Officer under section 10 of the Madras Forest Act was subject to second appeal, while in the present case we are concerned with the right of appeal in proceedings

(1) (1882) I.L.R. 11 Mad. 309 (F.B.).

PROVINCE OF
MADRAS
v.
RAMASWAMI
AYYAR.
—
BYERS J.

under an entirely different statute. The learned Government Pleader has contended that the order of the District Court conclusively determines the rights of the parties and is therefore a decree within the meaning of the definition contained in section 2 of the Code of Civil Procedure. But this argument overlooks the reference in the definition to a suit. The distinction between suits and applications is carefully preserved both in the Code of Civil Procedure and also in the Madras Estates Land Act. This distinction was discussed at considerable length in the Full Bench decision in *Rajagopala Chettiar v. H.R.E. Board, Madras*(1). In my opinion the decision of the District Judge, although styled as a decree, was only an appellate order and was not a decree within the meaning of section 100 of the Code of the Civil Procedure. Consequently no second appeal lies and it is ordered to be dismissed with costs.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Horwill.

PUBLIC PROSECUTOR, PETITIONER,

1942,
June 30.

v.

RAJAM AMMAL (ACCUSED), RESPONDENT.*

Madras Borstal Schools Act (V of 1926), sec. 1 (2)—Law (General) Department Notification No. 64, dated 26th January 1927—Offender—Adolescent girl cannot be sent to Borstal School.

The Madras Borstal Schools Act (V of 1926) is made applicable to adolescent offenders of the male sex only, according to section 1 (2) of that Act read with Law (General) Department Notification No. 64, dated 26th January 1927, by the Provincial Government.

Held accordingly that the accused who was a young woman of about 16 or 17 years of age at the time of her conviction could not be sent to a Borstal School.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of East Tanjore Division at Negapatam, dated 30th January 1942 and passed in Criminal Appeal No. 6 of 1942 preferred against the judgment of the Court of the Subdivisional Magistrate of Mayavaram in Calendar Case No. 163 of 1941.

N. Somasundaram for Public Prosecutor
(V. L. Ethiraj) for the Crown.

Respondent was not represented.

ORDER.

HORWILL J.—Rajam Ammal was convicted by the Subdivisional Magistrate of Mayavaram of an offence punishable under section 380, Indian Penal Code. She was a young woman of about sixteen or seventeen

HORWILL J.

* Criminal Revision Case No. 231 of 1942 (Criminal Revision Petition No. 217 of 1942).

(1) (1933) I.L.R. 57 Mad. 271 (F.B.).

PUBLIC
PROSECUTOR
v.
RAJAM AMMAL.
—
HORWILL J.

years of age at the time of her conviction. As she had had three previous convictions for which she had received three minor terms under the Children Act, the Magistrate realised that it would have been very desirable if Rajam could have been sent to a Borstal School; but he felt himself unable to pass an order to that effect because Borstal Schools are for boys only. He therefore sentenced her to nine months' rigorous imprisonment. In appeal the learned Sessions Judge seemed to think that the fact that in practice Borstal Schools are only for boys should not be an impediment to the passing of an order by the Court that the girl should be committed to a Borstal School. He passed an order accordingly. When the Sessions Judge made the usual reference to the Government asking them to make arrangements for the custody of this girl in a Borstal School, the Government instructed the Public Prosecutor to file a criminal revision petition in this Court to have the order of the Sessions Judge revised on the ground that it was an illegal order.

Section 1 (2) of the Borstal Schools Act says that the Provincial Government may, by notification from time to time, apply the whole or any of the provisions of this Act to adolescent offenders or any class thereof in any local area in the Presidency of Madras . . . By Law (General) Department Notification No. 64, dated 26th January 1927, published in page 210 of Part I of the *Fort St. George Gazette*, dated 1st February 1927, the Act was made applicable to adolescent offenders of the male sex. That means that Rajam cannot be ordered to be sent to a Borstal School.

As adolescent girls cannot be sent to a Borstal School, some arrangement is presumably made in the women's jail at Vellore for segregating adolescent offenders from the hardened adult ones. In any event, that

PUBLIC
PROSECUTOR
v.
RAJAM AMMAL.
—
HORWILL J.

is a matter for the Government to arrange and the Court can only impose such sentences as it thinks proper and leave the Government to make such arrangements as are possible for the protection of adolescents.

The learned Sessions Judge further seemed to think that the three previous convictions of Rajam Ammal cannot be taken into account under section 75, Indian Penal Code, because he thought section 39 of the Children Act prohibited that. The scope of section 39 is, however, not so extensive. It says that the conviction of a child or young person shall not be regarded as a conviction *for the purposes of any disqualification* attaching to a conviction for any offence. Section 75, Indian Penal Code, does not impose any disqualification on persons with previous convictions. It only makes permissible a sentence which exceeds the normal sentence for an offence. However, this question does not directly arise here because an offence under section 380, Indian Penal Code, is punishable with seven years' rigorous imprisonment and the sentence imposed on Rajam is only nine months' rigorous imprisonment.

I cannot think of any better sentence than that which the Subdivisional Magistrate imposed. A very short term would be out of place. It would not act as a deterrent and would not afford any opportunity for her education or for any corrective treatment to be applied, such as is possible when a prisoner is sentenced to a longer term.

The sentence imposed by the Sessions Judge is therefore set aside and that imposed by the Subdivisional Magistrate restored.

V.V.C.

